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Editor's Note: This issue of the *RELU Digest* focuses on the recent spate of United States Supreme Court cases in June. In addition, a new rule proposed by the U.S. Environmental Protection Agency could affect RELU readers in a variety of industries.

United State Supreme Court Cases

Supreme Court Strikes Down Local Non-Commercial Sign Regulations

Reed v. Town of Gilbert involved a church pastor, Reed, who wished to advertise the times and location of his congregation's services, which were not always in the same place, since there was no fixed church site. The signs did not always contain a date and were in place outside the time limits of the regulations imposed by the town of Gilbert, Arizona. Reed's church was given two citations for violating Gilbert's Sign Code.

One of the Code's 25 exemptions required that a sign permit be secured to display a sign. Those exemptions are based on the content of the sign. The category at issue was a "Temporary Directional Sign Relating to a Qualifying Event," which could be sponsored by a religious, charitable, or other non-profit organization. Signs in this category are limited in size (6 square feet), number (4 per property), and time (12 hours before and one hour after the event). Those signs are treated less favorably than "Ideological Signs" or "Political Signs." Reed filed a First Amendment claim in federal court. After two rounds in the trial court and Ninth Circuit, he was denied relief as the categories were deemed content-neutral. The Supreme Court granted certiorari.

Justice Thomas, writing for the Court, said that content-based regulations of expression were presumptively unconstitutional and would only be upheld if shown to serve a compelling public interest and narrowly tailored

to achieve the same. He added that "content-based" dealt with either the topic discussed or idea the message expressed. Even content-neutral regulations would be subject to strict scrutiny if they could not be justified without reference to the content of the speech.

The Court found the Gilbert regulations content-based as they depended on the message—specifically, a "Qualifying Event"—thus triggering strict scrutiny analysis. The Court found the justifications accepted by the Ninth Circuit "unpersuasive."

One justification was that the regulations were not motivated by disagreement with the message; however the Court responded that motivation is irrelevant if the regulations were not content-neutral, even if they were facially neutral. Such a regulation may be content-based even if it does not discriminate based on subject matter or viewpoints. In this case the regulation singles out specific subject matter (information on "Qualifying Events"), even if it takes no position on those events, and allows signs relating to the events to be treated differently than ideological or political signs—an example of content-based discrimination.

Another justification was that the regulations were content-neutral as to speaker and event. The Court said the signs were based on their content, rather than the identity of the speaker. Had the church or its pastor expressed an ideological message or supported a candidate, the regulations would have been different. Thus they were content-based. There was no adequate justification for these regulations and they did not survive strict scrutiny.

Justice Alito authored a concurring opinion, joined by Justices Kennedy and Sotomayor. Justice Alito described the varied methods by which signs may be constitutionally regulated, following the Court's decision in *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-69 (2009).

Justice Breyer concurred in the judgment, sounding caution in the formulaic use of strict scrutiny in every content-based sign code distinction. Justice Kagan, joined by Justices Breyer and Ginsburg, also concurred in the judgment. Justice Kagan questioned the justification for strict scrutiny in situations where signs do not interfere with the marketplace of ideas or impose viewpoint or subject-matter limitations on speech. If those concerns are not present and the risk is inconsequential, strict scrutiny is unwarranted and sweeps too broadly. Justice Kagan suggested the court exercise common sense, leaving intact laws that do not violate these interests. She noted that in *Members of the City Council v. Vincent*, 466 U.S. 789 (1984), and more recently in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), the Court passed over such distinctions and in *City of Renton v. Playtime Theatres*, 475 U.S. 41, 46 (1986), the Court used intermediate scrutiny to deal with distinctions between adult and other films shown by a movie house. Justice Kagan suggested using *Ladue* here, under which the Gilbert Code would fail to pass strict or intermediate scrutiny ("or even the laugh test") as there was no coherent justification for the distinctions made. There was no reason to apply strict scrutiny here and the Court risks becoming the "Supreme Board of Sign Review" without any necessary First Amendment justification.

Justice Kagan's concerns are certainly justified. In the light of this decision, what is the justification for distinguishing between commercial and non-commercial signs or between onsite and offsite signs? One must read the content of the sign to make such regulatory decisions if regulation is to be done at all. The principal opinion suggests that traffic signs "may" survive strict scrutiny, but what of the multitude of other public or private signs that are not traffic-related? Perhaps *Summum* will allow the public to use its proprietary and regulatory powers to deal with some signs, but that response is insufficient to deal with the host of sign issues facing local governments today. Let us hope we will not have wait another twenty years for answers from a Sphinx-like high court.

