# LAND USE CASE LAW UPDATE

A Review of Significant LUBA, Oregon Court of Appeals,
Oregon Supreme Court and Federal Cases

OAPA Legal Issues Conference

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## I. CONSTITUTIONAL LAW AND FEDERAL LAW

### A. Takings

- West Linn Corporate Park LLC v. City of West Linn, ___ F3d ___ (9th Cir. No. 05-36061, 05-36062, April 2011), *cert. denied* 565 US ____ (No. 11-299, Nov. 2011). In an unpublished opinion, the 9th Circuit affirmed the Oregon Supreme Court's conclusion that the rough proportionality analysis required by *Nollan* and *Dolan* does not apply in situations where the government conditions development to construct off-site improvements with personal property (money, piping, sand and gravel, etc.), but did not involve dedication of any interest in its own real property. In a footnote, the court went on to explain that this holding did not foreclose a regulatory taking claim under *Penn Central Transportation Co. v. New York City*, or a due process claim against the city for imposing arbitrary conditions of development. *Lingle v. Chevron USA, Inc.* Given its finding that no state or federal taking occurred, the court did not need to decide a constitutional question and vacated the magistrate judge determination that the claim was not ripe.

  The 9th Circuit agreed with the Oregon Supreme Court that the failure to follow the landowner consent requirements for a city-initiated vacation gave rise to an actionable damages claim and affirmed the $5,100 damage award to West Linn Corporate Park (WLCP). However, the 9th Circuit did not affirm the magistrate's award of $165,000 in fees for First Amendment retaliation claim against WLCP by one of its employees, determining that the First Amendment protects only conduct that is "inherently expressive" and convey a "particularized message." Here, the public works director's refusal to release a performance bond posted by WLCP until WLCP dedicated its interest in the disputed intersection did not equate to petitioning the government for redress of grievances. Because there was no First Amendment conduct at issue, the 9th Circuit remanded the decision to the district court to reapportion the fee award to include only the vacation and easement takings issues.

- Dunn v. City of Milwaukie, ___ Or App ___ (February 2011, A139386). The plaintiff was awarded $58,333 plus attorney fees for inverse condemnation damages to her home resulting from raw sewage backup when the city "hydrocleaned" a nearby sewer line. On appeal, the city argued that the lower court erred as there was no evidence that the city intended to cause damage per *Vokoun v. City of Lake Oswego*, and that the damage amounted to a substantial interference with the owner's use and enjoyment of the property. Relying on *Vokoun*, the court found that it could infer an intent if the "natural and ordinary consequence of that action was the substantial interference with property rights." The city's approach with hydrocleaning was to note the low pressure areas, those areas where sewer water flows into businesses and homes, and to not take such action in those areas in the future. The court rejected the city's claim that frequency of the occurrence was dispositive. Instead, the court found that the sewage intrusion was the natural and ordinary consequence of the city's high-pressure cleaning. The court went on to find that the damage to the ventilation system, hardwood floors, wallpaper and sheetrock resulted in a substantial interference to her property.

- Tonquin Holdings, LLC v. Clackamas County, ___ Or LUBA ___, (Aug. 2011, LUBA No. 2011-026). A condition of approval requiring that "all *** remaining wetlands *** on the subject site be protected within a Conservation Easement for the benefit of [Surface Water Management Agency of Clackamas County]" would constitute a *per se* taking if required without a finding that the dedication is roughly proportional to the impacts from development. The conservation easement limited a number of activities on the property and included conveying to the agency a right to access and inspect the easement area. Relying on *Loretto v. Teleprompter Manhattan CATV Corp*, LUBA rejected the county's argument that a right of public access is an essential component for finding a taking. See further discussion of this case in Special Use – Aggregate Mining.

### B. RLUIPA

- Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, ___ F3d ___ (No 09-15422, 9th Cir. July 2011). This is a reverse urban blight case where the church seeking to locate within the Old Town Main Street area, a tourist district intended to create a lively pedestrian-oriented district, was denied a conditional use permit because a state law prevents the issuance of liquor licenses within 300 feet of a church. Churches and schools must obtain a conditional use permit to operate in the Old Town district, but membership organizations and entertainment venues may operate without a permit. While the case was pending, the church lost the property to foreclosure and the 300 foot ban on liquor licenses was altered to allow for a waiver. Given the loss of the property, the court found that the church's claims for declaratory judgment and injunction were moot. However, the court went on to find that a the church could recover monetary damages for the cost of paying for two facilities over two years as RLUIPA allows parties to "retain appropriate relief from the government" including damages.

