Oregon State Bar

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Contents

The Digest at Thirty-Five

It has been my privilege every five years to note the status of the Real Estate and Land Use Digest, the flagship publication of the section. At thirty-five years, the Digest is now a mature publication and part of the everyday professional life of section members.

With this issue, the Digest will have only its fourth editor in Jennie Bricker, a seasoned professional who, with our new assistant editor, Judy Parker, will continue the high quality of our publication in a fast-changing world of legal information. Bricker and Parker follow an illustrious succession of Digest editors.

In 1979, the section initially chose the late Pat Randolph, who taught at Willamette University College of Law, to be editor. Professor Randolph took a position with the University of Missouri some months later, and Larry Kressel (he of the Glen and Nadine Twidley and the Science of Fasanology fame) edited the Digest until he passed away in 1996. From that time through the most recent issue, Kathryn Beaumont has been our editor and has overseen the gradual transition of the publication to accommodate the digital age. We owe Kathryn, and her long time assistant editor, Eric Shaffner, a huge vote of thanks for their work.

In this the digital age, our section has risen to meet the demand for timely information and immediate gratification. With the advent of Willamette Online Services, appellate court and LUBA case summaries are available almost as soon as the cases are released. We expect the Digest to offer more in-depth treatment of real estate and land use cases, as well as articles and commentary of interest to section members. The Digest will continue to be a leading benefit of section membership.

Alan Brickley and I will no longer be styled as associate editors (for real estate and land use respectively) but will join the editor and assistant editor as part of an editorial board to assist the publication, to recruit writers, and to provide advice when needed.

That great philosopher Yogi Berra once said "It's tough to make predictions, especially about the future." But we can be confident that the quality of the Digest in its first thirty-five years will continue with our incoming editor and assistant editor and that section members will find the Digest helpful in their practices.

Edward J. Sullivan

Hello

A new editor and assistant editor take the helm of the *RELU Digest* with this issue. The Digest's new editor is Jennie Bricker, whose practice focuses on water law, property and boundary issues, and natural resources permitting. The Digest's new assistant editor is Judy Parker, who focuses her practice on the wine industry, including business formation, employment issues, state and federal compliance, trademarks, and litigation—with developing expertise in real estate and land use matters. Both Bricker and Parker are solo practitioners who recently departed large law firms, and both have significant editorial experience in their résumés.

We, the editorial staff, always welcome your comments, observations, and suggestions. In particular, we would like to hear from you this month

about how you read the Digest, so we can plan for future formatting and other design changes. Please take a moment to respond to the following short survey: www.surveymonkey.com/s/RELUDigest

Jennie Bricker and Judy Parker

Appellate Cases – Real Estate

■ APPORTIONMENT OF FEES NOT REQUIRED WHEN THERE ARE COMMON ISSUES

In *Perry v. Hernandez*, 265 Or. App. 146 (2014), the court of appeals wrestled with the need to segregate attorney time spent on fee-bearing claims from claims for which fees were not authorized. The court overturned the trial court's denial of fees.

Perry brought claims against property owners and the property manager under the Residential Landlord and Tenant Act, as well as common-law claims for negligence, nuisance, and negligent trespass. Perry lived in a building with a laundromat and alleged that the Hernandez defendants had allowed hazardous fumes to leak into his apartment, injuring him. The RLTA claim, filed only against the owners, alleged that they had "failed to maintain the premises in a habitable condition." The common-law claims were brought against all defendants, seeking the same damages.

The owners made a pre-trial ORCP 54 offer of judgment, which Perry accepted. The offer included an award of attorney fees and costs but did not specify the amount. Perry then submitted a petition for fees pursuant to ORCP 68. The owners challenged the petition because the attorney's time had not been segregated between the RLTA claim, which allows fees, and the common law claims, which do not. Perry argued that because all claims arose out of the same common issues, apportionment was unnecessary. The trial court agreed with the defendants and refused to award fees.

On appeal, the court acknowledged the general rule that when a party prevails on a claim for which fees are authorized and a claim for which they are not, the trial court must apportion the fees incurred for each claim. The court also noted, however, the exception that applies when the claims involve issues common to both sets of claims. Fees are not subject to apportionment when the party "would have incurred roughly the same amount of fees, irrespective of the additional claims." Here, the court found Perry's situation fell within the exception, noting that all claims arose from the same hazardous conditions and deficiencies in the building. The evidence necessary to prove both the RLTA claims and the common-law claims derived from a "common core of facts." The evidence of damages was equally applicable to all claims. The court concluded that Perry's attorney fees would have been about the same whether or not he had included the common law claims. Thus, segregation was not necessary.

