Oregon State Bar

OREGON REAL ESTATE AND LAND USE DIGEST

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

Vol. 37, No. 1, February/March 2015 *Also available online*

From the Editorial Desk

The new year brings a new look to the RELU Digest. We hope you noticed! Our 2015 redesign should have something for everyone: For our mobile phone, tablet, and laptop readers, this format should make the Digest more accessible. For those who (like us) still prefer to peruse a print publication, we have chosen fonts and formatting that should transfer adeptly to paper. We have done our best to preserve the elements of a decades-old tradition while adding short pieces to supplement case summaries, throwing in the occasional image, and giving the pages some color. A hearty thanks to Oregon State Bar designer extraordinaire, Anna Zanolli, for creating this new design!

Jennie Bricker and Judy Parker

Appellate Cases

High Bar for Disqualification of Elected Official

In ***Columbia Riverkeeper v. Clatsop County***, the Oregon Pipeline Company appealed a LUBA order related to OPC's application for a natural gas pipeline, part of a larger project to build a liquefied natural gas terminal in Warrenton. OPC argued that a county commissioner's demonstration of actual bias prejudged the merits of the application and destroyed OPC's right to an impartial tribunal.

After the county initially approved OPC's application in November 2010, project opponents appealed the decision to LUBA. Due to the record's voluminous size, LUBA granted the county an extension of time to transmit the record. Before the record was transmitted, three newly elected county commissioners took office—one of whom, Commissioner Huhtala, was a strong and consistent opponent of LNG development. On that same day, the county voted 4 to 1 to withdraw the November 2010 approval. On reconsideration, the county denied OPC's application.

In its appeal to LUBA, OPC argued that the county's decision was tainted by Commissioner Huhtala's bias. As evidence, OPC provided LUBA with over a half-dozen examples of the commissioner's previous anti-LNG campaign statements and actions. LUBA concluded that the totality of the commissioner's actions was collectively clear and unmistakable evidence that the commissioner acted in the matter with actual bias. LUBA remanded the denial decision for reconsideration without the participation of Commissioner Huhtala. [Editor's note: Kathryn Beaumont summarized the LUBA order in the August/September 2014 issue of the RELU Digest.]

For OPC, LUBA's order did not go far enough. On appeal, OPC stressed that the taint of the commissioner's bias also reached the county's decision to withdraw the approval decision, and LUBA erred by not also remanding that decision. The county filed a cross-petition on the issue of the commissioner's actual bias. The court agreed with the county, concluding that the evidence in the record was legally insufficient to establish that the commissioner had so prejudged OPC's application as to be incapable of rendering a decision on the merits of the evidence and argument presented.

In its analysis, the court reiterated the following principles: Parties to a quasi-judicial land-use proceeding are entitled to an impartial tribunal. An elected local official is expected to have personal views on matters of community interest. Accordingly, and unlike the standards for judges, the impartial tribunal requirement does not bar an elected official's involvement in the affairs of the community or other governmental organizations or an elected local official's political predispositions. The impartial tribunal requirement is meant to insulate decisions from actual bias and private economic interests.

The court's conclusion that the commissioner did not demonstrate actual bias relied on the premise that the referent "matter" for assessing actual bias is precisely and narrowly defined. Given that the "matter" was limited to a 41-mile pipeline segment, the court determined that the commissioner's anti-LNG actions and statements merely demonstrated a non-disqualifying general political predisposition. The court further concluded that "actual bias can be established, where prejudgment has been alleged, by explicit statements, pledges, or commitments that the elected local official has prejudged the specific matter before the tribunal. It cannot be established circumstantially or internally except by necessary and indisputable implication."

The court remanded the proceedings to LUBA to evaluate OPC's substantive land-use challenges to the county's decision to deny the application.

Rebekah Dohrman

Columbia Riverkeeper v. Clatsop County, 267 Or. App. 578 (2014).

An Interesting Take on ORS 90.417

Editor's Note: After the publication of ***Neidhart v. Page***, we approached Mr. VanLandingham, one of the authors of ORS 90.417, to summarize the case for RELU readers. His article—with his unique perspective and voice—follows.

The most significant part of *Neidhart v. Page* deals with waiver under ORS 90.417. ORS 90.417, one of a set of three statutes regarding waiver written as part of the General Landlord/Tenant Coalition's 2007 bill, has rightly been criticized as too complex. (Of course, I'm known for drafting complex statutes, but that's a matter for another day. And, ironically, these three statutes replace an earlier one that we were trying to simply and clarify.)

In this case, the tenant tendered partial rent for February 2011, which the landlord rejected, as the statute allows. ORS 90.417(1). The next month, the tenant tendered the full March rent—which the landlord accepted—but without also paying the February rent. Thereafter, the tenant either tendered partial month's rent (which the landlord rejected, as allowed) or no rent at all. On October 4, 2011, the landlord gave a 72-hour nonpayment of rent notice, for a set amount of unpaid rent (the balance of the February rent plus the rent from the months after March, including the October rent, which was not yet late at the time of the notice), and then, when the tenant did not pay the unpaid rent, filed the FED. The tenant argued that, by accepting the March rent without the still-unpaid February rent, the landlord had accepted a partial payment in violation of ORS 90.417 and thereby waived the right to terminate for unpaid rent.

