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Appellate Cases – Real Estate

■ OREGON SUPREME COURT RULES ON STANDARD FOR “CONDEMNATION BLIGHT”

In late May, the Oregon Supreme Court addressed the standard for assessing whether “condemnation blight” constitutes a taking under the Oregon Constitution. As most commonly used, the term refers to the impact that project planning and related threatened acquisition has on the value of property. In doing so, the court reviewed and attempted to clarify its prior decisions in this area.

Hall v. State ex rel. Oregon Department of Transportation, 355 Or. 503, ___ P.3d ___ (2014), 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 had attempted to develop the property for a number of years without success except for three small areas with 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 and trigger its acquisition. As a part of the evaluation, ODOT issued a variety of public statements and held a series of public meetings over several years. 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 land locking the property had effectively devalued it through condemnation blight.

At trial ODOT moved for a directed verdict that its planning activities did not constitute a taking as a matter of law because some economically viable use of the property—the billboards—remained. The trial court denied the motion, ruling that the property owners simply needed to show that ODOT’s activities had substantially interfered with their use of the property. The jury then awarded the property owners nearly \$3.4 million for the reduction in value. The Court of Appeals reversed (*see* the December 2012 edition of the *Digest*). The Supreme Court, in turn, affirmed the Court of Appeals.

The Supreme Court reviewed prior case law dealing broadly with both condemnation blight and related project planning activities, notably *Lincoln Loan Company v. State ex rel. State Highway Commission*, 274 Or. 49, 545 P.2d 105 (1976), and *Fifth Avenue Corporation v. Washington County*, 282 Or. 591, 581 P.2d 50 (1978). The court determined that the substantial-interference standard applies only when a government entity physically occupies or otherwise invades the property interest concerned. The court noted that in *Lincoln Loan*, for example, the property owner alleged that a project demolition on nearby parcels had created noise and dust that had substantially interfered with use of the property at issue. Absent that physical aspect, however, the court found that public planning activities only support a claim for inverse condemnation by condemnation blight when they have deprived an owner of all economically viable use of the property involved.

The court concluded that in *Hall* there was no physical occupation or other invasion of the property interests and the owner continued to derive income from the billboards. Therefore, the court found no taking by condemnation blight under the Oregon Constitution. On an additional note, the corresponding federal standard was not before the court.

Mark J. Fucile

Hall v. ODOT State ex rel. Or. Dep’t of Transp., 355 Or. 503, ___ P.3d ___ (2014)

■ WHO OWNS A DEDICATED ROADWAY AFTER THE COUNTY VACATES THE DEDICATION? AND, IS IT WORTH THE TIME AND EXPENSE TO FIND OUT?

Seemingly simple disputes over roadways and driveways between neighboring property owners can often explode into complicated (and expensive) legal battles that require the courts to blend the laws relating to easements, adverse possession, the creation of subdivisions, and the power of a county or city to accept or vacate the dedication of a roadway. The resulting litigation often results in the litigants incurring expenses far in excess of the value of the underlying property. Moreover, the litigation can tie up the subject properties for years, depriving the property owners of the ability to convey or develop those properties. This was almost certainly the case in the recent decision in *Howe v. Greenleaf*, 260 Or. App. 692, 320 P.3d 641 (2014), in which the Oregon Court of Appeals was asked to decide who owned Skyland Drive in Lake Oswego after Clackamas County vacated the road dedication.

The complicated facts can be summarized as follows. In 1950, the Smiths subdivided a portion of their 36 acres of land in Lake Oswego. The subdivision plat included the dedication of Skyland Drive to Clackamas County and used the roadway as the boundary between the subdivision and the remainder of the Smiths' property. The remainder of the Smiths' property was divided into two lots located to the north and east of Skyland Drive. In 1969, Clackamas County vacated the southern portion of Skyland Drive. In 1982, Clackamas County vacated the remainder of Skyland Drive. Also in 1982, the then-owners of the various parcels of land entered into an easement agreement to create reciprocal rights to use Skyland Drive for utility and roadway purposes. The easement included a recital indicating that the vacation of the roadway would result in the ownership of Skyland Drive reverting to the parties of the easement agreement with the centerline of Skyland Drive serving as the property line. The litigation did not arise until 2008 when one of the property owners within the subdivision sought to claim ownership of the entirety of Skyland Drive as part of his attempt to further subdivide his lot.

The case quickly became a complicated morass of legal claims and issues. The plaintiffs, owners of the properties outside the subdivision, filed a lawsuit against the owners inside the subdivision, seeking to quiet title in one-half of Skyland Drive based on the statutes governing interpretation of conveyances and vesting rules applicable upon vacation of public property (ORS 93.310 and 368.366, respectively). The plaintiffs also sought to estop the defendants from claiming ownership of the entire road based on the recital contained in the 1982 easement agreement. In addition, the plaintiffs sought to enjoin the defendants from any future interference with their easement rights to Skyland Drive. One of the plaintiffs also sought to claim the southern portion of Skyland Drive through adverse possession. The defendants argued that the original subdivision plat reflected that the Smiths (the original owners of all the property) intended that ownership of the entirety of Skyland Drive would revert only to property owners within the subdivision. The defendants sought declaratory relief to that effect, claiming that the recital in the 1982 easement agreement was immaterial and insufficient to convey title to the plaintiffs. The case was decided in favor of the defendants on all claims after a bench trial. The defendants were awarded a portion of their attorney fees pursuant to the easement agreement. The plaintiffs appealed.

After five years of litigation, the court of appeals reversed the trial court's decision on the plaintiffs' quiet title claim, finding (1) that the plaintiffs became the owners of one half of Skyland Drive after the county vacated the road, and (2) that the property line between the properties was at the road's centerline. The trial court's decision in favor of the defendants on the adverse possession and easement claims, including the award of attorney fees, was affirmed.

The most interesting portion of the holding, the reversal of the trial court's decision on the plaintiffs' claim to quiet title, was primarily based on the court's application of the statutory presumptions for conveyances of property contained in ORS 93.310(4) and 368.366(1)(d). In a situation where a road serves as the boundary between two properties, ORS 93.310(4) creates a presumption that the centerline of the roadway is the property line and that the grantor conveys his or her rights up to the centerline. The presumption continues through subsequent conveyances. ORS 368.366(1)(d) presumes that title to a vacated county road vests in the abutting property owners to the centerline of the road.

The only exceptions to these presumptions occur when (1) at the time of conveyance of the abutting property, the road is owned by someone other than the grantor; or (2) the grantor expressly provides in the conveyance that he or she does not intend to convey title to the centerline of the road. The court found that the statutory presumptions applied because the original subdivision plat and subsequent deeds conveying the properties were essentially silent with respect to the ownership of Skyland Drive. Thus, the court reversed the trial court's ruling on the plaintiffs' quiet title claim, finding that title to one-half of Skyland Drive vested in the plaintiffs when the county vacated the road (which also rendered the adverse possession claim moot).