Gary Kahn

Perry v. Hernandez, 265 Or. App. 146 (2014).

■ TRUSTEE'S DEED PRIMA FACIE EVIDENCE IN AN FED ACTION

In *Federal National Mortgage Association v. Bellamy*, 265 Or. App. ____, ____ P.3d ____, 2014 WL_____ (2014), the Oregon Court of Appeals held that a trustee's deed was sufficient to show that a bank was entitled to possession in a forcible entry and wrongful detainer action.

Bellamy obtained a loan secured by a trust deed encumbering property in Milwaukie, Oregon. After Bellamy failed to perform his obligations under the trust deed, the plaintiff, Federal National, purchased the property at a trustee's sale held on February 17, 2012. The properly recorded trustee's deed stated that the trustee "does hereby convey unto [plaintiff] all interest which the grantor had or had the power to convey at the time of the grantor's execution of said Trust Deed, together with any interest the said grantor or grantor's successors in interest acquired after the execution of said Trust Deed in and to the [property.]"

Federal National initiated an FED action against Bellamy on April 5, 2012, seeking possession of the property. Bellamy filed an answer on April 13, 2012, and an amended answer on May 14, 2012, admitting in the latter that he was in possession of the property, but denying that he was holding the property by force or that Federal National was entitled to possession. At a trial on July 10, 2012, Federal National submitted the trustee's deed as its only evidence, while Bellamy failed to introduce any evidence.

In an FED action, under ORS 105.123, a plaintiff must prove (1) the defendant is in possession of the property, (2) the defendant is unlawfully holding the property by force, and (3) the plaintiff is entitled to possession. The court held that when Bellamy admitted he was in possession of the property in his amended answer, he relieved Federal National of its burden of proving the first element.

To determine whether Bellamy was unlawfully holding the property by force, the court cited ORS 105.115(1)(d), which for the purposes of FED proceedings provides that a person unlawfully holds property by force "[w]hen the person in possession of a premises remains in possession after the time when a purchaser of the premises is entitled to possession in accordance with the provisions of * * * [ORS] 86.782," which provides that a purchaser is entitled to possession on the tenth day following a trustee's sale. The court held that Bellamy's amended answer established he was in possession of the property at trial, which was more than ten days after the sale. Therefore, the second FED element was satisfied.

Addressing Bellamy's unlawful possession, the court held that recitals in a trustee's deed "shall be prima facie evidence in any court of the truth of the matters set forth therein[.]" Because the recitals in the trustee's deed established that Bellamy was the grantor of the trust deed and that "all interest" he had in the property at the time of execution was conveyed as a result of the trustee's sale, the recitals were prima facie evidence that he did not possess the property pursuant to "an interest prior to the trust deed," or to "an interest the grantor or a successor of the grantor created voluntarily[.]" Therefore, Bellamy unlawfully held the property by force and Federal National was entitled to possession.

FED practitioners should note that answers (and subsequently amended answers) can provide the platform for prima facie evidence.

Stephanie Schuyler

Federal National Mortgage Association v. Bellamy, 265 Or. App. ____, ____ P.3d ____, 2014 WL_____ (2014).

■ *ADVERSE POSSESSION AND ACCRETION*

Sea River Properties and Loren Parks own lots on the Oregon coast, south of the Nehalem River. When the lots were first platted in the 1850s, Parks's lot sat directly to the north of Sea River's lot, and both parcels abutted the Pacific Ocean. In the early 1900s, the Nehalem River shifted into its southern channel and eroded a significant portion of Parks's lot away. By 1926, the Army Corps of Engineers had constructed jetties to force the river into its northern

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channel, for safer navigation. Parks's lot became riparian to the previous southern channel, a small stream called McMillan Creek. Over time, tidal forces deposited new soil into the area, north of Sea River's lot and west of Parks's lot, first attaching to Sea River's land and spreading north and east until the tidal area west of Parks's lot was completely filled in.

In 2006, Sea River brought suit to quiet title on the newly accreted land on the basis of record title, accretion, and adverse possession. Parks counterclaimed on the same grounds, and also argued that he was entitled to the land under the doctrine of lateral accretion, which states that a court may "divide accreted land when land grows laterally beyond a fixed property line such that it blocks one littoral or riparian landowner's access to water." Finding that neither party's deed conclusively gave it title to the disputed land, the trial court decided the case based on the law of accretion. Under Oregon law, accreted land belongs to the owner of the upland to which the accreted land first attaches; thus, Sea River took title to the land. The trial court rejected Parks's lateral accretion argument, noting that the doctrine was not applicable because his property did not border on the ocean when the accretion began, and therefore the new land was not blocking his access to water. However, the court ultimately awarded title to Parks, finding that he had satisfied the elements of adverse possession.