Reed v. Gilbert, 576 U.S. ___ (June 18, 2015).
Edward J. Sullivan

Junior Mortgage Liens Cannot Be Voided in Chapter 7 Proceedings

The Chapter 7 debtors each owned a house encumbered by a senior mortgage lien as well as a junior mortgage lien in favor of petitioner Bank of America. The amount of each senior mortgage was greater than the house's current value. The debtors sought to avoid their junior mortgage liens under 18 U.S.C. § 506, which provides: "To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void." The Court analyzed whether a junior mortgage could be voided under 506(d). The Court relied on *Dewsnup v. Timm*, 502 U.S. 410 (1992), and declined to overrule or modify that prior ruling. The Court unanimously held that the lien could not be voided in a Chapter 7 Bankruptcy proceeding.

Bank of America, N.A. v. Caulkett, 575 U.S. ___ (June 1, 2015).
Alan Brickley

Disparate-Impact Claims Find New Grounds, New Requisites

The United States Supreme Court ruled this summer that disparate-impact liability under the 1968 Fair Housing Act can be measured by effect as well as intent. The 5-4 decision focused on Texas and its tax credits for affordable housing, which turned out to be racially discriminatory. Texas argued that it did not intend to create discriminatory policies, but the Court held that such discrimination need not be intentional to be illegal.

The tax credit policy had, in the words of a non-profit suing the Texas Department of Housing and Community Affairs, effectively guaranteed that affordable housing in Dallas was limited to—and concentrated in—minority-rich but fiscally-poor neighborhoods and not in any of that city's white suburbs. The policy resulted in de facto segregation. The state responded that such a policy might result in exactly what the non-profit claimed, but as long as there was no racial animus factoring in the policy's birth, there could be no FHA violation. The Court disagreed.

In most disparate-impact claims, a plaintiff must establish that a practice has a disproportionate impact on certain groups of individuals without regard to sound business considerations. Here, though, the Court held that

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a racial imbalance argument cannot alone be the basis for a disparate-impact claim and laid out new responsibilities for all parties: plaintiffs have an additional burden to also establish a "robust" causal connection between the practice and the disparities; defendants must step forward to show that their policies support legitimate business justifications (rather than artificial or contrived reasons); and courts preparing remedial orders to eradicate the effect of such disparate impacts must do so through "race neutral means."

Texas Department of Housing and Community Affairs v. The Inclusive Communities Projects, Inc., 576 U.S. ___ (June 25, 2015).

Judy Parker

Three Cs: Clean Air Act, Climate Change, Costs

One of the primary features of the 1990 Clean Air Act Amendments was the EPA's regulation of hazardous air pollutants. For most sources, a new program was established where maximum available control technology was imposed based on the best controlled sources in the country. However, the EPA imposed a number of other regulatory requirements on fossil fuel–fired power plants that were anticipated to reduce HAP emissions. Therefore, Congress ordered EPA to assess the residual risk posed by HAPs emitted by fossil fuel–fired power plants after the programs were implemented. Based on this assessment, EPA was required to determine whether additional HAP regulation was "appropriate and necessary."

In 2012, the EPA issued rules imposing limits on HAPs emitted from coal and oil-fired power plants. This rulemaking reaffirmed a finding issued by EPA in 2000 that further HAP regulations were "appropriate and necessary." EPA estimated as part of the rulemaking that the new HAP standards would cost $9.6 billion per year to comply. However, the reductions in HAP emissions would only result in benefits of $4 to $6 million per year. EPA conceded that it did not consider costs and benefits when concluding that the HAP requirements adopted in 2012 were "appropriate and necessary."

The issue before the Court was whether EPA had to consider cost when deciding that the 2012 HAP standards were "appropriate and necessary." EPA took the position that cost should play no part in making the determination that additional limitations were appropriate and necessary. EPA opined that cost would come into play in determining what the standards should consist of. The petitioner 16 states—which included Oregon—disagreed, arguing that cost should play a role in determining whether the additional standards are "appropriate and necessary." As they noted, once EPA commenced rulemaking, the process dictates that cost would not be taken into account in establishing the floor emission standards and could only be taken into account in deciding whether to require more than the floor standards. Therefore, appellants argued that cost needed to be taken into account when determining whether regulation is needed in the first place.