At the end of the day, neither the plaintiffs nor the defendants in this case appear to be winners. Their properties have been sitting under the cloud of litigation for over five years. Both sides must have incurred substantial attorney fees during the course of litigation. These fees likely exceed the land value of Skyland Drive. Moreover, the end result appears to leave the parties in almost the same position they were in at the time the litigation started with both sides having easement rights to use Skyland Drive for roadway and utility purposes. No doubt there is more to the story that explains what

motivated the parties to litigate the case so vigorously and for so long. However, this case, perhaps more than others, is a prime example of why real estate practitioners should actively encourage their clients to seek a reasonable and early settlement of these seemingly simple land disputes. The cost in time and money of finding out who is right in real estate litigation will too often exceed the value of the property in dispute.

Paul Trincherro

Howe v. Greenleaf, 260 Or. App. 692, 320 P.3d 641 (2014)

■ **CREDITORS WITH A MONEY JUDGMENT: YOU DON'T HAVE TO WAIT FOR FORECLOSURE SALE TO START COLLECTING**

In *Merril Lynch Comm. Fin. Corp. v. Hemstreet*, 261 Or. App. 220, 323 P.3d 361 (2014), the Oregon Court of Appeals held that ORS 88.060(2) “does not prevent a creditor that has a judgment encompassing both a money award based on debtors’ personal obligations and foreclosure provisions from collecting on the money judgment before any foreclosure sale has occurred.”

After a borrower and guarantor repeatedly defaulted on a commercial loan from plaintiff, they executed a confession of judgment that encompassed both (1) a money judgment in favor of plaintiff jointly and severally in an amount exceeding \$5,000,000, and (2) judgments in favor of plaintiff foreclosing trust deeds on properties that secured the same debt. After the confessed judgment was entered, plaintiff issued writs of garnishment to recover the amount due. Defendants challenged one of the writs and moved generally to enjoin plaintiff from enforcing the money judgment until after the sheriff’s sale established a deficiency. The trial court rejected defendants’ challenge and denied their requested injunctive relief, ruling that plaintiff was entitled to pursue all collection activity to enforce the confessed judgment.

Defendants argued that ORS 88.060 required plaintiff to sell the foreclosed real properties before enforcing any deficiency against the defendants. ORS 88.060 provides, in part, that “[t]he judgment may be enforced by execution as an ordinary judgment for the recovery of money, except as in this section otherwise provided . . . (2) When the judgment is also against the defendants or any one of them in person, and the proceeds of the sale of the property upon which the lien is foreclosed are not sufficient to satisfy the judgment as to the sum remaining unsatisfied, the judgment may be enforced by execution as in ordinary cases”

In the court's view, the parties’ arguments presented a question of statutory interpretation. The court started by stating that if the confessed judgment were merely for money and did not include the foreclosure, the plaintiff could pursue remedies under ORS Chapter 18 because the

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confessed judgment included a money award for the entire debt. The court then examined whether ORS 88.060 would preclude enforcing the money judgment until the foreclosed properties were sold just because the confessed judgment included both a money judgment and a foreclosure against real property. The court began by reviewing ORS 88.010, which begins ORS chapter 88. That statute provides for the filing of a mortgage foreclosure “suit” which “can result in a judgment that mandates both foreclosure of, the mortgage and . . . a money judgment against” obligors on the debt.

The court then examined the first sentence of ORS 88.060(2), stating that it plainly described a limited set of circumstances, including a judgment that is “also against the defendants or any one of them in person.” According to the court, “[t]wo types of judgments fall within that category . . . ,” including “a money judgment against the mortgagor or other debtor who has personally guaranteed the underlying debt . . .” and “deficiency judgments that arise when a deficiency remains following a foreclosure sale.” 261 Or. App. at 229. The court stated that the Oregon Supreme Court had explained that this statute “was intended to give courts sitting in equity the authority to enter deficiency judgments following foreclosure sales—authority they otherwise would not have had before the legislature largely eliminated the procedural distinctions between actions at law and cases in equity in 1979.” *Id.* (citing *Wright v. Wimberly*, 94 Or. 1, 8, 184 P. 740 (1919)).

The court stated that ORS 88.060(2) did not contain any words “*prohibiting* a creditor from enforcing an existing money judgment unless and until a foreclosure sale is accomplished.” *Id.* at 230 (emphasis in original). The court then examined related statutes and pointed out that ORS 88.040 did use prohibitive terms demonstrating that legislators could use those terms when they “intended a statute to have that effect.” *Id.* Finally, the court also considered the historical context in which ORS 88.060(2) was enacted to confirm its interpretation, citing *Wright*. In 1862, when the predecessor statutes in ORS Chapter 88 were enacted, courts distinguished between actions at law and suits in equity. At that time, some courts “sitting in chancery had held that in suits to foreclose mortgages no personal recovery against a mortgagor could be rendered, . . . since a judgment for such deficiency could only be given in an action at law.” *Id.* at 231 (citing *Wright*, 94 Or. at 8, 184 P. 740). In those jurisdictions, a creditor had to maintain both a suit in equity to foreclose and then an action at law to collect the deficiency, incurring costs for two actions. The ORS Chapter 88 provisions “were enacted to eliminate that requirement, allowing a court sitting in equity . . .” to award a deficiency judgment. *Id.* at 231-32 (citing *Wright*, *supra*).

In conclusion, the court held that ORS 88.060(2) does not limit the ability of creditors to collect on existing money judgments, and that a creditor could collect money judgments before a foreclosure sale had occurred. *Id.* at 232.

Marisol McAllister

Merril Lynch Comm. Fin. Corp. v. Hemstreet, 261 Or. App. 220, 323 P.3d 361 (2014)

■ OREGON COURT OF APPEALS REAFFIRMS THAT ABSOLUTE NECESSITY IS A PREREQUISITE FOR PURSUING AN EASEMENT BY NECESSITY CLAIM

In *Relling v. Khorenian*, 261 Or. App. 1, 323 P.3d 293 (2014), plaintiff filed a declaratory judgment seeking to establish an easement over the defendants’ properties for access. Plaintiff purchased property from N-C-W, Inc. (“NCW”) pursuant to a land sale contract in 1972. At the time of the conveyance, plaintiff accessed his property via a logging road on property owned by NCW to McKay Creek Road. The fulfillment deed held in escrow during the land-sale contract granted plaintiff “an easement for road purposes to McKay Creek Road.” Three months after conveyance to plaintiff, NCW began conveying the remaining lands surrounding plaintiff’s parcel, including parcels containing plaintiff’s existent logging road access across defendant’s property to McKay Creek Road. The fulfillment deed was recorded in 1978, after adjacent parcels had been transferred to others.

