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Appellate Cases

Notice of Intent to Appeal Properly "Filed" Only When All Persons Receive Notice

Editor's Note: Mr. Kabeiseman represented the petitioners in this case.

Oakleigh-McClure Neighbors involved an application to site a co-housing development in Eugene through the planned unit development process. LUBA remanded the case for a relatively straightforward screening issue; the more interesting part of the case, and the part addressed by the Oregon Court of Appeals, involved a procedural issue.

Simon Trautman participated in an initial hearing before Eugene's hearings officer by submitting written testimony. However, the city did not provide Trautman with notice of the hearings officer's decision. That decision was appealed to the Eugene Planning Commission and, again, no notice was provided to Trautman, either about the hearing or the final decision. The Planning Commission held a hearing and, eventually, approved the application.

Other parties appealed the final decision to LUBA and, during the course of resolving record objections, the parties recognized that Trautman had not been sent the required notices. The petitioners belatedly served their notice of intent to appeal on Trautman. Trautman moved to intervene at LUBA 21 days after being served with the notice of intent to appeal, but almost two months after the LUBA appeal was filed. LUBA rejected the motion to intervene under ORS 197.830(7), which requires intervention within 21 days of the filing of the notice of intent to appeal.

Thus, because Trautman had not timely intervened, LUBA did not resolve the procedural issues he raised; however, LUBA ultimately remanded the matter to the city to address screening issues on a portion of the property.

Trautman and one other petitioner appealed LUBA's denial of Trautman's motion to intervene. The court of appeals reversed on the procedural issue, concluding that the notice of intent to appeal is properly "filed" only when all persons receive notice of that filing.

William Kabeiseman

Oakleigh-McClure v. City of Eugene, 269 Or. App. 176 (2015).

Response to "An Interesting Take on ORS 90.417"

> Editor's Note: A summary of the court of appeals case, *Neidhart v. Page*, appeared in the February/ March 2015 issue of the *RELU Digest*. Counsel for the plaintiff in that matter offers his perspective.

I was counsel for Plaintiff-Respondent at trial and on appeal, in the matter of *Neidhart v. Page*. I would first like to thank John VanLandingham for his astute observations and analysis. They are accurate, with one exception, relating to the following comments:

> "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) . . . The tenant also argued that the termination was wrong, because the notice 'demands too much money.' . . . 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 . . . but the amount was still wrong, due to the inclusion of the October rent."

These comments are based on the assumption that the 72-hour eviction notice was served on October 4, 2011. The court did not comment as to the service date of the notice, but only as to when the rent was due: "After Defendant failed to pay the rent *due on* October 4, 2011, Plaintiff notified Defendant by letter that Plaintiff would terminate Defendant's tenancy for nonpayment of rent" (emphasis added).

The notice was actually mailed to the tenant on October 14, 2011. As the rent was due on October 4, 2011, the 72-hour notice was mailed more than 8 days after the due date. *See* ORS 90.394 (2)(a) (For month-to-month tenancies "[t]he landlord shall give this [72-hour] notice no sooner than on the eighth day of the rental period, including the first day the rent is due[.]").

The tenant argued that the notice "demands too much money" based on her view that the landlord waived the right to evict for nonpayment of the balance of the February rent. Because that balance was part of the 72-hour notice, she believed the notice required payment of more than what was owed. Although the court did not squarely address this question (as the argument was not adequately developed by the tenant), it rejected the notion that the notice demanded too much money: "Because Defendant continued to owe that amount to Plaintiff, it is not obvious that it was impermissible for Plaintiff to include that amount in the notice, once Defendant's subsequent defaults gave Plaintiff new grounds to terminate the tenancy." On May 13, 2015, the court issued a decision on reconsideration that confirms that the judgment on appeal did not include a monetary award; however, the decision did not alter the foregoing analysis.

Charles M. Greeff

Neidhart v. Page, 268 Or. App. 645, on reconsideration, 271 Or. App. 139 (2015).