Writing for a majority of five, Justice Scalia agreed with the appellant states, holding that EPA inappropriately failed to consider cost when concluding that further HAP regulation was "appropriate." The court held that the term "appropriate" obviously had to include cost. As Justice Scalia pointed out, by taking the position that cost played no part in the agency's initial decision, EPA had to argue that a regulation was "appropriate" even if it resulted in net harm. The majority decision notes "The Government concedes that if the Agency were to find that emissions from power plants do damage to human health, but that the technologies needed to eliminate these emissions do even more damage to human health, it would *still* deem regulation appropriate." The majority of justices ultimately held this position untenable.

Justice Scalia's opinion criticized EPA for straying from the clear statutory requirements. At one point he noted that "*Chevron* allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not." Justice Scalia similarly had no interest in EPA's argument that it would decide whether rulemaking was necessary at the outset and then address appropriateness later in the rulemaking process. As Justice Scalia pointed out, "By EPA's logic, someone could decide whether it is 'appropriate' to buy a Ferrari with-

out thinking about cost, because he plans to think about cost later when deciding whether to upgrade the sound system."

Justice Thomas drafted a concurring opinion in which he discussed how the case highlighted the problems with *Chevron* deference. Justice Thomas expressed the opinion that *Chevron* deference to agency interpretations of a statute amounts to an unconstitutional delegation of power to the administrative branch.

The dissent, penned by Justice Kagan, expressed powerful opposition to the majority holding. The dissent reasoned that cost did not need to be taken into account at the stage when it was determined whether regulations were necessary because EPA took cost into account when establishing the actual standards themselves (that is, after deeming regulation appropriate and necessary). However, as the majority pointed out, the standard-setting process commences with setting a regulatory floor, which is cost blind.

One interesting question was expressly not answered in the Court's opinion. At oral arguments an interesting exchange ensued where Chief Justice Roberts questioned EPA's defense of its HAP standards, for which there was relatively little economic benefit, based on economic benefits gained on pollutants that are not hazardous (most of the rule's benefit was predicted to be from reductions of fine particulate, which is not a HAP). EPA increasingly justifies its actions based on benefits unrelated to the statutory authority the agency is relying on. Therefore, the court's opinion on whether this is appropriate would be most welcome. However, because the court focused exclusively on the listing stage, the court expressly did not answer the question of whether EPA can legitimately rely on benefits unrelated to the rulemaking before it when assessing the benefits of the rule itself.

The *Michigan* decision is an interesting window into how at least five of the justices regard EPA's current approach to rulemaking. The decision is strikingly similar to last year's decision striking down, in part, EPA's regulation of greenhouse gases under the Prevention of Significant Deterioration program, *Utility Air Regulatory Group v. EPA*. Both decisions suggest that a majority of justices on the Supreme Court believe that EPA's authority is narrower than that claimed by the agency. While there is no indication that the court is ready to reject *Chevron* deference, as Justice Thomas suggests, there is an indication that the court will continue to oppose EPA claiming broad regulatory authority where the underlying statute does not clearly delegate such authority.

Michigan v. Environmental Protection Agency, 576 U.S. ___ (June 29, 2015).
Thomas R. Wood

EPA Rulemaking

The Environmental Protection Agency and the U.S. Army Corps of Engineers published potential rules on June 29, 2015, with an effective date of August 28, 2015. The new rules redefine "waters of the United States." The rule is designed to clarify various court rulings and agency "clarifications" on federal jurisdiction under the Clean Water Act. CWA jurisdiction extends only to "navigable waters," which Congress has defined as the "waters of the United States or the territorial seas." The rule could have a significant impact on industries such as construction, agriculture, energy development, transportation, and housing.

The potential rule deems all tributaries of generally recognized navigable waters within the definition of "waters of the United States"—regardless of size, so long as they have a bed, bank, and ordinary high water mark. The rule also includes "neighboring" wetlands, defined as all waters within the floodplain or within specified distances from the ordinary high water mark of traditional navigable waters and their tributaries.