The court of appeals affirmed the trial court's decision on different grounds. The court of appeals held that "ownership of the land whereupon that new land was formed"—or in other words, tidelands—was the controlling issue for application of the law of accretion to this case. Because the court ruled that title was rightly vested in Parks, it did not reach the issue of adverse possession.

The Oregon Supreme Court affirmed the principle that accreted land belongs to the upland owner where the accretion began, and, in so doing, affirmed the trial court's finding that title rested in Sea River and rejected the court of appeals finding that the owner of the underlying land was entitled to ownership of the accreted land. The court noted that relying on ownership of the underlying tidelands and riverbeds would result in the State being entitled to most accreted land, which runs counter to Oregon's interpretation of the law of accretion.

The court also dismissed Parks's lateral accretion argument, finding that Oregon common law does not recognize the doctrine, and that even if it did, it wouldn't apply to Parks's case because the disputed land does not block his access to the ocean, as that access was severed by the movement of the Nehalem river in the 1800s.

Finally, the court dismissed Parks's claim of adverse possession. Parks testified that he and his family used the property occasionally to wander the trails, access the jetties, and collect firewood, as did members of the general public. In addition, Parks paid property taxes on the land, granted two easements over the property to public entities, and permitted brush-clearing by a third public entity. The court found that these activities did not satisfy the "actual, continuous, and exclusive use" elements of adverse possession, nor did the evidence offered at trial establish actual, continuous, and exclusive use over a specific 10-year period.

Steve Cox

Sea River Properties, LLC v. Parks, 355 Or. 831 (2014).

■ SEA RIVER PROPERTIES, LLC V. PARKS*: A COMMENTARY*

The case of *Sea River* provides new perspectives on the law in two areas: adverse possession and accretion. In rejecting Parks's adverse possession claim, the court regards "temporal focus" as significant. In other words, the evidence needed to establish exactly *which* ten-year period Parks relied on to meet the requirements of adverse possession. The other important finding is that neither the payment of taxes (which befuddles the general public) nor the granting of easements by the putative adverse possessor was sufficient to establish any element of adverse possession.

While the issue of temporal focus is an important one, the court's treatment of the law of accretion is the most significant facet of the *Sea River* decision. The decision reiterates the general law regarding accretion: "Accretion is a geological process by which new land forms when sand, silt or soil is gradually and imperceptibly deposited on the edge of existing land" and "Since antiquity, the rule of accretion has been that gradual and imperceptible additions of new land to existing upland become the property of the upland owner."

The factual finding is that the accretion was to Sea River's property. The important aspect of this finding is that the Sea River property is south of the south boundary of Government Lot 4, the land belonging to Parks. In other words the disputed property is north of the common boundary between the two properties (see illustration at page 836 of the opinion). The court did recognize the existence of the doctrine of *lateral accretion* in other jurisdictions; however, this was a matter of first impression in the Oregon courts.

The doctrine of lateral accretion is an exception to the general rule that land accreting to the upland belongs to the upland owner. The court described the two principles at work: "First, the doctrine of lateral accretion applies when the accreted land that ordinarily would belong to one landowner cuts off an adjoining landowner's access to a body of water. Second, in that circumstance, some courts divide the accreted land to permit the adjoining landowner to maintain access to that body of water."

The court then held that the doctrine was inapplicable to the facts of the case. Formation of the disputed property did not cut off Parks's access to the Pacific Ocean because that had already occurred some forty years earlier as a result of the movement of the Nehalem River. Parks's access was only to the river, which still exists. Thus, the doctrine does not apply.

This appears to be a very narrow application of the doctrine of lateral accretion. If one accepts that Parks's property originally did have access to the Pacific Ocean, which appears to be the case, it begs an additional question—whether the doctrine of lateral accretion only applies to accretion, or whether it applies to the entire factual circumstances of erosion and accretion, together. If the latter, it would seem the doctrine should operate to maintain Parks's original ocean access, as granted in Government Lot 4.

Regardless of the outcome of future decisions, this case is an excellent summary of the law of accretion and does demonstrate the importance of factual findings to allow the court to make an appropriate application of the law.

Alan K. Brickley

Appellate Cases – Land Use

■ *COUNTY DECISION TO REMOVE TRAFFIC SIGNAL UNDER FURTHER REVIEW*

The Oregon Court of Appeals reviewed a LUBA final order in *Regency Centers, L.P. v. Washington County*, affirming the remand of Washington County's decision to remove a traffic signal.