The Now-and-Then of Historical Designation

The Court of Appeals recently reversed LUBA's decision in *Lake Oswego Preservation Society v. City of Lake Oswego and Marjorie Hanson*. At issue in the case was whether Marjorie Hanson could remove the historic designation placed on her property by the City of Lake Oswego in 1990–five years before the enactment of ORS 197.772.

Under ORS 197.772(1), a property owner may refuse to consent to a local government's historic property designation during the designation process. ORS 197.772(3) provides that a property owner may remove from the property a historic property designation already imposed by the local government.

LUBA concluded that only a property owner who had contested the designation *at the time of designation* could remove it. In other words, individuals who owned the property after the designation process was complete were not permitted to remove the historic designation. Although Hanson's predecessors had contested the designation, Hanson had not and, therefore, she could not remove the designation.

On appeal, Hanson raised two assignments of error. First, she contended that LUBA had lacked jurisdiction to hear the appeal. The court dismissed that argument, concluding that Lake Oswego's actions amended the landmark designation list, a land use regulation, and was therefore a "land use decision" within LUBA's appellate jurisdiction.

Next, the court considered whether the legislature had intended subsection (3) to allow property owners to remove a designation imposed on their property before their ownership. The court relied heavily on the legislative history of the statute, noting that House Committee records showed that subsection (3) was intended to allow property owners to contest historic designations imposed before the enactment of ORS 197.772. However, the records also suggested that the legislature did not intend for owners who had consented to designation before the enactment or did not use the mechanism after the enactment to be able to remove the designation under subsection (3).

Based on that legislative history, the court held that the legislature had intended to allow *any property owner* that had a local historic designation forced on their property to remove that designation. There is no requirement that the property owner seeking to remove the designation had to be the owner at the time of designation. When ORS 197.772 was drafted, the legislature was focused on "correcting the imposition of unwanted designations, and not the identity of the property owner that might now be stuck with the designation."

Lauren King

Lake Oswego Preservation Society v. City of Lake Oswego and Marjorie Hanson, 268 Or. App. 811 (2015).

Oregon Real Estate and Land Use Digest

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

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New Legislation

Governor Brown signed OSB-sponsored Senate Bill 368 on June 8, 2015. SB 368 applies to judicial foreclosures pending on the effective date and all foreclosures filed thereafter.

The bill changes ORS 88.010 and related statutes to make clear that a "money award" is not a requirement in a judicial foreclosure, as some courts have interpreted that statute in its prior form.

A judgment of foreclosure now requires a declaration of the amount due in all cases, and in those cases where entry of a money award is requested by the plaintiff and not prohibited by other law, a money award may be entered. Thus, creditors' counsel may avoid the issue of violation of an automatic stay or discharge injunction by excluding a money award in the form of judgment, and parties now have clearly delineated flexibility in fashioning a judgment of foreclosure to suit the particular requirements of the case.

Pat Wade

Cases from Other Jurisdictions

Corps of Engineers Liable for Lower Ninth Ward Flooding Damages

St. Bernard Parish Government v. United States is a takings claim brought by a local government and property owners affected by flooding during Hurricane Katrina and several subsequent hurricanes between 2005 and 2009. The parish and property owners alleged that the U.S. Army Corps of Engineers was negligent in failing to maintain a 76-mile navigational channel, the Mississippi River–Gulf Outlet, or MR-GO—a channel that acted as a funnel to intensify storm surges and direct them into New Orleans. In previous litigation, the courts had made a factual finding that the Corps was negligent, but also found the Corps had discretionary immunity under the Tort Claims Act. This phase of the case dealt with the takings claims. The record showed there were clear concerns that the work would compromise the ability of the soils to hold together in the event of storm surges, that the MR-GO had destroyed several thousand acres of wetlands when it was created, and that the result was a "funnel" of destruction. The federal government was contemplating closing the MR-GO when Hurricane Katrina arrived.