The Court of Appeals ruled, correctly in my view, that while the landlord may have waived the right to terminate for the February partial payment by accepting the March payment, the March payment acceptance did not waive the landlord's right to terminate for the subsequent months of nonpayment or partial rent tenders (from April through October).

While the court did not discuss this, the landlord's acceptance of the March rent alone could not waive the landlord's right to terminate for nonpayment of the February rent, since ORS 90.412(2)(a) requires that a landlord accept rent for three months with knowledge of a violation–here, the nonpayment of the February rent. The tenant tried to show a waiver by arguing that the March rent was only half of the rent owed for both February and March, and that the landlord's acceptance of half of the rent owed for that two-month period was a partial payment, and acceptance of that partial payment was a waiver under ORS 90.417. The court didn't resolve that argument, one I've never thought of, instead ruling that the landlord could still terminate for failure to pay the subsequent months' rent, which were not affected by the possible waiver of the February rent. I think that's right.

The tenant also argued that the termination was wrong, because the notice "demands too much money." I think the court misunderstood this argument and got the issue wrong. ORS 90.394 requires that nonpayment of rent notices must state the amount owed. The policy reason for this is so that the tenant knows how much money he or she must pay during the 72-hour cure period. I think that a nonpayment notice that states the wrong amount owed is defective, and an FED (forcible entry and wrongful detainer action) based on that notice should be dismissed. And it appears to me that the amount claimed to be owed in the notice in this case was wrong, because it included the October rent, which was not yet late when the notice was given. The tenant's argument appears to have been that the amount was incorrect because it included the unpaid February rent, which under the tenant's theory was waived, an issue the court didn't resolve. I don't think the February rent was waived, under ORS 90.412 or 90.417. But the amount was still wrong, due to inclusion of the October rent.

As a side note, the court in a footnote cited ORS 90.417(6), which repeats the common law rule that waived debts are still owed, as authority for including the February rent in the termination notice. That was not the intent of that subsection. The point of saying that waived rent is still owed is that a landlord could sue on the debt, not that a landlord could terminate for it. The right to terminate is what has been waived.

Oregon Real Estate and Land Use Digest

Editor
Jennie Bricker

Assistant Editor
Judith A. Parker

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

Oregon Real Estate and Land Use Digest is published approximately six times a year by the Section on Real Estate and Land Use, Oregon State Bar, 16037 SW Upper Boones Ferry Rd, PO Box 231935, Tigard, OR 97281-1935.

Subscription Price: free to Real Estate and Land Use Section Members, $25.00 per year for others.

To subscribe, send your name, firm name, address, telephone number, and OSB member number (if applicable) along with your check to OSB account #84-0335 at the above address.

The second holding involves an earlier judgment that the tenant got against the landlord–the opinion doesn't say for what, but my guess would be that it had to do with the reason why the tenant was offering only partial rent. The trial judge refused to offset that earlier judgment for the tenant against the back rent that the tenant was found to owe in the FED. The court held that whether to offset one judgment against another was within the trial judge's discretion.

The result of all this is that the landlord was awarded possession of the rental unit and a judgment for unpaid back rent. And that's puzzling to me, because a trial court in an FED is only allowed to award possession, not also damages against the tenant. If the landlord wishes to recover damages, the case should be heard on the regular trial docket, not the expedited FED docket. This opinion does not discuss this issue. My best guess is that there's stuff going on here that we don't know about from reading the opinion.

John VanLandingham
Neidhart v. Page, 268 Or. App. 643 (2015).

An Agency's Authority to Discipline a Former Licensee

In ***Sawyer v. Real Estate Agency***, the Oregon Court of Appeals affirmed an administrative order revoking an expired real estate license. On December 17, 2009, the Oregon Real Estate Agency notified real estate agent Tami Sawyer that it intended to revoke her real estate license based on multiple violations of ORS Chapter 696. Sawyer requested a hearing and an administrative law judge was assigned. Prior to the hearing, on April 30, 2010, her real estate license expired. On October 21, 2010, she was indicted in federal district court on charges of wire fraud, bank fraud, and money laundering.

On October 29, 2010, Sawyer moved to dismiss the administrative proceeding. She argued that because her real estate license had expired, the agency lacked jurisdiction over her. The ALJ denied both her motion to dismiss and a separate motion to stay the proceeding or grant use immunity, because of the criminal case pending against her.

Following a hearing, in which Sawyer invoked her Fifth Amendment rights not to testify, the ALJ issued a proposed order finding that the agency had jurisdiction to discipline Sawyer and that she had committed all but one of the alleged violations. The ALJ concluded, however, that the agency could neither "revoke a license [that] does not exist" nor "deny the issuance or renewal of a license in the absence of an application for one." The agency disagreed, reasoning that, under ORS 696.775 and ORS 696.301, it retained authority to revoke an expired license. Subsequently, the agency issued an amended proposed order largely adopting the ALJ's findings and conclusions, but revoking the expired real estate license. The agency's order became final.