Because the rule was pre-published on May 27, 2015, two groups of states have filed lawsuits, both focusing on states' rights. Nine states joined Georgia in challenging the proposed rule. Georgia argues that the "Agencies' unlawful attempt to expand their authority to broad categories of non-navigable, intrastate waters and lands imposes great harm upon the States and their citizens. Once a water is determined to fall within the Agencies' authority, this determination eliminates the State's primary authority to regulate and protect that water under the State's standards, and imposes significant federal burdens upon the States." The second case involves North Dakota and

twelve other states. North Dakota alleges that "The Final Rule will harm the States in their capacity as owners and regulators of the waters and lands within their respective boundaries. The States' use and management of the waters and lands they own or regulate will be subject to greater federal regulation under the Final Rule." Oregon has not joined either case.

Alan Brickley

Cases from Other Jurisdictions

California Supreme Court Dismisses "Unconstitutional Conditions" Claim

A recent case from California involved a trade association's challenge to a city's inclusionary zoning ordinance, which required developments containing 20 or more units to make 15 percent of those units available for low- or moderate-income purchase. The ordinance was a product of several state legislative efforts to facilitate low- and moderate-income housing beginning in 1975 and, although not mandated by law, was in effect in more than 170 California cities. The ordinance was passed to increase the number of affordable housing units and to integrate various socioeconomic groups into individual developments. The trade association brought a facial takings claim (but not a regulatory takings claim) alleging the ordinance violated the doctrine of "unconstitutional conditions," by which a claimant seeking a public benefit is forced to give up or refrain from exercising a constitutional right (in this case, the right to just compensation) in exchange for that benefit. In particular, the association alleged the ordinance was not supported by a sufficient evidentiary basis to show rough proportionality between adverse public impacts or a need for additional subsidized housing caused by, or reasonably attributed to, developments of 20 units or more. It asserted such a relationship was required by the takings clauses of the state and federal constitutions. The trial court allowed intervention by six affordable housing providers and a low-income city resident. The trial court used the association's unconstitutional conditions analysis over the "reasonable relationship" test proffered by the city that stressed the public welfare basis for the ordinance. The selection of that analysis was dispositive to the outcome, and the trial court found for the association.

The District Court of Appeal reversed, concluding that such non-exaction conditions must only bear a real and substantial relationship to a legitimate public interest. The California Supreme Court granted review.

Since 1965, California cities have been required to adopt a General (comprehensive) Plan and make adequate provision for affordable housing. In 1980 and subsequently, the California Legislature has added to the requirements of, and provision for, such housing, including providing for the authorization of inclusionary zoning regulations like the ones before the court. In 2010, in order to meet housing needs, the city enacted the challenged ordinance, which found a relationship between market-rate development and the need to provide affordable housing, as provision of market-rate housing raised land costs and thus made affordable housing more difficult. New housing required more city employees and services but also made it more difficult for such service employees to live in non-substandard housing within the city, resulting in longer commutes and forcing those service workers to pay a larger share of their incomes for housing.

The ordinance set out a number of options for developments to meet its affordable housing requirements, contained incentives for compliance, and provided for covenants and other safeguards to assure the price on resale was affordable. The ordinance did not take effect until after the end of the recent recession. It provided a waiver process to the extent any provision operated as an unconstitutional taking.

The supreme court first turned to whether the inclusionary zoning requirements were "exactions" that implicated the "unconstitutional conditions" doctrine used in takings claims under *Nollan*, *Dolan*, and *Koontz*. The court declared that public agencies have broad authority under their legislative or "police" power to regulate land so long as the restriction bears a real and substantial relationship to the public welfare. A land use regulation is presumed to be constitutional and is reviewed in a deferential way to determine whether it is "fairly debatable."

No taking challenge exists to a condition unless it is an exaction. In support of this point, the court observed that *Nollan* and *Dolan* involved exactions of real property, while *Koontz* involved public works or money as a substitute for real property dedications. The court concluded:

> Nothing in *Koontz* suggests that the unconstitutional conditions doctrine under *Nollan* and *Dolan* would apply where the government simply restricts the use of property without demanding the conveyance of some identifiable protected property interest (a dedication of property or the payment of money) as a condition of approval. It is the governmental requirement that the property owner convey some identifiable property interest that constitutes a so-called exaction under the takings clause and that brings the unconstitutional conditions doctrine into play.