Although plaintiff’s prayer for relief sought declaration of a common law easement of necessity, plaintiff’s arguments emphasized facts suggesting that plaintiff had an implied easement by nature of the fulfillment deed. Instead, the court held plaintiff to his plea that the landlocked nature of his property warranted granting an easement of necessity. The court held that three factors must be present in order to award an easement of necessity: (1) unity of title in the grantor; (2) severance of ownership; and (3) actual necessity. The facts indicated that plaintiff had multiple access points from other adjacent properties at the time of severance that did not rely on use of the logging road crossing defendants’ properties. Therefore, the court held that actual necessity was not present on these facts. The trial court’s judgment was affirmed.

Carrie Richter

Relling v. Khorenian, 261 Or. App. 1, 323 P.3d 293 (2014)

■ OWNER OF PROPERTY OUTSIDE OF STATUTORY NOTICE AREA MAY NOT FILE A LATE APPEAL AT LUBA

In *Aleali v. City of Sherwood*, 262 Or. App. 59, ___ P.3d ___ (2014), the Oregon Court of Appeals reviewed an order of the Land Use Board of Appeals (“LUBA”) that approved a City of Sherwood site plan and conditional use decision for a commercial shopping center following three hearings by its planning commission. Petitioner filed a notice of intent to appeal to LUBA more than seven months after the city’s decision. Before LUBA, petitioner contended that the time to appeal the land use decision, which is 21 days after actual notice where notice is required or within 21 days of the date a person knew or should have known of the decision where no notice is required, was tolled under ORS 197.830(3). That statute allows an extended appeal period when “a local government makes a land use decision without providing a hearing.” Petitioner conceded that hearings were held. However, he argued he was not notified of the hearings as required by local ordinance. LUBA concluded that ORS 197.830(3) did not provide petitioner with an extended time to appeal. The court of appeals affirmed LUBA’s order construing ORS 197.830(3) by using the analytic framework set forth in *State v. Gaines*, 346 Or, 160, 169-72, 206 P.2d 1042 (2009).

The parties agreed that petitioner is the record owner of a property located more than 100, but less than 1,000, feet from the subject property. Petitioner was entitled to notice of the hearings under the local ordinance, but not under state law. See ORS 197.763(2) (requires notice of a land use hearing to be mailed to the owners of record where the subject property is located within 100 feet). The court of appeals framed two questions of law about the meaning of ORS 197.830(3):

(1) Does “without providing a hearing” refer only to circumstances where no hearing is held, or does the phrase also implicate circumstances where a hearing is not practically provided because of defective prehearing notification? (2) If the phrase “without providing a hearing” refers to circumstances where a hearing is held but not practically provided, does state law, local law, or both, determine to whom prehearing notice and a hearing opportunity is owed?

262 Or. App. 59, 65-66.

The court of appeals examined the dictionary definition of “provide,” but found it did not answer the question “to whom must a hearing made available?” Finding the legislative history without significant evidence of the meaning of ORS 197.830(3), the court then reviewed the context of other parts of the bill that added ORS 197.830(3). The court found that the text of former ORS 197.830(4)(b) provided illustrative context to the question of whom was entitled to a hearing.

Prior to the adoption of HB 2288, the state statutes did not specify the persons entitled to notice of a hearing on a land use decision by a local government. After the bill was enacted, ORS 197.830(4)(b) referred both to land use decisions where a “notice of a hearing . . . is required but has not been provided” and those where a “notice of . . . an administrative decision made pursuant to ORS 215.416(11) or ORS 227.175(10) is required but has not been provided.” The court inferred that the notice of a land use hearing “required” by former ORS 197.830(4)(b) was likely to be a reference to the new and specific requirements for notice of a quasi-judicial land use hearing under ORS 197.763 (as enacted by section 10a of HB 2288). The contextual distinction of land use decisions requiring a preheating notice under HB 2288 is also consistent with ORS 197.830(5), ORS 197.830(6), and ORS 197.830(9), which qualify LUBA appeal rights pursuant to the operation of state law alone. Ultimately, the contextual evidence analyzed by the court of appeals was adequate to affirm LUBA’s order.

Alan M. Sorem

Aleali v. City of Sherwood, 262 Or. App. 59, ___ P.3d ___ (2014)

■ A WAY OF NECESSITY THROUGH MARBLED MURRELET HABITAT? NO WAY!

In *Bradley v. State, ex rel. Department of Forestry*, 262 Or. App. 78, 324 P.3d 504 (2014), plaintiff landowners filed a petition for a statutory way of necessity to acquire road access to their landlocked property over state land owned by the Oregon Department of Forestry (“ODF”) near the coast in Clatsop County. Under ORS 379.185 and 376.180(11), a plaintiff who seeks a way of necessity over state-owned land cannot receive road access unless the state grants permission or consent for the way of necessity. ORS 376.185 provides that the state “shall not unreasonably withhold . . .” the required consent for a way of necessity.

ODF withheld its consent based on the adverse impact of the road upon the marbled murrelet habitat. The marbled murrelet is a sea bird that has declined in population over the past century and in 1992 was listed as a “threatened” species under the federal Endangered Species Act (“ESA”). It is also protected by ORS 496.171 to 496.192.

Plaintiffs submitted several alternative locations for a permanent road easement, all of which were rejected by ODF because of their potential negative impact upon marbled murrelet habitat. Plaintiffs submitted a letter from the federal Fish and Wildlife Service (“FWS”) responding to plaintiffs’ “incidental take” permit request under the ESA. In the letter, the FWS stated that an incidental take permit was unnecessary because the effect of plaintiffs’ proposed road was not likely to rise to the level of a take of murrelets. The circuit court held that the FWS letter was not conclusive and did not qualify as either an incidental take permit nor an incidental take statement, which would constitute a “waiver” of more restrictive state protections of the marbled murrelets pursuant to ORS 496.172(4). The circuit court determined that ODF’s consent was not unreasonably withheld and entered a judgment denying the way of necessity and awarded ODF its attorney fees. Plaintiffs appealed.

The Oregon Court of Appeals affirmed, holding: (1) ODF did not arbitrarily and capriciously withhold consent because ODF had reasonable concerns about the adverse impact of plaintiffs’ proposed way of necessity on marbled murrelet habitat, and those concerns were supported by evidence in the record; (2) FWS’s letter was not a waiver of more restrictive state action by ODF because it was neither an “incidental take permit” nor an “incidental take statement,” as required by ORS 496.172(4); (3) the circuit court did not err in giving “not much weight” to the FWS letter; and (4) the circuit court’s award of attorney fees and costs did not violate the Justice Without Purchase Clause of Article I, section 10, of the Oregon Constitution. There are several noteworthy features of this decision.