Sawyer sought judicial review of the agency's order, arguing that "while ORS 696.775 authorizes the [agency] to proceed with a disciplinary proceeding [after a license has expired], it does not authorize the revocation of an expired license." Sawyer relied on *Schurman v. Bureau of Labor*, 36 Or. App. 841, 844 (1978). In *Schurman*, the Bureau of Labor revoked a business license and, as in this case, the petitioner's license expired after initiation of the revocation proceeding but before the hearing. The *Schurman* court held that the Bureau "lacked authority to take such action with respect to a 'non-existent license.'"

The *Sawyer* court distinguished *Schurman*, noting that the statute there, ORS 658.115 (1977), "did not, like ORS 696.775, grant the administrative body *any* continuing jurisdiction" after the license expired. This case, the court reasoned, was more like *Grobovsky v. Board of Medical Examiners*, 213 Or. App. 136 (2007), which clarified that *Schurman* does not control where there is a statute authorizing an agency to impose discipline on a former licensee.

The *Sawyer* court stated that "ORS 696.775 plainly allows the agency to '[c]onduct disciplinary proceedings' and '[t]ake action' against" a former licensee. ORS 696.775 provides that the "lapsing, expiration, revocation or suspension of a real estate license . . . does not deprive the commissioner of jurisdiction to . . .*[c]onduct disciplinary proceedings relating to the licensee [or][t]ake action* against a licensee" (emphasis added). The *Sawyer* court reasoned that ORS 696.775 did not limit the "action" to actions against current licensees. The court determined that, in context, "action" meant disciplinary action. This logically led to ORS 696.301, the statute describing the disciplinary actions

available to the agency. ORS 696.301 includes revocation of "the real estate license of *any real estate licensee*" among the list of authorized actions (emphasis added). This could include revocation of a former licensee's license. It followed, in the court's view, that the agency did not err in revoking a license "that existed at the time the Notice was issued" but expired before the administrative hearing.

Brian J. Kernan
Sawyer v. Real Estate Agency, 268 Or. App. 42 (2014).

Follow-Up to *US Bank, NA v. Eckert*

Editor's Note: Mr. Merrill summarized *US Bank, NA v. Eckert* for our August/September issue. Below, Mr. Merrill summarizes the opinion on reconsideration.

Last year, the Oregon Court of Appeals held that certain statutory prerequisites to nonjudicial foreclosure are absolutely mandatory. In that case, a "forcible entry and wrongful detainer," or "FED" action, a bank's failure to meet one of the prerequisites—namely, that any appointment of a successor trustee must be properly recorded (see ORS 86.752(1))—led the court to invalidate a trustee's sale and find in favor of a homeowner remaining in possession.

The tenacious bank filed, and the court allowed, a petition for reconsideration. The bank's argument centered on its assertion that a defendant in an FED action is not permitted to challenge the underlying trustee's sale. Pointing to ORS 86.797, the bank contended that a completed trustee's sale held under ORS 86.705 to 86.795 (the Oregon Trust Deed Act) forecloses and terminates the property interest of a person who received proper notice of the sale. The bank further argued that allowing FED defendants to challenge the validity of trustee's sales violates the public policy benefit of the finality of such sales, and that FED actions should be summary proceedings.

The homeowner returned fire, arguing that the bank could not base its petition for reconsideration on arguments it had failed to make at trial or in its answering brief on appeal. Regarding the merits of the bank's argument, the homeowner noted that the bank failed to recognize the requirement that trustee's sales be held pursuant to the provisions of the OTDA, including ORS 86.752's mandatory prerequisites, and that the statutory rubric and case law anticipates and recognizes post-sale challenges to the validity of trustee's sales. The court adhered to its former opinion, ruling that the bank's argument could not be made for the first time in its petition for reconsideration.

Nick Merrill
US Bank, NA v. Eckert, 267 Or. App. 721 (2014).

An HOA's Ability to Transfer Common Area Property

In ***Ventana Partners, LLC v. LaNoue Development, LLC***, the Court of Appeals found that a homeowners association can transfer common property to which it does not hold title, and that such title is marketable.

In 1998, LaNoue Development sought to develop a planned community in three phases. The declaration identified common areas in all three phases and provided that all lot owners would have an easement in the common areas, which would eventually be turned over to the Montara Owners Association (MOA). The original plat for the community, however, stated that the common areas would be "commonly owned and maintained" by the lot owners. In 2002, LaNoue built townhomes in phases 1 and 3, and the legal description in the deeds to these lots included the specific lot numbers and an undivided interest in the common areas contained in the plat.

LaNoue originally intended to build additional townhomes in phase 2 (referred to as "Lot 1" in the opinion), but later decided to develop condominiums. In December 2003, after negotiations with the townhome owners, 80 percent of the lot owners approved an amendment to the Declaration withdrawing Lot 1 from the MOA and conveying any interest in the associated common areas.