Because there was no exaction, there was no unconstitutional condition—the 15 percent requirement does not bind a landowner to give up a property interest or to provide public works or money in lieu of a property interest to the public. It simply places a use restriction on the land by limiting the return on that portion of the land, much like rent control or zoning regulations themselves. So long as the requirement does not constitute a physical taking or deprive the owner of all viable economic use, it does not violate the takings clause. Under the Due Process Clause, an increase of affordable housing to comply with state law, and locating such housing in economically diverse areas, are constitutionally permissible objectives. On its face, the ordinance was not unconstitutional.

The Court thus upheld the decision of the Court of Appeals. This unanimous decision upholding the city's inclusionary zoning regulations in this facial unconstitutional conditions challenge may not be the last word. It is probable that the trade association will seek certiorari to get a definitive answer to the correct constitutional test to be applied.

California Building Industry Assn. v City of San Jose, No. S 212072 (Cal. June 15, 2015).
Edward J. Sullivan

Oregon Court of Appeals Cases

Reinstatement of Trust Deed Does Not Automatically Follow Use of Correction Deed

Hucke v. BAC Home Loans Servicing arose from a complaint that sought to overturn a foreclosure action. Prior to trial, the defendant bank filed a Correction of Errors deed. The bank then filed a motion to dismiss. It argued that the case was moot because its decision to rescind a trustee's deed had voided the foreclosure sale. The bank had then reinstated the trust deed. The trial court held that the correction did not vacate the deed or reconvey the property. It denied the motion to dismiss. The court declared the foreclosure was improper, restored the owner's property ownership interest, and reinstated the trust deed.

The court of appeals reversed the trial court on its finding of an improper foreclosure, based on the 2013 Oregon Supreme Court decisions in *Brandup v. Recontrust* and *Niday v. GMAC Mortgage, LLC*. The court also determined the effect of ORS 86.722:

> Although we agree that ORS 86.722(2) supports the view that correcting an erroneous recording of a trustee's deed might make it possible for the trust deed to later be reinstated, we do not agree that, whenever the beneficiary uses the correction deed to set aside the trustee's deed as though it had not been recorded, reinstatement of the trust deed automatically follows.

Hucke v. BAC Home Loans Servicing, 272 Or. App. 94 (2015).
Alan Brickley

Substantial-Evidence Standard Sets a High Bar for Reversal of a Local Government's Decision

In *S. St. Helens, LLC v. City of St. Helens*, a property owner applied to the City of St. Helens for a land permit to excavate rock located within a wetland protection area on its property. The city denied the property owner's application on alternative grounds: (1) the proposed rock excavation constituted "natural mineral resources development" under the city code and thus was not allowed for the property as currently zoned, and (2) even if the proposed rock excavation did not constitute "natural mineral resources development," the excavation was not a "listed" use for the property and did not meet the criteria for an unlisted use. After LUBA affirmed the denial, the property owner appealed and argued that LUBA erred by misconstruing evidence to determine that the property owner would be engaged in "mining" if the application were approved.

On review, the court of appeals explained that LUBA may only reverse or remand a local government's decision for evidentiary error if the decision is based on facts that are "not supported by substantial evidence in the whole record." If a reasonable person could make the disputed factual finding, based on the whole record, then the local government's decision is supported by substantial evidence and cannot be overturned by LUBA. And as long as LUBA properly applies the "substantial-evidence" standard of review, then the appellate court will affirm LUBA's order unless it determines that there is no evidence to support the decision or the evidence is so at odds with LUBA's review that it appears LUBA misunderstood or misapplied the required scope of review. In affirming LUBA, the court concluded that LUBA articulated the correct substantial-evidence standard of review and the court could not infer that LUBA misunderstood or misapplied the standard.

While both LUBA and the court of appeals affirmed the city's denial of the proposed rock excavation application, they also invited the property owner to present a different proposal for developing the property. With such deference afforded to the city's decision, the property owner may be understandably skeptical of that invitation.

S. St. Helens LLC v. City of St Helens, 271 Or. App. 680 (2015).
Tyler Bellis

No Implied Easement Unless All Parties Come to Court

Douglas Miller owns a parcel of land in Lane County that has no access to the nearby county road. His parcel is one of three parcels partitioned from one large, rectangular parcel in the 1960s. Defendants Terry and Trudi Shenk own the parcel directly to the west of Miller's parcel, between his parcel and the county road. The third parcel, located to the south of the Miller and Shenk parcels, is owned by the Arnolds. The Shenks have access to the county road through an easement over property currently belonging to Steve and Karla Mattox, whose property lies to the northwest of the Shenk parcel.