The court determined it had jurisdiction under the Tucker Act, 28 U.S.C. § 1491, to deal with damage claims against the federal government under other substantive law, such as the Takings Clause, and found that the law of the case had already established standing. The court also found sufficient lay and expert testimony to support the connection between the construction of the MR-GO and the damages claimed on the basis of a temporary taking. Under *Arkansas Game & Fish Comm. v. United States*, 133 S. Ct. 511, 522-23 (2012), the plaintiff in a temporary takings case must plead and prove (1) a protectable property interest under state law; (2) the character of the property and the owners' "reasonable-investment backed expectations"; (3) foreseeability; (4) causation; and (5) substantiality. The court then reviewed each of these elements. The property owners had protectable property interests under Louisiana law, as well as reasonable investment-backed expectations of the use of those interests, because the flooding that had occurred was not comparable to that of the most recent times. Moreover, it was foreseeable that the construction, operation, expansion, and failure to maintain the MR-GO would substantially increase storm surge during hurricanes and severe storms and would cause flooding. This foreseeability was a factor in the *Arkansas Game & Fish* determination that a taking could result from operation of public works and was indicated by the evidence in this case as well.

In addition, there was a demonstrated causal link between Corps activities and the storm damages experienced because of increased salinity, loss of wetlands and wildlife habitat, storm surges, and erosion. The court rejected the arguments that the damages were caused on a single occasion (Hurricane Katrina), breaking the chain of causation, finding they were rather "inevitably recurring." The court concluded that the flooding was the "direct, natural, or probable result" of the Army Corps' authorized construction, expansions, operation, and failure to maintain the MR-GO and not "incidental or consequential" injury. The court went on to say that the increase of storm surge

flooding was the "direct result of the Army Corps' cumulative actions, omissions, and policies regarding the MR-GO that occurred over an extended period of time."

As to substantiality, the court observed there was "no question" that the flooding was severe, and found that the homeowners had no ability to access or use their property for a significant time following Hurricane Katrina. Accordingly, the court found a temporary taking had occurred and ordered the proceedings to turn to the issue of damages.

The 74-page decision in this case is an indictment of the mindset of initiation and expansion of environmentally damaging projects, followed by denial of liability and projecting blame elsewhere. It may be that a higher court reverses this finding of liability; if so, the chain of causation indisputably leads back to previous unfortunate choices of the Corps and political establishment that have proven to be calamitous to residents of St. Bernard Parish.

Edward J. Sullivan

St. Bernard Parish Government v. United States, 2015 BL 127431 (Fed. Cl. May 01, 2015).

Charitable Bins Protected By First Amendment

A charity collects clothing and shoes to send to foreign countries, placing its bins in a visible and accessible area for those donations. The charity gets the consent of the property owner and makes weekly pickups. The bins have a contact phone number in the event they are full. After the charity placed two bins in St. Johns, Michigan, the city ordered their removal, alleging they were a public nuisance and violated the local zoning regulations. About a year after their removal, the city adopted the prohibition on charitable bins as a zoning ordinance provision, but exempted an existing Lions Club bin. *Planet Aid v. City of St. Johns, Michigan* is an appeal from the grant of a preliminary injunction against the enforcement of this city ordinance, which banned most (but not all) outdoor unattended charitable donation bins.

The charity filed a complaint in federal district court, alleging, *inter alia*, that the ban violated its free speech rights, and requesting a preliminary injunction. St. Johns argued that the prohibition was a reasonable time, place, and manner regulation, analogous to sign regulations. After the trial court granted the preliminary injunction, the city appealed.

The Sixth Circuit reviewed facts for clear error and decided the legal issues—whether the charity had a strong likelihood of prevailing on the principal merits—*de novo*. The court noted that the U.S. Supreme Court had applied strict scrutiny to an ordinance requiring that charitable organizations use a certain percentage of donated funds for direct charitable work, finding the regulations violated the First Amendment. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). Political expression, even in the context of charitable solicitation, is protected and occupies the highest rung on the protected speech ladder. Also, the Fifth Circuit had invalidated a similar ordinance in *National Federation for the Blind of Texas v. Abbott*, 647 F3d 202 (5th Cir. 2011).