In April 2005, LaNoue transferred Lot 1 to Ventana Partners, but in September 2006, the MOA filed suit against Ventana, alleging defects in title based on the language in the lot owners' deeds. In February 2007, the first

condominiums on Lot 1 were substantially complete, but the Real Estate Agency declined to approve the declaration because of the alleged title defects. The lawsuit was settled in March 2007, when Ventana and LaNoue agreed to exchange quitclaim deeds, but by this time Ventana was in default on its loans.

Ventana brought suit against various defendants–including LaNoue's attorneys, surveyors, and title insurance companies–alleging that they did not receive good title to Lot 1 and that the uncertainty about the title to Lot 1 caused the project to fail. The trial court granted the defendants' motions for summary judgment, finding that the title was not defective and that it was marketable.

The court found that the procedures for transferring common area property in ORS 94.665(1) superseded the language in the individual lot owners' deeds. ORS 94.665(1) provides, "a homeowners association may sell, transfer, convey or subject to a security interest any portion of the common property if 80 percent or more of the votes in the homeowners association . . . are cast in favor of the action." The definition of "common property" in ORS 94.550(7) includes any real property "owned as tenants in common by the lot owners." The court found that the common areas in Lot 1 were "common property" under 94.550(7) because the lot owners held title as tenants in common. Therefore, the Association could transfer its interests in Lot 1, by means of the December 2003 amendment to the declaration, to LaNoue under ORS 94.665(1), despite the language in the lot owners' deeds. In this instance, the court held that the homeowners association could transfer property in which it as a separate entity did not hold title.

Ventana also claimed that the title to Lot 1 was not marketable because (1) it was an issue of fact, not law, and (2) it depended upon a ruling of first impression–whether ORS 94.655(1) authorized an association to transfer title to property it did not own. According to Ventana, this was a "doubtful and unsettled legal question." The court clarified that the issue of marketability of title is a question of law, not fact. Ventana did not establish a fact that needed to be decided before the court made a determination about marketability. The court also stated that the plain meaning of ORS 94.665(1) was unambiguous, and the MOA's transfer of its interests in Lot 1 under ORS 94.665(1) was free from doubt based on the plain meaning of the statute. According to the court, "unambiguous statutory text may be free from doubt despite a lack of appellate precedent interpreting it." Thus, the court affirmed the trial court's summary judgment ruling regarding defectiveness and marketability of title.

Steven Gassert

Ventana Partners, LLC v. LaNoue Development, LLC, 267 Or. App. 15 (2014).

Cases from Other Jurisdictions

New Hampshire Supreme Court Addresses Unused SDC Fees

K.L.W. Construction Co., Inc. v. Town of Pelham involved petitions for declaratory judgment by a construction company and a developer for a refund of what in Oregon are termed "systems development charges." Under the New Hampshire statutory scheme, while local governments may assess fees for capital improvements, fees must be refunded if not spent within six years. The town's ordinance authorized a refund but only to the land's "current owner."

The assessments here were levied to build a new town fire station, but after some of the funds had been spent for feasibility studies and architectural plans, the town's voters declined to authorize construction. The land in question was developed and sold to homeowners. The original developer and the homeowners all sought a refund of the unused assessments. The town contended that only the homeowner successors could claim the refund. The trial court upheld the town's restriction of refunds to current owners and granted the town's motion to dismiss, determining that the statutory direction for a refund of unused fees did not require that the refund be paid to the original payer–here, K.L.W. Construction.

On appeal, the court considered the statutory interpretation of "refund," a term not otherwise defined by the enabling legislation. K.L.W. contended that local governments must follow the statutory mandate and that "refund"

must be given its ordinary meaning of "pay back" or "reimburse." Citing decisions from other courts that allowed refunds to go to other than the original payers, the court rejected K.L.W.'s interpretation, affirming the trial court's conclusion that the local ordinance authorizing SDC refunds to current landowners was within the statutory authorization.

This is a case of statutory interpretation. Although Oregon law does not speak to the refund issue, common practice is that unspent systems development charges must be refunded. Refunding those charges to current landowners provides for better predictability in the use of those funds and for allocation of the risk of that possibility as part of the sales price for land.

Edward J. Sullivan
K.L.W. Construction Co., Inc. v. Town of Pelham, 2014 WL 6967664 (N.H.).

LUBA Cases

Marginal Lands

In the challenged decision, Lane County approved a special use permit for a nonfarm dwelling. The subject parcel includes 2.9 acres zoned for Exclusive Farm Use, was created after 1993, and is not composed of predominantly high value farm land. The property is located in the Willamette Valley, and specifically within Lane County, a "marginal lands" county.