The traffic signal at issue is located on Tualatin Sherwood Road east of Highway 99 West, at the intersection of Tualatin Sherwood Road and the main entrances to two commercial properties—a cinema north of the road and a market center to the south. The petitioners in the case, TakFal Properties, LLC, and MGP X Properties, LLC, owned the properties.

In 2005, the county identified improvement of Tualatin Sherwood Road along a section that includes the intersection as a Major Streets Transportation Improvement Program project called the "Borcher to Langer Parkway Project." In 2012, the county formed and funded a project team that included the county, the City of Sherwood, a design consultant, a traffic engineer, and a geotechnical engineer to consider alternatives for the project, including removal of the traffic signal, elimination of the two left turn lanes from eastbound Tualatin Sherwood Road, and conversion of the access to and egress from Tualatin Sherwood Road into the cinema and market center driveways to right-in and right-out only. That alternative was approved by the county's director of land use and transportation in September 2013. The underlying appeals to LUBA ensued.

The court of appeals considered three issues, each arising from LUBA's denial of the property owners' assignments of error: (1) The interpretation of the city's Traffic Control Master Plan, (2) the applicability of the Transportation Planning Rule, and (3) the definition of a "Permit" decision.

Interpretation of the City's Traffic Control Master Plan

First, the property owners argued that the county's decision to remove the signal conflicted with the city's Transportation System Plan, which, the property owners argued, requires the intersection to be signalized because "figure 8-10" in the city's Traffic Control Master Plan indicates that a signal is located there. The property owners asserted that to eliminate the signal, the county would have to amend the City TSP and comply with the city's Traffic Control Master Plan under Oregon Statewide Planning Goal 2. However, LUBA concluded that the property owners failed to demonstrate that the Traffic Control Master Plan required the signal or prohibited its removal. On appeal, the property owners provided portions of the City TSP that were omitted from the record below to LUBA in order to argue that figure 8-10 was of equal importance with the text of the City TSP and that figure 8-10 was intended by the Sherwood City Council as the location of traffic control devices needed to implement the city's comprehensive plan. Because they did not provide LUBA with any analysis regarding the text, context, or intent of the city's Traffic Control Master Plan, the property owners failed to preserve that issue and the court refused to consider it on review. Based on the sparse record provided to LUBA below, the court agreed with LUBA in concluding that the City TSP did not require a signal at any location depicted on figure 8-10. Rather, the portion of the City TSP text provided to

LUBA showed that the purpose of figure 8-10 is only to guide placement of potential future signals in order to avoid conflict. Thus, the court held that LUBA's conclusion was not "unlawful in substance" under ORS 197.850(9).

Applicability of the Transportation Planning Rule

Second, the property owners argued that the county's decision involved "land use decision-making" under OAR 660-012-0050(3), requiring the county to make its decision in accordance with a land use decision-making process. LUBA actually agreed with the property owners' position that OAR 660-012-0050(3) requires the county to make its decision in accordance with adopted procedures for making land use decisions, and requires the county to adopt findings that the decision complies with all applicable acknowledged comprehensive plan policies and land use regulations. However, LUBA denied the property owners' assignment of error because it added nothing to what LUBA required the county to do on remand under other assignments of error. Specifically, LUBA's remand already requires the county to "determine whether the project is a Category A, B, or C project [under the Washington County Community Development Code] and review and process it according to the procedures and development standards that it determines to apply to each type of project." The property owners asserted that their assignment of error was not merely derivative, but would add to the disposition on remand because it involved a different legal standard.

The court of appeals was unconvinced, explaining that a determination that the county's decision is a "project development" decision under OAR 660-012-0050(3) would simply require the county to determine which county and city comprehensive plans and land use regulations apply to its decision and make findings of compliance with those plans and regulations before project approval—precisely what LUBA directed the county to do on remand under other assignments of error. Thus, LUBA's order was not "unlawful in substance."

Definition of a "Permit" Decision

Finally, the property owners argued that the county's decision was a land use "permit" decision under ORS 215.402(4). Subsection (c) of that statute excludes from the definition of "permit" a "decision which determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility which is otherwise authorized by and consistent with the comprehensive plan and land use regulations," language identical to the exception from the definition of a "land use decision" found in ORS 197.015(10)(b)(D). Because LUBA determined that the exception did not apply, the property owners argued that the county's decision must be a permit decision and that the county failed to comply with applicable notice and hearing requirements. LUBA denied that assignment of error as insufficiently developed for review.

Affirming LUBA's order, the court focused on the property owners' assertion that they developed an argument below that the county's decision involved a "proposed development of land" under ORS 215.402(4). Concluding that the property owners could only point to factual assertions from scattered portions of their briefs and arguments made for the first time on appeal, the court agreed with LUBA that the property owners did not sufficiently develop their arguments for review. The court held that LUBA was not required to scour the property owners' petitions for material to support an argument that the county's decision involved a "proposed development of land" when the property owners did not make that argument for themselves.