The original rectangular lot was divided into equal 20-acre north and south parcels in 1963. The buyers of the southern parcel were granted an easement through the northern parcel to the Mattox property, in which they also have a recorded easement. In 1966, the northern parcel was partitioned, creating the western 5-acre parcel that is currently owned by the Shenks and the eastern 15-acre parcel now owned by Miller. After the partitioning, the recorded easement for the Arnold property runs through the Shenk parcel. Miller has no recorded easement across the Shenk property and does not have permission to travel over their property to reach the road.

Miller sued to establish an implied easement over the Shenk property based on the existence of a logging road from his property across the Shenk property that was in existence at the time the northern parcels were created. He asserted that anyone buying that parcel would assume access was granted based on the existence of the road and the fact that the parcel had no access to the county road. The trial court agreed and held that the easement arose by implication at the time the parcels were created.

On appeal, the Shenks argued, among other things, that the trial court lacked jurisdiction because Miller had failed to join the Mattoxes and Arnolds, who were necessary parties to the action. The Court agreed with the Shenks that the Arnolds (though not the Mattoxes) were a necessary party under ORS 28.110, which states that

"all persons shall be made parties who have or claim any interest which would be affected by the declaration and no declaration shall prejudice the rights of persons not parties to the proceedings." The court reversed the trial court's decision to grant Miller an implied easement over the Shenks' property because Miller had failed to join all necessary parties. Although the Arnolds' easement does not include any of Miller's property, their interest in the easement is affected because a judgment in favor of Miller would mean increased traffic on their easement. Because of the jurisdictional error, the Court did not rule on the merits of Miller's arguments.

Miller v. Shenk, 272 Or. App. 12 (2015).
Steve Cox

LUBA Cases

Petitioner Must Identify Applicable Statute/Standard Before LUBA Will Apply Significant Impacts Test

In *Northwest Trail Alliance v. City of Portland*, LUBA dismissed an appeal where no land use decision was at issue and where the petitioner, Northwest Trail Alliance, failed to identify statutes or other applicable non–land use standards under which LUBA could exercise jurisdiction under the significant impacts test.

NWTA appealed a letter from Portland Parks and Recreation and the Bureau of Environmental Services that declared mountain biking would no longer be allowed in the River View Natural Area, a city-owned natural area. The RVNA is a 146-acre natural area in southwest Portland and has seven miles of trails that mountain bikers have used for many years. The city began working on a natural area management plan for the RVNA in 2013, and NWTA was a member of the plan's Project Advisory Committee. On March 2, 2015, PP&R and BES Commissioners sent a letter to NWTA and other stakeholders, stating that mountain bikes would no longer be allowed in the RVNA. NWTA appealed the letter to LUBA.

The city argued the letter was not a "land use decision" subject to LUBA's jurisdiction, and LUBA agreed. LUBA disagreed with the city's assertion that the letter was not a "final" decision and was merely an interim or interlocutory determination regarding mountain biking in the RVNA, finding that the adoption and content of a citywide off-road bicycle master plan, which the city argued would be the "final" decision, were speculative.

However, LUBA agreed that the letter did not concern the adoption, amendment, or application of any of the statewide planning goals, a comprehensive plan provision, or a land use regulation. Although NWTA argued that the letter concerned application of city comprehensive plan policies implementing Goals 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) and 8 (Recreation), the letter did not mention any comprehensive plan policies, and NWTA failed to identify any that either were or should have been applied. Therefore, NWTA failed to demonstrate that the letter was a "land use decision" subject to LUBA's review.

LUBA also held that the letter did not meet the significant impacts test. LUBA assumed, without deciding, that by removing more than 50 percent of the single-track mountain bike trails in Portland, the letter did significantly affect the status quo of mountain biking within the entire city. However, such an effect was inadequate. LUBA found that in making a decision to restrict public use, the city was acting as a manager or custodian of the RVNA, similar to a decision to prohibit dogs in public parks to avoid conflicts or prevent harm to wildlife. Furthermore, NWTA failed to identify any statute or other standard it believed should govern LUBA's review, and this was fatal to its argument. LUBA held that in order for it to exercise its jurisdiction under the significant impacts test, a petitioner must identify the non–land use standards it believes apply to the decision, and such identified standards must also have some relationship to the use of land. The appeal was therefore dismissed.