The LUBA order addressed the complicated history that led to the present statutes governing county approval of nonfarm dwellings. LUBA noted several possible sets of statutory approval criteria authorizing nonfarm dwellings in EFU zones. ORS 215.284(1) states that a single-family residential dwelling not provided in conjunction with farm use may be established as a conditional use in an EFU zone, but only on a parcel created before January 1, 1993. ORS 215.213, which applies in marginal lands counties, allows nonfarm dwellings as a conditional use in an EFU zone, but without the requirement that the parcel be created before January 1, 1993.

The first question is which of these statutes applies. If ORS 215.213 applies, a second question arises: whether ORS 215.213(3) or 215.213(4) applies. After discussing all of the alternatives, LUBA concluded that ORS 215.213(3) applied and affirmed the county's decision to issue the special use permit.

LUBA's opinion relies on the legislative history associated with ORS 215.213 (for marginal lands counties) and ORS 215.283 (for non-marginal lands counties). After marginal lands legislation was adopted in 1983, the standards governing residences on marginal lands were less restrictive than those applicable to EFU-zoned lands. In 1993, when the legislature adopted the sweeping land use bill HB 3661, it added four additional subsections to ORS 215.283, which imposed additional restrictions on nonfarm dwellings in non-marginal lands counties. Rather than continuing the numbering within that statute, legislative counsel, on its own initiative and as authorized by ORS 173.160, incorporated these changes into a new statute, ORS 215.284. This history makes clear ORS 215.284 began as an amendment to ORS 215.283. For that reason, LUBA concluded it applies only in non-marginal lands counties.

ORS 215.213(3) and a parallel county regulation allow a nonfarm dwelling, subject to conditions, on a lot or parcel with soils predominantly in classes IV through VIII. ORS 215.213(7) states that 215.213(4) applies to a lot or parcel lawfully created between January 1, 1948 and July 1, 1983. ORS 215.213(4) allows a nonfarm dwelling, subject to conditions, on a lot or parcel not larger than three acres. Based in part on its conclusion that ORS 215.284 does not apply at all to marginal land counties, LUBA rejected the argument that because ORS 215.284(1) and (4), which address nonfarm dwellings in the Willamette Valley, do not include the "unsuitable land" standard, it can be inferred that ORS 215.213(3), which does include the "unsuitable land" standard, cannot be applied to land within the Willamette Valley. LUBA also rejected the argument that because ORS 215.213(4) mentions the Willamette Greenway, while ORS 215.213(3) does not, ORS 215.213(4) alone applies to land within the Willamette Valley. Finally, LUBA rejected the contention that because OAR 660-033-0130(4)(e) directs marginal lands counties to "apply the standards in

ORS 215.213(3) through 215.213(8),” both 215.213(3) and 215.213(4) should be applied. LUBA agreed with the county that the two subsections contain different standards that can be met depending on the circumstances.

Peter Livingston
Landwatch Lane County v. Lane County, LUBA No. 2014-070 (Nov. 12, 2014).

LUBA Affirms Demolition of Salem's Howard Hall

In ***Rushing v. City of Salem***, LUBA concluded that the Salem City Council correctly applied Salem Revised Code 230.090 to issue a permit to demolish a historic resource, Howard Hall. Howard Hall is a one-story brick building constructed in 1932 as a dormitory for the Oregon School for the Blind. It was designated as a local landmark in 1989, but in 2009 the Oregon State Legislature voted to close OSB and sell the property. Salem Hospital purchased the property and applied to the city for a historic demolition review, proposing to construct a commemorative garden and a playground in the place of Howard Hall. Salem's historic landmarks commission denied the application, but the city council reversed and issued a permit to demolish Howard Hall. LUBA affirmed, finding that the city council's decision was supported by substantial evidence in the record as to each of SRC 230.090's four criteria.

One of those criteria, SRC 230.090(d)(2)(A), requires a finding that “[t]he value to the community of the proposed use of the property outweighs the value of retaining the designated historic resource[.]” The city council reasoned that the proposed use—the commemorative garden—would better serve the original purpose of designating Howard Hall by recognizing the cultural significance of that place as a part of OSB, particularly where the OSB campus was now privately owned and not accessible to the public. However, the city council attached a condition that the garden be open to the public. Despite petitioners' protests that the condition allowed for future modifications and required only “substantial compliance,” LUBA agreed with Salem Hospital that the condition left little room for doubt about the scope of the obligation and refused to hold that the city was required “to impose unalterable and perpetual requirements.” Notably, LUBA also rejected an argument under SRC 230.090(d)(2)(A) that the site is a poor location for a commemorative garden and playground because of its proximity to major roadways, remarking that the code “does not require the city to evaluate the value of the proposed use of the site compared to the value of the proposed use at alternative sites.”

LUBA also addressed an interesting argument that Salem Hospital had not “made a good faith effort to sell” Howard Hall as required by SRC 230.090(d)(2)(C) because they had only sought to lease the building. The city council concluded that because the designated resource in this case was only the building of Howard Hall, and not the surrounding or underlying land, it lacked the authority to require Salem Hospital to “sell” only the building. Under those circumstances, the city concluded that Salem Hospital had complied with SRC 230.090(d)(2)(C) by making a good faith effort to lease the resource. LUBA affirmed, noting its deferential standard of review to a governing body's interpretation of its code provisions under ORS 197.829(1).