## II. STATEWIDE SUBSTANTIVE LAND USE STATUTES

### A. Measure 37/Measure 49

- Friends of Yamhill County, Inc. v. Board of Commissioners of Yamhill County, __ Or __ (October 2011, SC S058915). The appellant Gordon Cook obtained a Measure 37 waiver to divide his 38.8-acre property into 10 parcels and to develop dwellings on nine of them. After receiving preliminary subdivision approval from the county, Cook began developing his property including clearing, excavating, and grading. The day before Measure 49 became effective, Cook obtained final subdivision plat approval, recorded and was ready to begin constructing homes. At the time Measure 49 was referred to the voters, Cook spent $120,494.06 in development expenses. By the time it was effective, Cook had spent a total of $155,160.53. Originally, Cook planned to develop only "finished lots" at a total cost of $204,660.53 meaning that he would have expended 76% of the total development cost. Cook estimated that the cost of completing the proposed subdivision would be $871,158.54 meaning that at the time of Measure 49 enactment, Cook would have expended nearly 18% of the total project costs. Although the Friends of Yamhill County disputed the overall

project costs, the county and circuit court concluded that the Holmes factors were satisfied and Cook had established a vested right to complete construction.

Contrary to the Court of Appeals decision, the Oregon Supreme Court found that none of the Holmes factors were redundant. For example with regard to the good faith factor, the Court of Appeals erred in concluding that a provision in Measure 49 asking whether the claimant had a common law vested right "on the effective date of this 2007 Act" permits an inference that all expenditures made before that date were made in good faith. The Oregon Supreme Court concluded that the more appropriate and complete interpretation is that this phrase serves merely to identify the cut off date for calculating expenditures and expenditures made in bad faith before this date cannot be considered.

The Supreme Court agreed with the Court of Appeals that the county erred by failing to decide the ratio between the costs that Cook had incurred and the projected costs by failing to determine the cost of building homes. The county must make this determination keeping in mind Cook's state of mind as it relates to the good faith factor – originally intending to sell the lots for luxury homes as compared to Cook's modified plan explained during the legal proceedings to site manufactured homes. The court instructed that the county must evaluate what would constitute a "substantial expenditure" given the ultimate cost suggesting that the 6.6% expenditure that was sufficient in the Holmes case may not be the appropriate yardstick in every case. Short of stating the lack of a bright line rule, the court gave no further guidance.

Finally, the Supreme Court found that the county erred in concluding that the zoning scheme in 1970 did not preclude the use rather than focusing on whether the applicable zoning permitted the use. The case was remanded back to the circuit court for further proceedings.

***MANY OF THE FOLLOWING CASES WERE THE PROGENY OF THE COURT OF APPEALS DECISION IN FRIENDS OF YAMHILL COUNTY v. YAMHILL COUNTY. Therefore, those cases decided prior to October 2011 that refer to Friends of Yamhill County v. Yamhill County, 237 Or App 149 (2010) refer to the Court of Appeals decision. Cases below that were appealed to the Supreme Court will be considered with the Supreme Court's decision in Friends summarized above as precedent.***

- Friends of Polk County v. Oliver, 245 Or App 680 (September 2011). This case is an appeal of a circuit court decision holding that a Measure 49 claimant had a vested right to continue construction pursuant Measure 37 waivers she had obtained to develop her 137 acre parcel. The claimant planned to develop the property in phases, where the first phase was an approximately 30-acre subarea. Petitioners challenged the circuit courts conclusion arguing that the claimant did not have a vested right to complete construction of all the phases and that claimant did not have a vested right in continuing construction of Phase I. By December 6, 2007, the effective date of Measure 49, claimant claimed she had invested almost $2 million toward the completion of the entire development with the estimated cost of building phase one

was approximately $18 million. The Court agreed with Petitioners that the claimant had not presented sufficient evidence on the nature of the buildout of the 107-acre portion of the property and its costs to determine whether she had a vested right. As to the 30-acre Phase I portion of the property, the Court reviewed the expenditures submitted by the claimant in calculating a vested right and determined that it was appropriate in this case for legal fees related to a condemnation settlement with the county that would include expedited review of access to Phase I to be properly included in the expenditure analysis. The Court characterized these costs as being associated with the expenditures necessary to obtain an access permit. Therefore, the Court upheld the determination that the claimant has a vested right in Phase I of the development.