The Sixth Circuit found *Abbott*'s reasoning persuasive, observing that a "charitable donation bin can—and does—'speak,'" and holding that "speech regarding charitable giving and solicitation is entitled to strong constitutional protection, and the fact that such speech may take the form of a donation bin does not reduce the level of its protection." The court added that strict scrutiny applies only to the content of protected speech and not to its non-communicative aspects. Under this standard, the St. Johns ordinance violated the First Amendment because it banned only outdoor receptacles that had a message requesting charitable donations. The court rejected the litany of damages to the public interest set forth in the purpose clause of the ordinance and in the city's briefs, noting that the ordinance only prohibited receptacles "intended to accept donated goods or items" and did not apply to receptacles that did not request a charitable donation. It was the soliciting message that invoked the prohibition. While the law may have been viewpoint-neutral, it was not content-neutral. The court also rejected the analogy to time, place, and manner regulations of signs because such valid regulations do not deal with content, as this ordinance did, or limit themselves to non-communicative aspects of signs. Because the trial court did not err in applying strict scrutiny to the subject ordinance, the decision was affirmed.

This decision is not surprising. By banning only donation bins that had charitable solicitation messages on them, the city had discriminated on the basis of content and failed the strict scrutiny test.

Edward J. Sullivan

Planet Aid v. City of St. Johns, Michigan, 2015 WL 1616242 (6th Cir. Apr 6, 2015).

LUBA Cases

Subjective Benefits-Impacts Analysis Causes Petitioner to "Frac-Out"

Riverkeeper strikes again! In this appeal of *Oregon Pipeline Company, LLC v. Clatsop County and Columbia Riverkeeper*, on remand from the Court of Appeals, LUBA considered challenges to Clatsop County's denial of the pipeline company's land use application. OPC sought land use approval for an LNG pipeline that would run through the county and estuary resource areas. LUBA affirmed the county's decision.

This summary focuses on OPC's eleventh assignment of error, which involves application of the Columbia River Estuary Impact Assessment and Resource Capability Determination to OPC's proposal. Section L5.830(9) of the impact assessment requires "demonstration that the project's potential public benefits will equal or exceed expected adverse impacts."

With regard to "potential public benefits," the county acknowledged OPC's claims that there is a need for natural gas and that the project, including the terminal to be located in the City of Warrenton, would create thousands of construction jobs and hundreds of ongoing jobs in addition to injecting millions of dollars into the local economy. In spite of these "potential public benefits," the county determined that OPC's proposal did not comply with the L5.830(9) benefits–impacts standard. The county reasoned that it was hard to determine how many of the "potential public benefits" could actually be attributed to the pipeline–the subject matter before the county in the application–versus the whole LNG project. The county determined that it was improper to credit the benefits of the whole project to the pipeline project alone.

Regarding "expected adverse impacts," OPC stated in its application that horizontal directional drilling minimizes adverse impacts on estuary resources as compared to traditional techniques. However, one of the potential side effects of HDD includes the risk of hydraulic fracturing or "frac-out." If hydraulic fracturing occurs, then the drilling fluid, a bentonite mixture (fine clay material), used in the HDD process can leak out into waterways. OPC provided a contingency plan to the county that explained that OPC would use a backhoe or bulldozer to clean up the leaked bentonite mixture after a "frac-out." Based on evidence from the Oregon Department of Fish and Wildlife, the county determined that leaks due to hydraulic fracturing and subsequent cleanup actions are highly damaging to aquatic resources. Overall, the county determined that the "potential public benefits" did not equal or exceed the "expected adverse impacts" of the project.

First, OPC argued that the county improperly interpreted the word "project" when it limited the "potential public benefits" to the pipeline contained within Clatsop County. LUBA applied a deferential standard of review to the county's interpretation of local code per ORS 197.829(1) and the standard established in the *Siporen* case. Applying this standard, LUBA found that the county's interpretation of "project" was consistent with the context within this particular section of the county's code and was not reversible under ORS 197.829(1).

OPC also argued that although it provided the county with substantial evidence that it would implement safety measures to avoid hydraulic fracturing, the county improperly relied on evidence of adverse environmental impacts associated with other pipeline projects when it determined that OPC's project would result in "expected adverse impacts."