Zoee Lynn Turrill Powers
Rushing v. City of Salem, LUBA No. 2014-079 (Dec. 17, 2014).

“This Town Ain't Big Enough for the Both of Us”

The title of this case note (a line from a 1932 movie called “The Western Code”) long defined local politics along the American frontier. Some version of it seems to be playing out between truck stop operators near Boardman. The competitors asked LUBA to sort out a mishmash of appeals in *Devin Oil Co. v. Morrow County*, LUBA Nos. 2013-110, 2014-010, 2014-011, and 2014-012.

In 2011, the county issued a CUP to Love's Travel Stops to operate on a site near a lonely I-84 interchange. Devin challenged issuance of that CUP, but was refuted after two trips to LUBA and the Court of Appeals. Notwithstanding the hassle it endured to obtain the approval, Love's did not commence operation under its CUP, so, in June 2013, requested an extension. This request kicked off four appeals that LUBA consolidated into the current case:

- Overturning its planning commission, the county court denied Love's request for extension of the CUP. Love's appealed that decision to LUBA.
- In October 2013, Love's filed a second application to extend the 2011 CUP. The planning director issued an approval, which Devin appealed to LUBA.
- Despite the unsettled status of its CUP, Love's applied in March 2014 for site plan approval. The county court would, following local appeals, issue an approval. Each party appealed that decision.

The first case was the easiest to dispose. Love's dismissed its appeal of the county court's January 2014 decision denying extension of the CUP (presumably because it was, by then, armed with the second extension approval). The Board then took up Devin's appeal of that second extension approval, issued by the planning director in October 2013. Love's moved to dismiss, asserting that Devin lacked standing to bring such appeal because it had not appeared in the proceeding below.

The Board noted that standing may be established under at least two statutory provisions. ORS 197.830(2)(b) –applicable when no local hearing is offered–requires a petitioner simply to have "appeared" below. In October 2013, Devin had sent an email to the planning director regarding the extension application. The Board deemed that sufficient to constitute an appearance.

Love's persisted on the point, asserting that Devin was obligated also to meet the "adverse affect" threshold of ORS 197.830(3). The Board disagreed, reaffirming its prior case law that subsection (3) is inapplicable where a petitioner seeks standing under subsection (2).

The Board proceeded to evaluate the merits of Devin's case against the CUP. The material issue was the length of time that Love's had to vest its CUP. When the CUP was approved, the code set that period at one year. In September 2013, Morrow County lengthened the vesting period to two years. In order to make its case to uphold the October 2013 extension, Love's had to establish that the new ordinance had retroactive application.

On that issue, the Board looked to the intent of the September 2013 ordinance. Finding nothing in the text or context of the ordinance that suggested retroactive application, the Board reversed the extension approval.

The Board then evaluated Devin's appeal of the site plan approval. Here, jurisdiction and standing were not at issue, so LUBA's opinion proceeded directly to the merits. Devin argued two points that the Board summarily dismissed, that (a) the CUP had to predate the site plan approval and (b) compliance with the street access criterion could not be deferred pending ODOT's access permit process.

LUBA dismissed Love's appeal of the site plan approval because it failed to file a petition for review. LUBA noted that Love's had filed only a single "cross petition" in the consolidated appeals.

Ty Wyman

Devin Oil v. Morrow County, LUBA Nos. 2013-110, 2014-12, 2014-010, 2014-011 (Dec. 9, 2014).

Goal Compliance on Exception Lands

The subject property in *Ooten v. Clackamas County* is comprised of two adjoining parcels, both owned by Bruce Goldson. Each parcel contained a dwelling and landscaped and wooded areas, as well as a number of improvements related to Goldson's paving business. Over time, Goldson also used the property to conduct vehicle sales and the repair and storage of autos, trucks, and heavy equipment.

In the past, the property was subject to a number of land use proceedings. In 1980, the property's prior land use designation was changed to Rural and RRFF-5. Between 1991 and 1998, the owner sought and obtained verification and expansion of nonconforming uses on both parcels, although he did not succeed in all his attempts to obtain county approval for some of the uses. Indeed, some of the uses remained violations of the county's zoning code.

Goldson's attempt to obtain a map amendment and zone, from Rural to Rural Industrial and RRFF-5 to RI, gives rise to the present appeal. The county board of commissioners approved the applications, but retained the Rural

Industrial and RRFF-5 designations for the dwellings and wooded areas. The re-designations therefore applied only to the property developed with shop buildings, parking facilities accessory to the shop buildings, and driveways. Moreover, the board's approval restricted Goldson to the present uses of the property instead of the full panoply of uses allowed by the Rural Industrial and RRFF-5 designations.