Northwest Trail Alliance v. City of Portland, LUBA No. 2015-015 (June 3, 2015).
Stephanie L. Schuyler

Local Ordinance Interpretation

LUBA's decision in *Widgi Creek Homeowners Association v. Deschutes County* emphasizes the importance of addressing all relevant code provisions when interpreting a local zoning code section, particularly where—as here—the affected development project's history is long and the code's legislative history is ambiguous. In this appeal, the Association challenged a county decision approving a site plan and 24-lot subdivision for a 4.4-acre parcel. All but a sliver of this parcel is within the Seventh Mountain Resort development; the sliver is within the previously approved Widgi Creek Resort.

As originally approved in 1983, the Widgi Creek Resort and master plan allowed 210 residential units consisting of 95 single-family dwellings and 120 residential condominium units. The plan was later modified to change the mix to 107 single-family dwellings and 103 condominium/townhomes. The northern part of the resort property was divided into 107 single-family lots, known as the Widgi Creek subdivision. The middle part was divided and developed with 86 townhomes in a development known as Elkai Woods. This left 17 condominium/townhomes allowed by the master plan remaining for development. Two subsequent approvals, the Points West subdivision approved in 2006 and the Mile Post One subdivision approved in 2009, would have approved lots that extend into the Widgi Creek Resort and used up almost all of the remaining condominium/townhome allotment. Neither was developed and the approvals expired. In the decision challenged in this appeal, eight of the 24 lots in the second Mile Post One (MPO II) subdivision extend into the Widgi Creek Resort.

The key issue before LUBA was whether the county's decision violated the Widgi Creek master plan or whether that plan was superseded by the Resort Community Zone the county adopted in 2001. The county hearings officer concluded the RC zone was controlling and even if it were not, the question of consistency with the Widgi Creek master plan was resolved in the 2006 and 2009 approvals and could not be challenged in the review of the MPO II subdivision. The hearings officer cited several factors that influenced her decision: (1) the 2006 and 2009 approvals did not apply the master plan; (2) the stated purpose of the RC zone was to provide standards for the review of development in the Seventh Mountain/Widgi Creek resorts, suggesting the RC zone's standards were intended to replace the master plans for both developments; and (3) the ordinance adopting the zone did not mention the master plan at all.

LUBA agreed with the Association that the hearings officer relied too heavily on the lack of any "savings clause" in the RC zone adopting ordinance. Of particular concern to LUBA was the "deeply ambiguous" legislative history of that ordinance and relevant comprehensive plan policies that the hearings officer did not discuss in her decision. The county's zoning code states that it does not repeal or impair "any existing easements, covenants, deed restrictions or zoning permits such as***conditional use approvals." As a result, LUBA concluded a savings clause was unnecessary to allow the Widgi Creek master plan to remain effective. LUBA noted, however, the county's comprehensive plan contains policies that make sewer and water capacity the limiting factor for development in several named resorts, including Widgi Creek. In contrast, a different comprehensive plan policy specifically names the Black Butte Ranch resort and requires future development to be consistent with that resort's master plan. There is no similar policy addressing the Widgi Creek master plan. Yet, an exhibit to the ordinance adopting the RC zone stated that Widgi Creek and Seventh Mountain resorts have master plans that control future development. Given the conflicting policies addressing the Widgi Creek master plan, LUBA determined remand was appropriate to give the hearings officer another chance to consider all relevant code and comprehensive plan provisions in resolving the ongoing effectiveness of the plan.

LUBA also disagreed with the hearings officer's conclusion that the Association was precluded from raising arguments about the effect of the now expired 2006 Points West and 2009 Mile Post One approvals. The Association argued both approvals effectively used up the remaining condominium/townhome allotment allowed under the Widgi Creek master plan and approval of the MPO II subdivision exceeds the master plan's limits. Regardless of the legal theory underlying the hearings officer's decision, LUBA concluded she erred in failing to address the Association's argument.

The concept of "issue preclusion" was inapplicable here because one of the five necessary elements—being a party or in privity with a party to a prior proceeding—was missing. The Association was not a party or in privity with any party to the review proceedings leading to the 2006 and 2009 approvals. The "law of the case" or "waiver" concept applies to later phases of a litigated case (such as remand or later appeal of a LUBA decision after remand). It was inapplicable here because the MPO II development the Association challenged in this appeal is a different development proposal than was approved in the prior decisions. Finally, this was not the type of proceeding in which a later approval (the MPO II decision challenged here) raises arguments that could have been raised in an earlier phase of the approval and were not. In LUBA's view, the MPO II decision involves a different proposed development than the 2006 and 2009 approvals and the hearings officer erred in viewing the Association's local appeal as collaterally attacking these earlier decisions. This error provided an additional justification for LUBA to remand the county's decision.