First, the case discusses the way of necessity statutes in general and as applied to state lands. In a way of necessity proceeding, the plaintiff has the burden to show by a preponderance of the evidence that the 12 conditions for establishing a way of necessity enumerated in ORS 376.180 have been met. One of those conditions, ORS 376.180(11), provides that a way of necessity shall “[n]ot be established over land owned by a state or a political subdivision of the state unless permission is granted for the way of necessity under ORS 376.185.” In addition, the court must direct the plaintiff to pay reasonable attorney fees and costs by each landowner whose land was subject to the action for which the way of necessity has been established. ORS 376.175(2)(f). The court examined the legislative history of the state consent requirement and found that, in determining whether consent to a plaintiff’s proposed way of necessity to landlocked property over public land is “unreasonably withheld,” the court applies a “highly deferential ‘arbitrary and capricious’ standard . . .” 262 Or. App. 78, 90.

In this case, the plaintiffs decided to build a residence on their property. The nearest public access or roadway was Shannon Drive, which connects to Highway 101, and although there are seven different platted roads that connect to the property, all of those roads cross deep valleys or steep ridges, which make access impractical, if not impossible. Thus, notwithstanding the existence of legal access to a public road, the court nevertheless considered the property to be “landlocked” and, as such, eligible for a statutory way of necessity.

Second, there was conflicting biological evidence regarding whether a road would cause damage to the marbled murrelet habitat, and the court found that ODF did not unreasonably (i.e., arbitrarily and capriciously) withhold its consent. ODF had explained that the proposed road could negatively impact marbled murrelet habitat, and wildlife experts expressed various concerns as to the impact of the proposed road on quality nesting trees. The arbitrary and capricious standard is highly deferential to agency action, and in reviewing agency action the court is not to substitute its judgment for that of the agency but must determine whether the agency examined relevant data and articulated a satisfactory explanation for its decision.

The court deferred to the circuit court’s finding that concern about damage to the marbled murrelet habitat was reasonable. The plaintiffs proposed six alternative routes for a 750 foot road which would be 16 feet wide with a cleared 20 foot width and a permanent 25 foot easement. The chosen alternative route followed a former logging road, and the plaintiffs’ wildlife biologist opined that the proposed road would not result in damage to the marbled murrelet’s habitat.

Plaintiffs also submitted a letter from FWS that construction of the road access was “not likely to result in incidental take of murrelets . . .” *Id.* at 97. The ODF biologist and an ODFW wildlife biologist disagreed, stating they were concerned about the increased risk of windthrow due to the proposed road clearing and an adverse impact upon a creek that the road would cross. The circuit court determined that ODF’s consent was not unreasonably withheld and that ODF’s concern about damage to habitat was reasonable. The trial court was not convinced by plaintiffs’ expert and found that FWS had sent mixed signals (at one point stating the road could likely result in unauthorized take of a listed species, and later issuing a letter that the effect of the road was not likely to rise to the level of a take), whereas the ODF biologist had consistently raised concerns about road building in the management area.

Third, the case is a cautionary tale regarding the legal significance and effect of federal agency actions on state agency actions. Any taking of a federally-listed species by a federal agency or private application that complies with the conditions set forth in either an “incidental take permit” or an “incidental take statement” is permitted under section 7(b)(4) of the ESA and is considered a waiver of further state protections of listed species. But the phrase “statement issued by a federal agency,” which under ORS 496.172(4) is a waiver of any additional state protections of listed species for that particular

project, does not refer to *any* statement that an agency makes concerning a federally listed species. Rather, the statute only refers to an incidental take issued to a *federal agency* (not to a private party). So the FWS opinion that the road was not likely to result in incidental take of murrelets did not constitute an incidental take permit or incidental take statement.

Finally, the court interpreted the statutory attorney fee statute in ORS 376.175(2)(e), which provides that an order granting or denying a way of necessity shall “direct the plaintiff to pay reasonable attorney fees and costs incurred by each landowner whose land was subject to the action for a way of necessity under.” *Id.* at 83. Plaintiffs argued that the attorney fee statute was facially unconstitutional because it required the court to award attorney fees to each landowner, even if the landowner was the “losing party.” As a result, plaintiffs asserted that this violated the Justice Without Purchase Clause of Article I, section 10 of the Oregon Constitution because the effect of the attorney fee statute is to “‘impose the government’s costs, disbursements and attorney fees on the plaintiff[] as a condition of using the court system,’ which would ‘chill’ a plaintiff’s right to bring an action for a way of necessity.” *Id.* at 103.

In rejecting that argument and upholding the trial court’s award of attorney’s fees to ODF in the amount of \$45,698, the court reviewed the constitutional cases and the legislative history of the attorney fees statute. The basis for allowance of attorney fees in way of necessity cases is that the court considers them to be like an eminent domain taking by a private individual for public use, which would require the assessment and tender of just compensation. If the landowner is put to the expense of hiring an attorney in order to realize just compensation for his land, he should be entitled, if successful, to attorney fees in addition to the actual money value of the taking. Therefore it is not unreasonable to shift the burden to a plaintiff to pay just compensation, even if the plaintiff prevails.

The court said “‘purchase’ within the meaning of the Justice Without Purchase Clause meant ‘bribery and other forms of improper influence’ and ‘judicial imposition of fees and costs in amounts so onerous as to unreasonably limit access to courts.’” *Id.* at 106 (quoting *Allen v. Employment Department*, 184 Or. App. 681, 688, 57 P.3d 903 (2002)). Since the payment of attorney fees does not procure a particular result, the court concluded that payment of reasonable attorney fees and costs is not a “purchase” and would not procure a particular result within the meaning of the Justice Without Purchase Clause.

John Pinkstaff

Bradley v. State, ex rel. Dept. of Forestry, 262 Or. App. 78, 324 P.3d 504 (2014)

■ LUBA REQUIRED TO REVIEW FOR COMPLIANCE WITH TRANSPORTATION PLANNING RULE, NOTWITHSTANDING MAP AMENDMENT CONDITION THAT MAY NEVER OCCUR

Root v. Klamath County, 260 Or. App. 665, 320 P.3d 631 (2014), presents the tortuous tale of a local government decision that amended the plan and zoning maps to include property owned by an applicant within a Destination Resort Overlay (“DRO”). On the first appeal, LUBA remanded the decision for the county to address deficiencies related to applicability of ORS 197.455(1)(e) and ORS 197.435(7) to the proposed “tracts” to be located within the DRO as well as an inadequate Goal 5 analysis regarding conflicts with inventoried Goal 5 resources. LUBA also determined that the county had improperly deferred an assessment of compliance with the Transportation Planning Rule (“TPR”) until after approval of the amendment.