LUBA agreed that OPC provided substantial evidence and that the county would be justified to rely on that evidence. However, LUBA pointed out that the county's balancing test is highly subjective and creates a very difficult burden for OPC. LUBA determined that L5.830(9) would require OPC's evidence to be so overwhelming that it carried OPC's burden as a matter of law. LUBA determined that OPC did not meet this burden due in part to the fact that OPC's own evidence demonstrated that there is some risk of habitat damage associated with hydraulic fracturing. Further, other evidence demonstrated that hydraulic fracturing can result in environmental damage. Based on the evidence in the record, LUBA found that OPC did not meet its burden to show that "potential public benefits" would equal or exceed "expected adverse impacts" as a matter of law.

LUBA denied this assignment of error, in addition to others, and affirmed the county's decision to deny OPC's application.

Rebekah Dohrman

Oregon Pipeline Company, LLC v. Clatsop County and Columbia Riverkeeper, LUBA No. 2013-106 (April 29, 2015).

LUBA Short Summaries

Local Procedure

Making a decision on a permit application is at least as important as the substance of the decision, as *Smith v. City of Gearhart* illustrates. The city approved a conditional use permit allowing Smith to use a barn on her property to hold events. Under the city's code, a permit expires one year after it is granted if no substantial construction has occurred or no permit extension has been approved. Shortly before the one-year period expired, the city approved Smith's request to extend her permit for an additional six months. Smith's LUBA appeal involves her application for a second six-month extension, which the county administrator denied. Her request was precautionary in part because she also claimed the project would be substantially complete before the first extension expired. Smith appealed the administrator's decision to the city council and, at the conclusion of the appeal hearing, one councilor moved to approve the additional six-month extension. No one seconded the motion and it died. The council took no further action on Smith's appeal.

On appeal to LUBA, Smith argued her request for the permit extension was a "permit" under ORS 227.160(2) and the city erred by failing to make a decision on her application. LUBA agreed with Smith and rejected Gearhart's argument that her application became void under ORS 227.178(4) because she failed to submit missing information. The record showed the city administrator never told Smith her application was incomplete. Moreover, the city administrator denied her extension request less than two weeks after Smith submitted it, undercutting the notion that he needed additional information to make a decision. Finally, in her city council appeal, Smith stated she did not intend to submit any additional information, which meant the administrator should have deemed her application complete under ORS 227.178(2).

LUBA also agreed with Smith that the city council's failure to make a decision on her appeal violated state law and city code. Both required the council to make a decision and adopt findings that explain the basis for its decision. Given the council's inaction on her appeal, LUBA sent the matter back to Gearhart and directed the council to decide Smith's appeal and determine whether her project satisfies the "substantial construction" standard.

Smith v. City of Gearhart, LUBA No. 2014-058 (April 1, 2015).

EFU Land and Golf Courses

LUBA teed up questions about the state administrative rules allowing golf courses in EFU-zoned lands in *Oregon Coast Alliance v. Curry County*. Oregon Coast Alliance challenged the county's decision approving Elk River Property Development's proposal for an 18-hole Scottish-style golf course, a 7,500 square foot maintenance/storage facility, and a 10,000 square foot clubhouse in an EFU zone. Before LUBA, the Alliance disputed whether Elk River proposed a

"golf course" at all and whether the associated maintenance and club house facilities were larger than permitted under the applicable administrative rules, OAR 660-033-120 and OAR 660-033-130.

LUBA had little difficulty agreeing with the county that the proposed course was in fact a "golf course" under the applicable administrative rule. The rule defines this term to include a regulation 18-hole course on a site that is "generally characterized by a site of about 120 to 150 acres in size." Unlike a typical course with trees and vegetation as buffers between fairways, a Scottish-style course has none. As a result, this type of course needs more acreage between fairways for safety purposes. The Alliance argued that the 198-acre course exceeded the maximum permissible size to be considered a "golf course" and was not allowed in the EFU zone. Like the county, LUBA rejected this argument, noting the rule used the words "generally" and "about," which did not establish an absolute size limit, and Elk River's proposal otherwise met the rule's standards for a golf course.