- Fischer v. Benton County, 244 Or App 166 (July 2011). The Fischer's appealed a circuit court ruling that affirmed Benton County's determination that they have a vested right to complete a subdivision of their property in compliance with waivers issued pursuant to Measure 37 but do not have a vested right to establish seven residential dwellings on the lots in that subdivision. This is another case deciding the scope of the denominator in the expenditure ratio analysis for a vested rights determination. The Court ruled that in calculating the expenditure ratio a cogent assessment of total project cost ) will, in turn, require particular identification of the development that the property owner sought to vest as of December 6, 2007 and that property owners must demonstrate the likely costs of completing the particular development sought to be vested based on construction costs as of December 6, 2007 (the date Measure 49 went into effect).

- Oregon Shores Conservation Coalition v. Clatsop County, 243 Or App 298 (June 2011). Petitioners appealed the county's decision finding that Gary and Beverly Aspmo obtained vested rights in their Measure 37 waivers to construct a 30–lot residential subdivision. Significantly, unlike in other cases that the Court has considered, the county planning director determined that, in calculating the vested right expenditure ratio, the cost of the residences must be included in the denominator. On appeal the County Commission agreed with the director's conclusion, and found that in determining the total project cost in this case, it could properly consider "a range of the potential total cost" of development. The County Commission then concluded that the Aspmos did not establish that their expenditures resulted in a vested right. However, in considering the separate Holmes factor regarding whether the expenditures could apply to various other uses of the land, the commission found no other adaptability because all the activities connected to development of the subdivision pursuant to the waivers. Based on the adaptability analysis, the county concluded the Aspmos had a vested right. The circuit court affirmed the county's findings and conclusions. Petitioners challenged both the county's consideration of the expenditure ratio and the adaptability finding. The Court ruled that in calculating the expenditure ratio the cost of building homes must be included in the denominator, and that cost must be the likely costs of completing the particular development sought to be vested based on construction costs as of December 6, 2007 (the date Measure 49 went into effect). Based on that ruling, the Court reversed the circuit court's decision and remanded on the adaptability question because it was unable to determine whether the circuit court reviewed the county's

finding concerning the adaptability factor for substantial evidence and, if it did, whether it applied the correct standard.

- DLCD v. Clatsop County, __ Or App __ (June 2011, A144073). Petitioners appealed the county's decision finding that James and Virginia Carlson obtained vested rights in their Measure 37 waivers to subdivide their approximately 76-acre parcel into 43 parcels and to place a dwelling on each parcel. The Carlsons subsequently applied for preliminary plat approval for a 31-lot subdivision. Significantly, unlike in other cases that the Court has considered, the county planning director determined that, in calculating the vested right expenditure ratio, the cost of residences must be included in the denominator. However, on appeal the County Commission disagreed with the director's conclusion, and found that the cost of residences should not be included in the denominator. In the alternative, the County Commission found that if the cost of residences should be included, the cost should be based on current market conditions. The Court ruled that in calculating the expenditure ratio the cost of building homes must be included in the denominator, and that cost must be the likely costs of completing the particular development sought to be vested based on construction costs as of December 6, 2007 (the date Measure 49 went into effect).

- DLCD v. Clatsop County, __ Or App __ (June 2011, A143964). Petitioners appealed the county's decision finding that George and Barbara Fraser obtained vested rights in their Measure 37 waivers to subdivide their approximately 32-acre parcel into 120 lots and to develop a dwelling on each lot. This is another case deciding the scope of the denominator in the expenditure ratio analysis for a vested rights determination. The Court ruled that in calculating the expenditure ratio the cost of building homes must be included in the denominator, and that cost must be the likely costs of completing the particular development sought to be vested based on construction costs as of December 6, 2007 (the date Measure 49 went into effect).