On remand, the applicant submitted another request for a plan amendment and zone change. The applicant’s expert submitted a letter setting forth her analysis of tracts within the proposed overlay area and her professional opinion that the proposed overlay area satisfied the requirements in ORS 197.435(7). The county also conducted a more rigorous review of protections for Goal 5 resources. Based on the additional evidence, the county approved the amendment as a final decision for purposes of appeal, but imposed a condition delaying its effectiveness to change the zoning maps until compliance with the TPR is demonstrated in a future proceeding. *Root v. Klamath County*, 260 Or. App. 665, 668-69. Since the effect of the county’s condition was that no new uses were allowed by the decision, the county concluded the decision did not significantly affect a transportation facility. The petitioners, objectors to the proposal, again appealed to LUBA. LUBA affirmed the county’s decision regarding compliance with the TPR based on reasoning similar to that of the county.

The petitioners sought review at the court of appeals, which handily rejected the petitioner’s assignments of error based on the “substantial evidence” standard of review and the procedural rule requiring the petitioners to identify what Goal 5 resources are affected by the government action. This requirement is not tantamount to improper “burden shifting” as petitioners had asserted. *Id.* at 672-73.

However, the appellate court agreed with the petitioners that LUBA erred in finding that the challenge to the proposed DRO maps was premature. The statutory timelines for appealing the county’s decision and for LUBA’s issuance of its final order do not permit the petitioners or LUBA to wait and see whether the approved plan amendment takes effect before

addressing the petitioners' challenge concerning compliance with the TPR. The court of appeals reversed and remanded this portion of LUBA's order for a determination whether the map amendments significantly affect a transportation facility.

Jacquilyn Saito-Moore

Root v. Klamath County, 260 Or. App. 665, 320 P.3d 631 (2014)

■ **COURT UPHOLDS CITY'S INTERPRETATION OF ITS DENSITY TRANSFER REGULATIONS**

Sellwood-Moreland Improvement League v. City of Portland, 262 Or. App. 9, 24 P.3d 549 (2014), involved Portland's authority to approve a density transfer for a multi-family residential development in the Sellwood-Moreland neighborhood. Because the Oregon Court of Appeals' decision turned on language unique to discrete aspects of Portland's development code, its import is probably limited to those who regularly advise residential developers in Portland.

In this case, a developer proposed a 68-unit apartment building on a lot roughly three-quarters of an acre in size. The neighborhood surrounding the lot is generally residential in nature and is built-out mostly with single-family residential homes. The lot has a base zone classification of "R1," which permits 43 units per acre, but also has a "plan district" overlay zone that contains regulations applicable only to properties within the district.

Because the base zone only permitted 34 units, the developer sought a density transfer of an additional 34 units from an adjacent property in the R1 zone. The question the court confronted was not whether the developer was entitled to a density transfer, but rather which density transfer provisions—those identified in the base zone or those identified in the more specific plan district—governed the applicant's request.

Portland's code at 33.700.070 and at 33.500.040 states that if there is a conflict between regulations in a plan district and regulations in a base zone, the plan district regulations control. The petitioners argued that the city erred when it approved the applicant's density transfer request pursuant to the base zone's transfer criteria, because the plan district's criteria would have prohibited the applicant from transferring an additional 34 units. The petitioners believed language in the plan district provided the exclusive method for permitting density transfers, and alleged that the plan district only permitted density transfers from properties zoned single-family, not from properties whose zoning would permit multifamily dwellings, as was the case here.

The court disagreed with the petitioners and upheld LUBA's affirmation of the city's decision. The language the petitioners relied on states the "[t]ransfer of development rights between sites in the plan district is allowed as follows." Portland City Code § 33.537.110(B). The court agreed with the city that, in advancing their argument, the petitioners inserted language that is absent from the code—namely, the word "only" between "allowed" and "as."

As the city determined in its decision, and as the court agreed, the absence of the word "only" means that the applicant could also avail itself of the density transfer language in the base zone, to the extent no conflict existed. In this case, the city, LUBA, and the court concluded that the transfer provisions in both the base zone and the plan district could operate in harmony, and therefore the city did not err when it permitted the additional 34 units the developer requested.

David Doughman

Sellwood-Moreland Improvement League v. City of Portland, 262 Or. App. 9, 24 P.3d 549 (2014)

■ **COURT OF APPEALS ILLUSTRATES LIMITS OF ITS REVIEW OF A SUBSTANTIAL EVIDENCE CHALLENGE**

The Oregon Court of Appeals reaffirmed the stringency (or lack thereof) of its review of a substantial evidence challenge in *Stevens v. City of Island City*, 268 Or. App. 768, 324 P.3d 477 (2014). There, the city allowed operation of a commercial trucking company as a home occupation. The parties disputed the sufficiency of the evidence supporting the city's decision.

The parcel in question measured four acres and was improved with a dwelling and a 4500-square-foot workshop. Commercial trucking, consisting of six tractor-trailers, would operate from a 600-square-foot office in the shop and employ a non-family, full-time mechanic.

The relevant land use regulation required the occupation to be "secondary to the residential use." The case offered no analysis of how the city was to measure the relative primacy of the uses. Instead, the opponents argued that "by any empirical measure" the above-described operation did not meet this standard.

Though LUBA remanded the case, a divided Board upheld the city on the substantial evidence argument. The majority simply refused to rule that "no reasonable person" could reach such a conclusion. Board Member Holstun disagreed, describing the city's conclusion as "preposterous." 268 Or. App. 768, 772, n.2.

The court of appeals noted this divide, but also noted the limitations of its review. Not only was the court not reviewing the evidence in the first instance, it was not even second-guessing LUBA's evaluation thereof. Rather, the question before the court was simply whether LUBA "misunderstood or misapplied its standard of review." *Id.* (quoting *Younger v. City of Portland*, 305 Or. 346, 752 P.2d 262 (1988)). Concluding that it had not done so, the court affirmed. *Id.* at 773.

Ty K. Wyman

Stevens v. City of Island City, 268 Or. App. 768, 324 P.3d 477 (2014)

Statutes – Real Estate

■ THE EFFECT OF FORECLOSURE REDEMPTION

The RELU listserv recently hosted a very interesting discussion regarding the effect of ORS 18.952 and the redemption statutes, ORS 18.960-18.982. The following question was posed: Is a purchaser of the title and redemption rights of a foreclosed owner a "successor in interest" within the meaning of ORS 18.952?