LUBA sustained, in part, most of petitioner Ooten's ten assignments of error. In the first, Ooten asserted that the county board could not bypass a reasons exception to Goals 3 (Agricultural Land) and Goal 4 (Forest Land) in approving the map and zone change merely because, in 1980, an exception was adopted and acknowledged when the property was zoned in its current designations. LUBA noted that goal compliance need not be re-established so long as the proposed plan and zone designations meet the requirements of OAR 660-004-0018(2)(a) and (2)(b)(A)-(C): Proposed uses are limited to "those * * * [t]hat are the same as the existing land uses on the exception site" and are limited to maintain the land as rural land. In this case, the proposed plan and zone designations were more intensive than the former designations and as a result, could not meet this test.

LUBA chair Ryan and LUBA member Holstun issued separate concurring opinions on this lone issue. Chair Ryan provided a thorough summary of LUBA's interpretation of OAR 660-004-0018 and clarified LUBA's decisions in *Friends of Yamhill County v. Yamhill County*, 41 Or. LUBA 247 (2002) and *Doty v. Coos County*, 42 Or. LUBA 103, *rev'd and rem'd on other grounds*, 185 Or. App. 233 (2002). These cases, Chair Ryan noted, may be misconstrued to read that Goal 3 no longer applies to a Goal 3 exception area taken to allow a prohibited use or that no evaluation is ever necessary under OAR 660-004-0018(2) to determine a proposed use's compliance with Goal 3.

Member Holstun provided a detailed analysis of the 2011 amendment to OAR 660-004-0018(2)(c) and (d), a change that replaced the conjunction from "or" to "and." He noted that the amendment changed the Board's previous interpretation of the rule—but with three somewhat different interpretations, further clarifying amendments by LCDC might be in order.

Practitioners are advised to read both the majority opinion and the concurring opinions to flesh out LUBA's reasoning with regard to how Statewide Planning Goals—typically, Goals 3 and 4—relate to exception lands.

Jacquilyn Saito-Moore

Ooten v. Clackamas County, LUBA No. 2014-069 (Nov. 20, 2014).

SHORT LUBA SUMMARIES

EFU Zones and Utility Facilities

The issue before LUBA in ***McLaughlin v. Douglas County*** was whether the county erred in removing a condition of approval that limited use of a previously approved natural gas pipeline to importing natural gas. In 2009, the county approved an 8-mile portion of the pipeline as a "utility facility necessary for public service" under ORS 215.575(2)-(5) subject to the import-only condition of approval. The 8-mile county segment was part of a 232-mile pipeline that terminated at the Jordan Cove terminal in Coos Bay. Approximately 2 miles of the county segment crossed an exclusive farm use zone. As a result of later market changes, exporting natural gas proved to be more profitable than importing it. In 2013 the applicant sought to remove the import-only condition so the pipeline could be used to transport gas to the Jordan Cove terminal for export.

At LUBA, the petitioners argued the county's decision violates state law because a "utility facility necessary for public service" may be approved on EFU-zoned land only if it serves the county's citizens. LUBA disagreed, explaining that the relevant statutes (ORS 215.183(1) and 215.275) contain no such limitation; in fact, ORS 215.275(6) explicitly includes federally regulated interstate natural gas pipelines as "utility facilities necessary for public service." By their nature, these interstate pipelines do not necessarily serve county residents at all. Where, as here, the county's decision simply allows the flow of natural gas to be reversed, LUBA concluded the pipeline remained an approved utility facility and affirmed the county's decision.

McLaughlin v. Douglas County, LUBA No. 2014-049 (Nov. 12, 2014).

LUBA Jurisdiction

In ***Carver v. Washington County***, LUBA (and the petitioners) confronted a common question: When does a local decision become final for purposes of the LUBA appeal clock—the date it is signed by the local decision maker or the date the notice of decision says it became final? Here, the hearings office signed the decision on October 6th and, consistent with the county's code and LUBA's rules, it became final on that date. The county's mailed notice of decision misstated the date of the decision, however, as October 9th. Petitioner filed his Notice of Intent to Appeal with LUBA on October 30th, more than 21 days from October 6th and exactly 21 days from October 9th.

The intervenor-applicant moved to dismiss the appeal, arguing the date the decision was actually signed (October 6th) was controlling and the petitioner filed his appeal too late. In the absence of any county code provision that made the decision final at a later date, LUBA agreed with the intervenor and explained: "[A]n erroneous statement in a notice of decision regarding the date a decision becomes final does not change the date the decision becomes final, or provide a basis to appeal the decision more than 21 days from the date the decision became final." LUBA granted the intervenor's motion and dismissed the appeal.

Carver v. Washington County, LUBA No. 2014-097 (Jan. 2, 2015).

Limited Land Use Decision

In ***South Central Association of Neighbors v. City of Salem***, LUBA reaffirmed that ORS 197.195(1) means what it says when it comes to using comprehensive plan standards as approval criteria for limited land use decisions. Under that statute, a local government must incorporate any plan standards it wishes to be approval criteria into its land use regulations by way of a post-acknowledgment plan amendment under ORS 197.610 through 197.625. Petitioners in *South Central* challenged the city's decision approving site plan review for new medical buildings and associated parking and argued the decision violated a parking management element of the city's transportation system plan. The TSP is adopted as part of the city's comprehensive plan. Petitioners cited a development code chapter that they assert implements the TSP and, as a result, incorporates the TSP into the city's development code.