Widgi Creek Homeowners Association v. Deschutes County, LUBA No. 2014-109 (June 2, 2015).

LUBA Procedure—Prevailing Party

LUBA's Order on costs in *Rogue Advocates v. Jackson County* takes the unusual position that all of the parties prevailed in this appeal and none of the parties will be awarded their costs. This appeal involved a county decision denying the intervenor-respondent Meyers' request to confirm the nonconforming use status of an asphalt batching plant. Rogue Advocates appealed the county's decision to LUBA, but asked for LUBA to affirm the decision, as did the Meyers and the county—all for different reasons. In its final opinion and order, LUBA concluded Rogue Advocates challenged portions of the county's decision that were nonbinding *dicta* and affirmed the decision. Each of the parties subsequently claimed prevailing party status and submitted cost bills: Rogue Advocates for its filing fee and deposit for costs, the Meyers for their filing fee as intervenor-respondents, and the county for its record preparation costs.

LUBA noted that it typically treats a petitioner as the prevailing party when it reverses or remands a challenged decision and the respondent as the prevailing party when it affirms the decision. LUBA's administrative rules give it some discretion and it has varied from this approach in exceptional circumstances. Citing the complicated history leading to the county's decision and its lack of clarity, LUBA concluded all of the parties in this appeal are prevailing parties. However, LUBA's rules allowing costs to be awarded anticipate there will be both a prevailing party and a non-prevailing party in each appeal. Since it designated all of the parties as prevailing parties, LUBA used its discretion to decline all of the parties' requests for costs.

Rogue Advocates v. Jackson County, LUBA No. 2014-200 (June17, 2015).

LUBA Review—Limited Land Use Decision

A key question posed in *Truth in Site Coalition v. City of Bend* is whether the nature of LUBA's review of a substantial evidence challenge differs for a land use decision and a *limited* land use decision. LUBA concluded the answer is "yes," but declined to clarify the precise nature of this difference. The Coalition appealed a city decision approving Oregon State University's site plan and design review for a new 10.44-acre undergraduate campus on commercially zoned property. In one of its assignments of error, the Coalition argued some of the city's findings addressing transportation requirements were not supported by substantial evidence, citing the statute establishing LUBA's scope of review for a land use decision, ORS 197.835(9)(a). The city and OSU argued the appealed decision is a land use decision and the correct substantial evidence standard is contained in ORS 197.828(2)(a), the statute describing LUBA's review of a limited land use decision.

LUBA agreed with the city and OSU that the appealed site plan and design review decision falls squarely within the statutory definition of a "limited land use decision." Turning to the legislature's phrasing of its substantial evidence review standard for land use decisions and limited land use decisions, LUBA also agreed there is a difference. Under ORS 197.835(9)(a)(C), LUBA may reverse or remand a local decision if it is "not supported by substantial evidence in the whole record." However, the review standard for a limited land use authorizes LUBA

to reverse or remand only if the decision "is not supported by substantial evidence in the record." ORS 197.828(2)(a) goes on to say "[t]he existence of evidence in the record supporting a different decision shall not be grounds for reversal or remand if there is evidence in the record to support the final decision." (LUBA characterized the absence of the words "whole record" in this statutory provision to mean its review of a substantial evidence challenge to a limited land use decision is "likely less rigorous" than its review of an evidentiary challenge to a land use decision. Unfortunately, the statute's legislative history yielded no clues about the exact nature of this difference. LUBA found it unnecessary to explore this issue further since the evidentiary support for the challenged transportation findings passed muster under the more rigorous evidentiary review standard for a land use decision. As a result, practitioners will need to await future LUBA or appellate decisions for clarification of precisely how the two evidentiary standards differ.

Truth in Site Coalition v. City of Bend, LUBA No. 2014-098 (June 8, 2015).
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AUTHORS WANTED

The Real Estate and Land Use Digest is seeking authors to contribute case summaries and/or articles for future Digest issues. If you are interested, please contact Jennie Bricker at brickworkwriting@gmail.com.