ORS 18.952 Effect of sale on judgment debtor's or mortgagor's title; effect of redemption by judgment debtor or mortgagor. (1) The title of a judgment debtor or mortgagor to real property that is subject to redemption under ORS 18.960 to 18.985 is not transferred by the sale of the property at an execution sale. If a judgment debtor or mortgagor, or a successor in interest to a judgment debtor or mortgagor, redeems property sold at an execution sale, the right to possession of the property is restored subject to all liens of record, whether arising before, on or after the sale, as though the sale had never occurred.

(Emphasis added.) While there are no cases to this effect, it seems that a plain meaning of the statute would include any grantee or assignee of those rights.

The real issue is, if the property is redeemed and the amount to redeem is less than the amount in the judgment of foreclosure, what is the effect of ORS 18.952 on "restoring" judgment, in particular the foreclosure judgment? In order to more fully explore this question, consider the following hypothetical:

1. A foreclosure judgment is entered in the amount of \$500,000 in favor of the first lender. There is also an outstanding child support judgment (the creditor was served with notice of the proceeding) and a second trust deed (also served with notice of the proceeding), although neither creditor made an appearance and defaults were entered.
2. There was an execution sale and a certificate of sale was issued to the successful bidder (identity is not relevant) with bid (actual or credit) in the amount of \$300,000.
3. The borrower (or their successor-in-interest) redeems for the \$300,000 plus statutory additions as required.

Question #1: Who now owns the property? Title is vested in the successful redemptioner. The words of the statute would seem to make it impossible to separate the ownership and rights of redemption and, in fact, the typical assignment of redemption rights is done by deed from the owner. Therefore, when the redemption is successfully completed, title (which never left the owner) is fully restored by restoring the right to possession, which was transferred by the execution sale.

Question #2: After the redemption, what is the status of the second trust deed? The plain meaning of the statute would suggest that it is now a lien on the property since "all liens of record . . ." have been restored, "whether arising before, on or after the sale, as though the sale had never occurred." Although the statute only refers to the "right of possession," title has never transferred from the owner who was subject to the execution sale. Therefore, no liens have been eliminated.

Question #3: After the redemption, what is the status of the child support judgment? In addition to the reasoning in #2 above, the effect of a judgment is to attach to any property held in fee title or to the property in question.

Question #4: After the redemption, what is the status of the first trust deed judgment? I would suggest the property is subject to the lien in favor of the judgment creditor (first trust deed) based on the same reasoning in the paragraphs above. However, one might argue that a judgment, specifically *in rem* or the bar to deficiency judgments in ORS 86.797, would preclude the application of this reasoning:

ORS 86.797 Effect of sale; actions for deficiency; restrictions

* * *

(2) Except in accordance with subsection (4) of this section, after a trustee's sale under ORS 86.705 to 86.815, or after a judicial foreclosure of a residential trust deed, an action for a deficiency may not be brought or a judgment entered against the grantor, the grantor's successor in interest or another person obligated on:

(a) The note, bond or other obligation secured by the trust deed for the property that was subject to the trustee's sale or the judicial foreclosure; or

(b) Any other note, bond or other obligation secured by a residential trust deed for, or mortgage on, the property that was subject to the trustee's sale or the judicial foreclosure when the debt, of which the note, bond or other obligation is evidence ***.

The first response is that the above statute is simply not applicable, since ORS 18.952 states that the parties are restored to the previous status "as though the sale had never occurred." Although the sale *has* occurred, the legal fiction identified in the statute requires that the effect of the sale be ignored. Therefore, the operative language of ORS 87.797, "after a trustee's sale under ORS 86.705 to 86.815, or after a judicial foreclosure of a residential trust deed . . .," does not take effect (emphasis added). Accordingly, title to the property following redemption is subject to the balance due, if any, in the original foreclosure action.

Another response might well be that there should be no distinction in how the various liens are to be treated; however, there is one legal theory that would allow the entire statutory scheme to be fully implemented. It is clear that every secured debt has two separate and distinct features, the lien on the property and the personal obligation to pay. If it is argued that the *in rem* judgment or the bar of a deficiency judgment will preclude collection of any personal obligation to pay, that does not necessarily estop the creditor from collecting the balance as a result of the lien. In a different context dealing with the question of lien avoidance in a bankruptcy, the U.S. Supreme Court stated: "Rather, a bankruptcy discharge extinguishes only one mode of enforcing a claim, namely, an action against the debtor *in personam* while leaving intact another—namely, an action against the debtor *in rem*." Further, "the creditor's lien stays with the real property until the foreclosure" as the parties bargained in the mortgage, thus giving the creditor the benefit of any upswing in the value of the property prior to foreclosure. *Dewsnup v. Timm*, 502 U.S. 418, 116 L. Ed. 2d 903, 112 S. Ct 778 (1991).

Therefore, the only way to secure title free of these items is if the successor-in-interest purchases the certificate of sale following execution or is the successful bidder at the sale. If they don't want to wait the 6-month redemption period, they can purchase the redemption rights and request the issuance of an early sheriff's deed. It is ultimately the issuance of the sheriff's deed that is the only way to eliminate inferior liens.

Alan K. Brickley

Cases From Other Jurisdictions

■ US SUPREME COURT DERAILS "RAILS TO TRAILS" LEGISLATION

Marvin M. Brandt Revocable Trust v. United States, ___ U.S. ___, 134 S. Ct. 1257, 188 L. Ed. 2d 272 (2014), involved the allocation of property interests in a former railroad right-of-way when the railroad subsequently abandoned its use. Plaintiff trust succeeded to the interests of Melvin and Lulu Brandt, who purchased 83 acres of land in Wyoming by patent from the United States in 1976, subject to, among other things, an easement for railroad purposes. The successor to that railroad formally abandoned the right-of-way and tore up the tracks and ties in 2004. The United States claimed a reversionary interest in the former right-of-way in the form of an easement by virtue of a 1988 statute. The government settled with all landowners except the trust in order to convert that land to a public path, part of a nationwide effort known as rails to trails. The trust argued that any government claim to the land was extinguished when the easement was abandoned by the railroad.

Both lower federal courts sided with the federal government, but in an 8-1 opinion authored by Chief Justice John Roberts, the Supreme Court reversed. Chief Justice Roberts traced the historical relationship of railroads to settlement of the West, noting that from 1860 to 1871, when there was a need to build a transcontinental railroad and very little money available (mostly due to the Civil War), the federal government granted lands to railroads outright to encourage transcontinental service. (Author's note: This was the practice when the "O&C Lands" were granted from 1866 to 1872 under the Oregon and California Railroad Act and related legislation.)

The practice of giving land to railroads ceased by 1875, when Congress enacted the General Railroad Right of Way Act and adopted a new practice to grant right-of-way easements for railroads (although those easements frequently did not specify what would happen if the easements were no longer used for railroads). This was the type of easement granted for the subject lands in this case. The trust claimed that, to the extent any easement existed, the easement was extinguished by abandonment. The United States claimed a reversionary interest that it granted to other public agencies for, among other things, hiking and bike trails.