LUBA agreed with the city that a code chapter that implements the TSP does not serve to incorporate the TSP as a whole into the code and, as a result, the TSP standards are not approval criteria for the challenged site review. For comprehensive plan standards to serve as approval criteria for limited land use decisions, ORS 197.195(1) requires a local government to adopt a post-acknowledgment plan amendment that explicitly incorporates and specifically identifies the plan standards that are being adopted into the code as approval criteria. Here the city had not amended its code to include specific TSP parking elements or requirements as approval criteria for site review. LUBA concluded the city's failure to apply certain TSP parking standards was not error and affirmed that aspect of the city's decision.

South Central Association of Neighbors v. City of Salem, LUBA No. 2014-083 (Dec. 31, 2014).

Local Ordinance Interpretation

Petitioners in ***Weston KIA v. City of Gresham*** challenged a city hearings officer's decision approving an equipment shelter designed to serve a wireless communication facility. The shelter will support multiple antennae to be placed on a 100-foot tower in the public right-of-way. At issue in this appeal were the hearings officer's code interpretations that (1) only the equipment shelter was subject to review and not the associated tower and (2) the code's setback standards were inapplicable to the shelter.

After parsing the city's code, LUBA upheld the hearings officer's determination that the code exempted wireless towers in the public right-of-way from review and required special use review for only the equipment shelter because it will be built on private property adjacent to the tower. However, LUBA concluded the hearings officer erred in his reading of the setback requirement. The current code imposed a 200-foot setback from the nearest residence for "all wireless communication facilities." An earlier version of this code language applied the setback requirement to "all [Wireless Communication Facility] tower proposals." The hearings officer based his decision on the legislative history, which suggested the city did not intend to eliminate the word "tower" from the setback requirement when it

amended the code and concluded the 200-foot setback did not apply to the equipment shelter. LUBA concluded his interpretation ignored the plain language of the code, which applies the setback to all wireless facilities including accessory equipment shelters, and improperly inserted language into the current code in violation of ORS 174.010. Based on the hearings officer's misreading of the code, LUBA remanded the city's decision.

Weston KIA v. City of Gresham, LUBA No. 2014-085 (Dec. 31, 2014).

Kathryn S. Beaumont

QUINQUE

Quinque, Latin for *five questions*, will be an occasional but regular series interviewing non-lawyers whose industries intersect those of *RELU Digest* readers. If you have suggestions for future *Quinque* profiles, please email the editors.

David Ellis, Williamette Cultural Resources Associates, Ltd.

Q1. Tell the readers of the RELU Digest about your job.

A. I am a professional archaeologist. My business, Willamette Cultural Resource Associates, Ltd., is based here in Portland but we work throughout the state. I direct cultural resource studies throughout the Pacific Northwest.

Certain state and federal laws protect resources such as Indian burials, certain historic buildings, and archaeological sites, which are considered "significant." Certain federal laws–the Archaeological Resources Protection Act and the Native American Graves Protection and Repatriation Act–apply only to federal and Tribal lands.

But Section 106 of the National Historic Preservation Act applies to *any* federal "undertaking" and includes federally funded protects, whether on federal land or not, and the issuance of federal permits and licenses. Private developers run into these requirements when they apply for Section 404 wetland fill permits from the U.S. Army Corps of Engineers.

Resources fifty years or older must be evaluated for their significance. While the federal agencies are ultimately responsible for ensuring compliance with cultural resources laws and regulations, they typically delegate some of their responsibility for meeting the 106 requirements to proponents, who usually contract with professional cultural resource consultants like me.

Q2. What trends do you see in your industry with respect to real estate/land use?

A. The Grand Ronde Tribe is becoming increasingly proactive in tracking development in the Willamette Valley. Our advice to clients whose land is in or by Tribal land–"consult early and often." Tribes are eager to engage with developers, archaeologists, and attorneys to avoid a larger battle down the road.

Q3. Tell us your professional horror story.

A. We were working on a pipeline project in eastern Oregon and got a phone call that they were cancelling the project–"Please go home now because we won't pay you after today." What a nightmare!

Q4. Do you think the law helps or hinders your industry?

A. Well, the law creates the need for our industry! The laws drive 98 percent of what we do. Oregon's State Historic Preservation Office, SHPO, has guidelines that direct how we do the work.

Q5. What one thing do you wish you could tell lawyers about interacting with you and your clients?

A. In general, getting last minute requests for cultural review or archaeological review won't be easy (or possible) for us to accommodate. With our industry, we can't drop everything to help your client. And if there's a state or federal agency involved, you will need extra time.

Attorneys representing developers with permitting or regulating cultural resources should understand the timeline for archaeologists and not wait until the last minute to address the need for cultural resource protections.