Accordingly, the court affirmed LUBA's decision on the petition and cross-petitions.

Tyler Bellis

Regency Centers, L.P. v. Washington County, 265 Or. App. 49 (2014).

Cases From Other Jurisdictions

■ NEW YORK COURT LIMITS DEVELOPMENT RIGHT CREDITS

A recent New York appellate case presents another aspect of the "law of the case" doctrine. *Tuccio v. Central Pine Barrens Joint Planning & Policy Commission*, 113 A.D.3d 693, 978 N.Y.S.2d 350 (2014). The Pine Barrens Credits program allocates transferable development rights to owners of property located within the "core preservation area" of the Central Pine Barrens in Long Island, under the Long Island Pine Barrens Protection Act.

Tuccio and other property owners, the petitioners, sought an allocation of credits to their property. Initially, the Pine Barrens Commission denied the request for *any* Pine Barrens Credits, and petitioners brought a declaratory judgment proceeding seeking 50.42 credits. In the first iteration of this case, the appellate court determined that although there was

no clear legal right to the requested 50.42 credits, petitioners were entitled to an allocation accounting for restrictions in the local zoning code that limited development to 20 percent of the property. On remand, the Commission determined that 18.46 Pine Barrens Credits should be allocated. Petitioners again sought declaratory relief and again appealed from dismissal of their declaratory judgment petition.

The appellate court held that the "law of the case" doctrine precluded petitioners' request for the full, 50.42-credit allocation, and that the Commission acted consistently with the appellate court's directive in the first appeal. Implicitly, the appellate court agreed that the number of credits was related to the intensity of allowable development.

This case presents another aspect of the "law of the case" doctrine and also appears to limit transferable development rights solely to compensate a land owner for actual, rather than speculative, lost development opportunities.

Edward Sullivan

Tuccio v. Central Pine Barrens Joint Planning & Policy Commission, 113 A.D.3d 693, 978 N.Y.S.2d 350 (2014).

LUBA Cases

■ *CITY COUNCIL SLAPPED DOWN IN AFFORDABLE HOUSING WIN*

In *Parkview Terrace Development LLC v. City of Grants Pass*, LUBA considered the appeal of a city council decision that denied site plan approval and a variance from street and block length standards to allow construction of 50 units of federally assisted, low-income housing.

The 3.02-acre subject property, zoned High Density Residential, was originally approved, in 2006, as part of the 88-unit Maple Park planned unit development. Twenty-eight residential townhouses—the first phase of the PUD—neighbor the property to the south, but phases two and three were shelved during the recession. Parkview Terrace, the petitioner, a successor-in-interest to the original developer, wanted to build a 50-unit multi-family housing project in place of the second and third phases of the PUD. Although the project was supported by staff and approved, with conditions, by the Urban Area Planning Commission, the Grants Pass City Council denied the application following an appeal by project opponents.

Under ORS 197.835(10)(a), LUBA must not only reverse the decision, but order approval of the application, when a local government's decision is "outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances." ORS 197.835(10)(a)(A). Here, the city council gave ten reasons for denying Parkview's application. LUBA concluded that the city had exceeded its "range of discretion" with respect to all ten reasons.

The first seven reasons were site plan review criteria. They included standards requiring (1) compliance with a traffic plan; (2) mitigation of "potential land use conflicts"; (3) availability of "basic urban services"; (4) assurance that the project would cause no shortage of services to existing development; (5) mitigation, such as screening or setbacks, for adjacent development; (6) minimization of "traffic conflicts and hazards"; and (7) adequate "open space" and "common areas." LUBA determined that, because the application was for "needed housing," ORS 197.307(4) barred use of any standards that were not "clear and objective." None of the seven review criteria met that threshold.

In its eighth and ninth reasons for denial, the city relied on two additional standards, adequate parking and "internal circulation." LUBA determined that those standards satisfied the "clear and objective" requirement but that the city had misapplied them: The "adequate parking" basis for denial was inconsistent with other findings in the decision, and the "internal circulation" standard was inapplicable to residential developments. Finally, LUBA held that the city incorrectly denied Parkview's variance application through misinterpretation of one of the variance criteria.

Because LUBA found that the City of Grants Pass had acted outside its allowed range of discretion, it both reversed the city's decision and ordered that the city approve the project in accordance with the planning commission's decision and associated conditions. This may be one of the rare cases in which LUBA would consider a grant of attorney fees: Stay tuned!