Chief Justice Roberts' opinion relies on a case previously decided in 1942 by the Supreme Court in *Great Northern Railway Company v. United States*, 315 U.S. 262, 62 S. Ct. 529, 86 L. Ed. 836 (1942), in which the federal government

defeated a private claim to oil rights under a railroad right-of-way by claiming the railroad's interest was merely an easement and did not entitle it to mineral rights under the tracks. When the United States granted title by patent to the Brandts in 1976, the land was "subject to those rights for railroad purposes" to a predecessor railroad. The Court found that, in such situations, when the beneficiary railroad abandons the right-of-way, the easement disappears and the landowner has an unencumbered interest in the land. Chief Justice Roberts characterized the federal government's position in the present case as suggesting that the *Great Northern* opinion did not really mean what it said, calling its arguments based on the 1875 Act an "improbable (and self-serving) reading. . . ." of that legislation. 134 S. Ct. 1257, 1266.

The Court noted that Congress again changed its policy in 1922 to grant all property interests in forfeited or abandoned railroad rights-of-way to the municipality or private person who owned the underlying land. But in 1988, Congress declared that title to abandoned or forfeited railroad rights-of-way would vest in the United States. The Court said that the nature of the property interests in the former railroad right-of-way turned on the date of the original grant of that interest, rather than on subsequently-enacted legislation. Thus, if all the railroad had was an easement, the federal government could not acquire a greater interest by changing the rules after the fact. The Brandt Trust owned the property subject to the easement and when the easement was abandoned, that interest simply went away.

This is not to say there may be other ways to acquire easements over these former rights-of-way for pedestrian or bicycle trails—by purchase, gift, or condemnation, for example. Perhaps there are cases to be made that title has been lost by adverse possession. Nevertheless, those owning lands crossed by now-abandoned railroad rights-of-way have something to talk about to public agencies asserting that those owners have no legal interest in that land.

Edward J. Sullivan

Marvin M. Brandt Revocable Trust v. U.S., ___ U.S. ___, 134 S. Ct. 1257, 188 L. Ed. 2d 272 (2014)

LUBA Summaries

■ **EFU ZONES**

Aplin v. Deschutes County, ___ Or. LUBA ___, No. 2013-055 (Mar. 12, 2014), gave LUBA an opportunity to add to the limited body of case law interpreting the term "principally engaged in farm use" as used in the county's code and state administrative rules implementing Statewide Planning Goal 3. Petitioners in *Aplin* appealed the county's approval of an accessory farm dwelling occupied by Dave and Terry Page, arguing the county's findings failed to explain how the county's standard for accessory farm dwellings is satisfied based on the facts presented. The county's code echoes OAR 660-033-0130(24) and requires that an accessory dwelling be occupied by a person who is "principally engaged" in the farm use of the land. Petitioners argued the evidence did not support the county's approval because the record showed Mr. Page is a long-haul truck driver who works off of the property and Mrs. Page is a homemaker who does not spend a substantial amount of her time engaged in ranch duties.

Noting the lack of case law interpreting what it means to be "principally engaged" in farm use, LUBA agreed with the petitioners that this standard requires some quantification of the amount of time the occupant(s) will be engaged in farm-related activities. Because the time spent on these activities will vary between types of farm use and may vary seasonally, a necessary first step is to calculate the average number of weekly hours a full-time employee of the farm use will typically spend on farm tasks. To support approval of an accessory farm use, an applicant must show that she will devote a similar number of hours to farm-related work.

The county's decision in *Aplin* described the farm activities that Mrs. Page performs in general terms as assisting with elk births, calving, and related record keeping, general bookkeeping, and ranch security. LUBA agreed with the petitioners that these findings were inadequate for two reasons. First, the findings did not quantify the amount of time she spent on each of these activities. Second, the county's description of the work Mrs. Page performed did not connect her work to operation of the farm with sufficient specificity. The county failed to explain how her "general bookkeeping" was necessary to run the farm. Additionally, her "ranch security" activities consisted of simply being at home and keeping an eye out for strangers while she was engaged in other home-related tasks. LUBA concluded: "In our view, activities inseparable from general rural residential living do not constitute activities that can be considered in determining whether a dwelling occupant is 'principally engaged in farm use of the land,' even if those residential activities arguably benefit or assist the farm operation in some way." (Slip op at 13) Given these deficiencies, LUBA remanded the county's decision.

■ **GOAL 4**

In *Lindstromberg v. Lane County*, ___ Or. LUBA ___, No. 2013-096 (Feb. 13, 2014), LUBA reversed the county's approval of a private park and campground in a forest zone, finding the proposed use is not permissible under the Goal

4 administrative rules and county code because it is not a recreational opportunity appropriate in a forest environment. As proposed and approved, the park and campground would be used for outdoor music events, weddings and reunions, performance arts events, environmental education programs, and camping for 2,000 people at 250 campsites.

Even though the Goal 4 administrative rules allow private parks and campgrounds, petitioners argued the rules limit these activities to “recreational opportunities appropriate in a forest environment” and the approved use is inconsistent with this standard. LUBA agreed and, as a starting point, noted the proposed park and campground includes an event venue, which transformed it into something other than a recreational opportunity or a campground. Other considerations that supported LUBA’s decision to reverse the county’s decision included: (1) the traffic generated by up to 2,500 attendees at the four annual music events allowed under the county’s approval; (2) the Goal 4 rule’s prohibition on intensively developed recreational activities like the proposed concert venue; and (3) prior decisions in which LUBA concluded that recreational uses that dominate and change the character of a forest environment, like a motocross or motorcycle track, are inconsistent with the rules even though they can be considered “outdoor recreation” in its broadest sense. The inclusion of a campground component was insufficient to override the other features of this use. Because the county’s decision was so at odds with the Goal 4 rules, LUBA concluded reversal was the only appropriate disposition.

■ GOAL 14

LUBA found wanting a county’s approval of a reasons exception to Goal 14 to allow an urban level of industrial use on existing industrial lands in a rural unincorporated community in *Landwatch Lane County v. Lane County*, ___ Or. LUBA ___, No. 2013-058 (Feb. 20, 2014). The community of Goshen contains 316 acres that are designated as a Regionally Significant Industrial Area (“RSIA”) under ORS 197.722 and partially developed with industrial uses. In 2011, the county adopted a strategic plan for Goshen that focused on job creation and subsequently approved a reasons exception to Goal 14 to allow urban industrial development within the RSIA.