The question of whether the clubhouse and maintenance facilities satisfied the administrative rule's size limitations proved more troublesome. The standards for golf courses in EFU zones limit the size of associated enclosed facilities to a "design capacity" of no more than 100 people if, as here, they are within three miles of an urban growth boundary. The Alliance argued "design capacity" is the same as "maximum occupancy" and the size of both facilities exceeds the 100-person limit. The county understood the two terms to be different and interpreted "design capacity" to mean the number of people a facility is designed to accommodate at any one time. The county found the buildings were consistent with the standard because under normal operations no more than 100 people would use them at any given time.

LUBA agreed with the county that "design capacity" and "maximum occupancy" are two different and sometimes overlapping concepts. LUBA observed that "design capacity" generally denotes the number of people a structure is designed to hold. As a result, LUBA concluded the 100-person limitation did not apply to the maintenance buildings or parts of the clubhouse that would house golf carts, since they were designed to hold machinery and equipment, not people. However, LUBA found there was insufficient evidence to support the county's findings that the main part of the clubhouse satisfied the rule's size limitation. The county relied on testimony by an Elk River representative who estimated how many people could be expected to use the clubhouse at any one time. In LUBA's view, the absence of any evidence from an architect or building designer about the number of people the lounge, restaurant, and other club house facilities were designed to hold undercut the county's findings that Elk River satisfied the 100-person design capacity limitation and required a remand of the county's decision.

Oregon Coast Alliance v. Curry County, LUBA No. 2015-006 (May 15, 2015).

Local Ordinance Interpretation

Island City's interpretation and application of its home occupation code provisions to a commercial truck business proved problematic in *Stevens v. City of Island City*. The city's code limits a home occupation in an accessory structure to 600 square feet of floor area. Intervenor Fregulia applied for a home occupation permit to use a workshop on his property for his truck maintenance and repair business. He argued that only the workshop areas actually occupied by trucks and trailers under repair, a work bench, tool chest, supply shelf, and storage area should be counted, and not the surrounding "dead space." By his calculation, the total area used for his business added up to less than 600 square feet. City staff and Stevens asserted Fregulia failed to count the areas needed for mechanics to actually work on the trucks or walk between the trucks and the work bench, tool chest, or paper drop box. When these areas were included, they contended, Fregulia's truck business exceeded the permissible size limit. In approving the home occupation, the county's decision generally agreed with Fregulia that dead space should be excluded and also appeared to agree that some additional area beyond the area physically occupied by trucks and equipment should be included as well. Despite the lack of any numerical calculation for the additional area, the city found the truck business would not exceed the size limitation and approved Fregulia's home occupation permit.

LUBA identified two flaws with the city's decision. First, the city failed to describe exactly how much of the area unoccupied by trucks, the tool chest, and other business-related structures should be counted in determining compliance with the 600 square foot floor area limitation. The findings simply repeated Fregulia's statement that all

work activities would take place within the footprint of the trucks being serviced. The city did not address Stevens's assertion that Fregulia's statement was implausible because mechanics needed to use additional space to work on the trucks. Second, the record indicated Fregulia did not make the statement the findings attributed to him and, if he had, there was no substantial evidence to support this statement. As LUBA observed, "[n]o reasonable person could conclude that a mechanic can accomplish all tasks associated with oil changes, lubrication, brake maintenance and repair, and replacement of filters, lights and wheel seals entirely with the footprint of a truck or trailer." Additionally, the findings did not address how much of the workshop's floor area should be considered uncounted dead space. The city council rejected Stevens's argument that an additional two-foot perimeter around the truck/trailer should be included in the calculation, but didn't discuss any alternative. Based on these flaws, LUBA remanded the county's decision for purposes of reopening the record and adopting better findings.

Stevens v. City of Island City, LUBA No. 2014-105 (May 6, 2015).