Jennifer Bragar

Parkview Terrace Development LLC v. City of Grants Pass, LUBA No. 2014-024 (July 23, 2014).

■ STATEWIDE PLANNING GOAL 2

LUBA's 62-page decision in *Columbia Riverkeeper v. Columbia County* highlights the difficulties a local government faces in attempting to approve a "reasons" exception under Goal 2 for a very broadly defined class of uses. In this appeal, LUBA found fatal flaws in the county's decision approving an exception to allow future maritime and large lot industrial uses on 837 acres of high value farmland. The most significant feature of this decision is LUBA's analysis of why such an unfocused exception is ultimately doomed to failure.

The Port of St. Helens asked the county to approve an exception to Statewide Planning Goal 3, the agricultural lands goal, for a 957-acre property. This land is adjacent to the 905-acre Port Westward Industrial Park, which the Port also owns. Port Westward is an approved rural industrial exception area that consists of 43 acres leased to a biomass refinery and 862 acres leased to Portland General Electric. PGE operates two power plants on 120 acres of the leased area and subleases the remaining 542 acres for farming. Port Westward also has 4,000 feet of deepwater frontage on the Columbia River, a 1,250-foot dock, internal roads, infrastructure, and rail service via a railroad spur.

The county ultimately approved a reasons exception for 837 acres of the Port's 957-acre request after removing two riverfront lots based on concerns about impacts to riparian habitat. The county applied Rural Industrial Planned Development zoning, which allows outright farm, forest, and forest processing uses and conditionally allows a broad range of industrial uses. The county's decision did not approve a specific use of the exception area. Instead, it described the exception as permitting the 837 acres to be used for "future maritime and large lot industrial users that will benefit from the moorage and deepwater access, existing services, energy generation facilities, and rail/highway/water transportation facilities." The county also applied conditions requiring site design review for any new use, a trip cap, a rail plan for new uses requiring rail transportation, and a prohibition on coal storage, loading, or unloading. Petitioners Columbia Riverkeeper and an area mint-farming family appealed the county's decision to LUBA, asserting the county's decision did not address adequately the standards for approving a reasons exception.

Under Statewide Planning Goal 2, a local government may allow uses not otherwise permitted by Goal 3 if it can identify reasons that justify why Goal 3's expressed policy should not apply. The standards for establishing this "reasons exception" involve multiple steps. First, the rule identifies three possible reasons for allowing an exception: the use is significantly dependent on a unique resource (such as a port); it cannot be located within an urban growth boundary because its impacts are hazardous or incompatible with a dense population; and it has a significant comparative economic advantage by being located near certain activities or resources. Step two involves an alternatives analysis that demonstrates why lands that do not require a new exception (such as existing exception areas or areas within an Urban Growth Boundary) can't reasonably accommodate the proposed use. The third step requires analysis of the relative environmental, economic, social, and energy, or ESEE, consequences of allowing the proposed use in the new exception area as compared to other potential exception areas. The ESEE consequences for the new exception area must not be "significantly more adverse" than these consequences for other areas. Fourth, the local government must find the proposed uses are compatible with adjacent uses or can be made compatible by imposing conditions. Finally, the local government must adopt zone and plan designations that "limit the uses, density, public facilities and services, and activities to only those that are justified in the exception," pursuant to OAR 660-004-0020(2)(c) and (d).

Before addressing the merits of the petitioners' arguments, LUBA emphasized the challenge inherent in the county's approach. LUBA noted that a reasons exception requires a close fit between the articulated reason for the exception and the proposed uses addressed under the required analytical steps. Here the county compounded the difficulty of approving a reasons exception in two ways: by considering "a wide and open-ended range of industrial uses" and by attempting to justify this large class of uses based on all three possible reasons for granting an exception. While some of the uses fall into distinct categories, they also overlap. As a result, the county "vastly complicate[d] what is already a difficult process."

With these observations in mind, LUBA addressed the petitioners' substantive arguments, disagreeing with some and agreeing with others.

LUBA rejected the petitioners' claim that only a specific use, not a category of uses, may be analyzed under the exception criteria. Nothing in the applicable administrative rules imposes this requirement. Additionally, LUBA rejected the petitioners' claim that the county failed to appropriately limit the uses allowed by the exception to one or more of the reasons justifying the exception. The conditions of approval the county imposed will require future conditional use applicants to show that a proposed use is allowed by the county's decision, as will the county's code. LUBA also disagreed with the petitioners that the county was required to find a demonstrated need for the exception area under OAR 660-004-

0022(1)(a) and erred by finding the exception area benefits the county economy and gives it a comparative advantage in the region. Finally, LUBA upheld the county's findings that approving the exception would result in a "minimal loss of productive resources," rejecting the petitioners' argument that the county erred by focusing on only the loss of resources in the exception area and not on impacts to adjoining resources uses.