Under the Goal 14 rule, a reasons exception to allow new urban development on undeveloped rural lands may be approved if urban levels of development are necessary to “support an economic activity dependent on a natural resource.” (OAR 660-014-0040(2)) The county based its approval of the challenged exception on a finding that the Goshen RSIA is a natural resource. LUBA agreed with the petitioners that “[i]ndustrially zoned and developed property, no matter how useful to man, is not in itself a ‘natural’ resource for purposes of [the rule] of the general Goal definition.” Slip op. at 9.

However, LUBA rejected the petitioners’ claim that the county failed to explain adequately the reasons why the unique features of the RSIA make it well suited for urban industrial development. Based on the property’s status as a RSIA, its industrial comprehensive plan and zoning designations, and its proximity to rail and highway infrastructure, the county identified 15 reasons or feature that make the property suitable for large-site, rail-dependent industrial uses. LUBA rejected the petitioners’ argument that county failed to explain why each of the 15 features is necessary and erred by labeling some of these reasons “desirable.” In LUBA’s view, the rule does not require the county to find that each of these characteristics is essential to accomplish the county’s objective, distinguishing the county’s decision here from the county decision challenged in *VinCEP v. Yamhill County*, 57 Or. LUBA 514 (2007), *aff’d in part and rev’d and remanded in part*, 215 Or. App. 414, 171 P.3d 368 (2007).

Despite surviving this hurdle, LUBA found the county failed to explain adequately its analysis and decision that purportedly addressed other portions of the Goal 14 rule. The zones applied to the Goshen RSIA allow a small number of commercial uses. Petitioners asserted the county failed to show these commercial uses cannot be reasonably accommodated within the Eugene or Springfield urban growth boundaries as OAR 660-014-0040(3)(a) requires. LUBA rejected the county’s argument that these commercial uses are supportive of the allowed rail- dependent/related industrial uses because the county’s findings failed to address or analyze the commercial uses under the rule’s reasonable accommodation standard. Similarly, LUBA concluded the county erred by excluding identified wetlands in the RSIA in its economic, social, environmental, and energy analysis of whether urban industrial development of the property is limited by air, water, land, and energy resources under OAR 660-014-0040(3)(b).

Finally, LUBA agreed with the petitioners that the county’s findings were insufficient to demonstrate an appropriate level of sewer infrastructure will be provided in a timely and efficient manner as OAR 660-014-0040(3)(d) requires. The county found that when industrial development reaches a level that requires installation of a community sewer system, rather than reliance on individual septic systems, further development will be limited or prohibited until the new sewer system is in place. In LUBA’s view, the county must do more and demonstrate both that it is feasible to provide a community sewer system and that it will be in place at the time of full build out of the RSIA. Based on these cumulative errors in the county’s analysis, LUBA remanded the decision.

■ LOCAL PROCEDURE

In *Elle Belle Bend, LLC v. City of Bend*, ___ Or. LUBA ___, LUBA No. 2013-115 (Mar. 6, 2014), LUBA held the city's code limitation on who could file a local appeal is inconsistent with state law. Under the city's code, the right to appeal a Type II administrative decision made without a hearing is limited to: (1) a party (defined as a person who appears orally or in writing), and (2) a person entitled to notice and who received no notice. When the petitioner attempted to appeal a Type II planning director's decision, the city denied her appeal as invalid because she was neither a party nor entitled to notice.

On appeal to LUBA, the petitioner argued the city erred in rejecting her appeal because the planning director's decision approved a discretionary permit and ORS 227.175(10)(a) allows a person "adversely affected or aggrieved" to file a local appeal of a discretionary permit decision under the circumstances presented here. LUBA agreed, noting that the statute does not limit who is adversely affected or aggrieved to just parties or persons entitled to notice, as does the city's code. In LUBA's view, ORS 227.175 establishes a *quid pro quo*: the city can approve or deny a discretionary permit without holding the hearing that is otherwise required; in exchange, the city must allow any person who is adversely affected or aggrieved by the decision to appeal this administrative decision and participate in a *de novo* appeal hearing. Since the city failed to honor this *quid pro quo*, LUBA remanded the city's decision.

■ LUBA JURISDICTION

When land uses or development activities require a state agency approval, the agency often requires the relevant local government to sign a Land Use Compatibility Statement ("LUCS") that certifies whether the proposed use is consistent with the local comprehensive plan and zoning regulations. In *Curl v. Deschutes County*, ___ Or. LUBA ___, LUBA No. 2013-086/095 (Mar. 19, 2014), LUBA attempts to define when a LUCS also constitutes an appealable discretionary permit decision and when it does not.

Petitioners in *Curl* appealed the county's issuance of a LUCS that determines the proposed construction of piping from an existing irrigation canal is an allowed use in the Suburban Residential (SR 2.5) zone. The county cited portions of its code that allow piping of an existing irrigation canal in the EFU and Open Space and Conservation zones (where existing piping to a hydroelectric facility is located) and that contain special regulations allowing certain types of utilities within the Bend Urban Area.

Among the issues raised on appeal to LUBA, the petitioners argued the LUCS is a discretionary permit and asserted the county erred by failing to provide notice and hold a hearing consistent with the procedural requirements in ORS 214.416. LUBA disagreed, noting that the question typically asked and answered by a LUCS is which use category best fits the proposed use. The answer to that question will determine whether local approval of the use is required and, if so, what standards will apply and what permits will be required. Characterized this way, LUBA explained: "If that is all the LUCS decision determines, then it is very similar in function to a use or zoning classification decision described in ORS 215.402(4)(b)" and "is not a . . . 'permit' as defined at ORS 215.402(4) for the simple reason that the LUCS does not *approve* the proposed development of land, no matter how much interpretation or discretion may go into that use categorization." Slip op. at 10-11. However, if the county goes further and actually applies discretionary approval standards as part of its LUCS determination, the county's determination approves a "permit" and the county must provide notice and an opportunity for a local appeal consistent with ORS 215.416(11)(a). LUBA concluded the LUCS challenged in *Curl* simply determined the piping is allowed by the county's code, but did not purport to apply any standards or approval criteria to that use and is not a discretionary permit decision that requires notice and a hearing.

Petitioners also challenged the merits of the county's decision, arguing the county erred in determining the piping is an allowed use rather than a conditional use. LUBA agreed and identified two options available to the county on remand. First, the county could issue a new LUCS that states the piping is "allowed *with review*" and defer approval of the piping to a future conditional use proceeding. Second, the county could issue a decision approving or denying a conditional use permit and any other necessary discretionary reviews as part of issuing the LUCS. This would require the county to give notice, provide an opportunity for appeal and an appeal hearing for the LUCS. Based on the county's erroneous characterization of the piping as an allowed use, LUBA remanded the county's decision.

Kathryn S. Beaumont