Goal 10

Under Statewide Planning Goal 10, a local government must inventory its buildable lands and provide an adequate supply of land to meet its identified housing needs. Buildable lands are defined as urban or urbanizable land and generally do not include land in a rural unincorporated community, or RUC. The issue LUBA addressed in *Seabreeze Associates Limited Partnership v. Tillamook County* was whether the county's application of an overlay zone to a RUC affected the county's housing capacity and required the county to assess its ongoing compliance with Goal 10.

Seabreeze challenged a county ordinance applying a Coastal Hazards Overlay zone (the Nesk CH zone) to Neskowin, a RUC. As adopted, the Nesk CH zone limits land divisions, construction on newly created lots, and new accessory dwelling units, among other requirements. Seabreeze argued the county's buildable lands inventory relied on Neskowin's housing capacity to address the county's need for housing in the housing element of its comprehensive plan. Application of the Nesk CH zone would reduce Neskowin's housing capacity and thus required the county to evaluate its ongoing compliance with Goal 10. The county and intervenor Department of Land Conservation and Development disagreed. Although the county's comprehensive plan notes there are "additional housing opportunities" in RUCs like Neskowin, they argued this did not make land within Neskowin part of the county's needed housing inventory. They also pointed to the adopted Neskowin Community Plan, which was acknowledged for compliance with Goal 10 and which they asserted did not identify residentially zoned land within the plan area as a resource for addressing the county's housing needs.

LUBA concluded it could not tell whether residentially zoned lands in Neskowin were inventoried and included to meet the county's housing needs or whether they were identified to meet only local, rural housing needs. Some language in the Housing Element of the county's comprehensive plan seemed to assign some of the calculated needed housing capacity to Neskowin. However, the ordinance adopting the Nesk CH overlay did not address either the county's Housing Element or Goal 10. As a result, LUBA concluded it could not agree with the county and DLCD that the Nesk CH overlay did not affect the county's residential lands inventory. Since the Nesk CH reduces the potential for new housing in Neskowin, a remand was necessary for the county to address the impact of the Nesk CH overlay on the county's compliance with Goal 10 and on the Neskowin Community Plan.

Seabreeze Associates Limited Partnership v. Tillamook County, LUBA No. 2014-106 (April 16, 2015).

Kathryn S. Beaumont

QUINQUE

Quinque, Latin for *five questions*, is 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.

Daniel Renton, registered professional surveyor and principal of Minister & Glaeser Surveying, Inc. 360-694-3313.

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

I am a Professional Land Surveyor and licensed in the States of Oregon, Washington, and Idaho.

I am also a Certified Water Rights Examiner in the State of Oregon. I have been a principal owner of Minister and Glaeser Surveying, Inc., since 2003. My job consists of estimating and bidding projects, scheduling crews, troubleshooting technical problems with field equipment and office computers. I also take care of preparing responses to requests for proposals and statements of qualifications. The best part of my job is going to the field—that gets me out of the office and keeps me up to date on field equipment and procedures.

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

As the value of land increases in the Portland-Vancouver metro area, I see the demand for land surveying also increasing. People want to know what real estate they are purchasing. I hope someday that the states of Oregon and Washington will pass legislation that requires real estate to be surveyed before a sale.

Q3. Tell us your professional horror story.

Back when I first started surveying, the company I worked for did all the crime scene surveys for the District Attorney's Office. On one occasion two mountain men got into an argument and one of the mountain men killed the other with a custom-made chainsaw blade whip. The crime scene was on or near the line between two counties. We were tasked with locating the chopped up body and figuring out which county the crime was committed in, since one county was poor and the other county had money. It cost money to convict a person and the poor county was hoping the crime took place in the wealthy county. I surveyed the body—which wasn't a pleasant sight—and determined that the crime took place in the wealthy county.

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

The law definitely helps our industry. About 50 percent of our work is law-related: boundary surveys, boundary disputes, and ALTA surveys. The whole survey profession is tied to the law.

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

I have worked with a lot of lawyers that do not understand our profession and will ask for things that we cannot legally do. I have also worked with lawyers that could be surveyors, since they understand our profession. It would be helpful for attorneys who deal in the real estate and land use market to attend land surveying seminars to learn more about our profession.