Siding with the petitioners, LUBA held the county failed to explain which of the allowed uses have "impacts that are hazards or incompatible in densely populated areas," and erred by discounting the availability of lands for the proposed uses in the adjacent Port Westward exception area. Even though most of that exception area is vacant, the county excluded from consideration lands leased to PGE and designated wetlands and concluded only minimal property in the Port Westward area was available for development. Without evidence that PGE is unwilling to sublease some of its land for industrial use or that it is impossible to obtain a state fill permit to use the wetlands, LUBA concluded the county's findings were inadequate. Similarly, LUBA found the county's alternatives analysis flawed for two reasons. First, the county failed to show that all of the proposed class of industrial uses could not be accommodated on other sites that required no exception. Second, the county rejected alternative sites because they were not big enough to hold all of the large industrial uses for which the exception is sought, rather than considering whether one or more sites could accommodate one or more of the proposed uses.

One of the key flaws in the county's decision was timing: the time for determining compliance with the exception process's compatibility standard is when an exception is approved, not when a future development is proposed.

LUBA concluded that a "complete deferral of findings of compliance with a Goal 2 exception standard" is "clearly impermissible." In LUBA's view this conclusion emphasizes the county's "highly problematic" approach to approving the goal exception challenged in this appeal, which led LUBA to remand the county's decision.

Kathryn S. Beaumont

Columbia Riverkeeper v. Columbia County, LUBA No. 2014-017/018 (Aug. 27, 2014).

■ *SHORT LUBA SUMMARIES*

Historic Resources

Under state law, an owner of historic property may do two things: (1) refuse to consent to a local government's potential historic designation of the property; and (2) remove a historic designation that was "imposed" by local government. Over a decade ago, LUBA concluded the word "imposed" meant the historic designation was applied to a property over the owner's objection at the time. *Demlow v. City of Hillsboro*, 39 Or. LUBA 307 (2001). One question the *Demlow* decision did not address was whether the property owner who seeks removal of an imposed historic designation may be a successor owner or must be the same person who owned the property at the time of designation. In *Lake Oswego Preservation Society v. City of Lake Oswego*, ___ Or. LUBA ___, LUBA No. 2014-009 (Aug. 5, 2014), LUBA resolved this question and held "the legislature did not intend that a 'property owner,' as used in ORS 197.772(3), includes persons who become owners of the property after it is designated."

The *Lake Oswego* appeal concerned two properties that were originally part of a 10-acre parcel owned by Wilmot: tax lot 1200, a 1.25-acre parcel that contained the historically significant Carman House, and tax lot 1201, an 8.75-acre parcel that contained a barn. Wilmot sold tax lot 1201 to Gregg in 1979. The city added the parcels to its historic resources inventory in 1990, but offered a quasi-judicial pre-designation process to allow property owners to object to further historic designation of their properties. Using this process, Wilmot and Gregg subsequently objected to designation of the entire 10-acre parcel; in the alternative, they argued that only the Carman House on tax lot 1200 should receive a historic designation. The city denied the objection, but withdrew its decision after it was appealed to LUBA. On reconsideration, the city retained the historic designation for tax lot 1200 and removed it from tax lot 1201, explaining that no one argued the house on tax lot 1200 should not be designated. At the time of its decision on reconsideration, Wilmot had neither withdrawn nor reiterated his original objection to the designation. In 2013, Wilmot's successor in interest, a trust, applied to remove the historic designation for the house and tax lot 1200. The city's Historic Resource Advisory Board denied the request and interpreted ORS 197.772(3) to permit only the owner at the time of designation to request its removal. On appeal, the city council overturned the board's decision, concluding a subsequent owner like the trust could request removal of the designation and that it had been imposed over Wilmot's objection.

The issue before LUBA was which property owner—Wilmot or Wilmot's successor in interest—could seek removal of the historic designation for tax lot 1200 under ORS 197.772(3). Examining the statute's use of the term "property owner" was not particularly helpful. Comparing the forward-looking focus of subsection (1) and the backward-looking focus of subsection (3) suggested the current owner (here the trust) could ask to have the designation removed, but did not yield a definitive answer. While not entirely clear, the legislative history suggested the opposite result: only an objecting owner at the time of designation could later seek to have the designation lifted. Finally, LUBA resorted to a maxim of statutory construction that favors a narrow construction of exceptions in an ambiguous statute. Considering all of these analytical strands, LUBA concluded ORS 197.772(3) permits only the objecting owner at the time of designation to seek removal of any historic designation that was imposed on the owner's property. Since the trust was an ineligible successor owner, LUBA remanded the city's decision.

Note: LUBA's decision is on appeal to the Oregon Court of Appeals and the court is scheduled to hear oral argument on November 7, 2014.

Lake Oswego Preservation Society v. City of Lake Oswego, ___ Or. LUBA ___, LUBA No. 2014-009 (Aug. 5, 2014).

LUBA Scope of Review

In numerous decisions issued since 1981, LUBA has questioned whether it has the statutory authority to apply principles of equitable estoppel in reviewing appealed local land use decisions. LUBA finally concluded that it does not in *Macfarlane v. Clackamas County*. In this appeal, the petitioners challenged a county decision determining two existing and connected dwellings may not be treated as a single dwelling because one of the dwellings was never lawfully established. Petitioners argued the county's failure to enforce its code over a 35-year period meant the county was estopped from enforcing its code now. Relying on the absence of any statutory directive that it apply equitable principles in its decision making or any legislative history to show the legislature intended it to do so, LUBA affirmed the county's decision. LUBA announced "the present case is as good as any to determine that LUBA will no longer entertain, even hypothetically, an argument that LUBA should reverse or remand a decision based on equitable principles, unless the proponent first provides a sufficient basis to conclude that the legislature granted LUBA that authority."

Macfarlane v. Clackamas County, LUBA No. 2014-036 (Aug. 5, 2014).

Local Ordinance Interpretation

LUBA's decision in *PacifiCorp v. Deschutes County* is noteworthy for its analysis of the county's historic designation and consideration of whether an undefined term used in the designation should be interpreted consistent with its technical meaning. Petitioners appealed the county's declaratory ruling that in applying a historic designation to the "dam, penstock and powerhouse" of the Cline Falls Power Plant, the penstock included a wooden flume that was improperly removed without a permit. In resolving this question, the county board relied on a 2014 on-line dictionary, which defines a "penstock" as a sluice gate for regulating water flow and a conduit through which water flows. Petitioners argued "penstock" has acquired a technical meaning and must be interpreted according to that meaning as the county code requires. The petitioners also pointed to technical treatises and long-standing practices at the power plant that treat a penstock and a flume as different structures. Finally, the petitioners noted the dictionary definition of "penstock" at the time the plant received its historical designation defined this term narrowly as a sluice gate.

LUBA agreed with the petitioners that the county's ruling was inadequate for review in at least three ways. First, the county failed to analyze how the term "penstock" was used in the context of the historic designation. Second, the county didn't consider whether the term had a technical meaning and failed to follow a code directive that technical terms should be understood according to their technical meaning. Third, the county erred in applying the 2014 on-line dictionary definition of "penstock" rather than the dictionary definition in effect in 1992 when the power plant was designated a historic resource. On remand, LUBA framed the issue before the county board as "whether in designating the 'penstock' as one part of the Cline Falls Power Plant significant historic site, the county commissioners intended in 1992 to include the 96-inch diameter pipe only or intended to include the wooden flume as well."

PacifiCorp v. Deschutes County, LUBA No. 2014-016 (Aug. 1, 2014).

Local Procedure

In *Save Downtown Canby v. City of Canby*, LUBA was asked to decide whether two land use applications that were filed separately, processed using different procedures, and later combined for purposes of final decision making are "consolidated" within the meaning of the consolidated procedure statute, ORS 227.175(2). The developer of a proposed fuel station submitted separate applications for a zone change and a site design review. Since the site design review was dependent on the zone change, the city's planning commission and council deferred consideration of that application until the zone change was finally approved. Following appeal of the zone change to LUBA and remand, the city consolidated its consideration of the zone change and site design review and issued a single decision approving both applications.

On appeal to LUBA the petitioners argued the applications were not "consolidated" within the meaning of ORS 227.175(2) because they were not processed together initially using the same procedures. Additionally, petitioners asserted the site design review application should have been evaluated against the standards of the old zone, not the new zone. LUBA rejected both arguments and affirmed the city's decision, concluding that nothing in the text of the consolidation statute precludes two separately filed applications for the same development from being consolidated later for purposes of final decision making. Reading the consolidation statute and the "fixed goal post" statute (ORS 227.178(3)) together, LUBA held the petitioners' argument made no legal or practical sense. In particular, "[t]he text and purpose of ORS 227.178(3) do not require that a permit application that is predicated on and approved as part of a zone change must be reviewed under the standards and criteria of the former zone that no longer apply."

Save Downtown Canby v. City of Canby, LUBA No. 2014-014 (July 23, 2014).

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