- DLCD v. Crook County, __ Or App __ (May 2011, A142004). DLCD appealed the county's determination that Shelley Hudspeth had a vested right to complete development of a 59-lot residential subdivision in compliance with her waivers issued pursuant to Ballot Measure 37. DLCD claimed the circuit court's decision was based on an inadequate consideration of the expenditure ratio factor (viz., the ratio of expenditures to total project costs). Hudspeth's application indicated that the total project budget was $5,081,946. That figure, however, did not include the cost of residences that would ultimately be constructed in the subdivision. Ultimately, the county adopted findings that Hudspeth had a vested right, did not need to provide for the cost of residences in the total project costs calculation, and even if she did the county could assume a minimum cost of $100,000 per residence. Based on its participation in the county process, DLCD filed this appeal. Hudspeth challenged DLCD's standing claiming that the department lacked statutory authority to participate in a proceeding concerning a vesting determination and to seek review of that determination. The Court concluded DLCD does have standing to challenge a vesting determination under ORS 197.090(2)(a) because the grant of a Measure 37 waiver was within DLCD's statutory authority. DLCD's challenges to the vested rights determination charged that the total project costs needed to include the cost of residential construction and that the county's alternative findings based on a

minimum residential construction cost of $100,000/unit was an assumption adopted by the County Commission but not based on evidence in the record. The Court concluded, as it did in Friends of Yamhill County, Biggerstaff, and Kleikamp, *infra* that the circuit court should have remanded for the county to determine the extent and general cost of the project to be vested and to give proper weight to the expenditure ratio factor in the totality of the circumstances.

- Damman v. Board of Commissioners of Yamhill County, 241 Or App 321 (March 2011). This is another case deciding the scope of the denominator in the expenditure ratio analysis for a vested rights determination. Petitioners appealed the county's decision finding that the McClures obtained vested rights in their Measure 37 waivers to subdivide one piece of property and to use an adjacent property for commercial development. The McClures began residential development of a portion of the properties subject to the Measure 37 waivers. They sought and obtained preliminary subdivision approval for a residential subdivision of 51 acres. The preliminary plat laid out 37 residential lots and two open space tracts. The McClures planned to develop the remainder of the property with a winery and a retirement home. By December 6, 2007, the McClures had incurred $189,778 in expenditures for street and utility costs, and $416,087 in "soft costs" (planning, legal, engineering, and survey costs, costs of permits, and interest on borrowed money) toward development of the subdivision. In addition, the McClures executed a performance agreement and irrevocable letter of credit with the county. That agreement obligated the McClures to complete road and utility improvements for the subdivision property, and to secure performance of that commitment with a $989,777 letter of credit from a bank. The Court ruled that in calculating the expenditure ratio the cost of the proposed development must be included in the denominator, and that the county's record did not adequately establish the cost. In addition, a letter of credit may qualify as an expense to be included in the numerator, but the county must consider this in the first instance.

- Burke v. DLCD, 241 Or App 658 (March 2011). The issue in this appeal is the meaning of "owner" for purposes of Measure 49. Specifically at issue is whether the seller under a recorded land sale contract that is in force is, in addition to the purchaser, a qualifying "owner," as defined in ORS 195.300(18). Plaintiff Burke, the land sale contract seller, acquired title to the subject property in 1967, before the adoption of comprehensive statewide planning goals and land use regulations. Plaintiff Educative, LLC (Educative) is the successor to the purchaser's interest in the contract under which Burke sold the property in March 2005, after the adoption of those goals and regulations. Plaintiffs argued that, because the categories of owners described in the three paragraphs of subsection (18) are set apart by the disjunctive "or," to be an owner a claimant need satisfy only one of those three categories. Plaintiffs then reasoned, that Burke, the fee title holder of the property, is an owner under paragraph (18)(a), and Educative, the purchaser under a recorded land sale contract that is in force, is also an owner under paragraph (18)(b). To reinforce their argument, plaintiffs also noted that, under ORS 195.300(18)(b), only a purchaser with a recorded interest qualifies as an owner. Because every property must have an owner, plaintiffs reasoned that the fee title holder under ORS 195.300(18)(a) must also necessarily be an owner in such a circumstance. Plaintiffs claimed it made little

sense for the happenstance of a recorded purchaser's interest to automatically disqualify the fee title holder as an owner under paragraph (18)(a), when an unrecorded purchaser's interest would not have such an effect. Finally, plaintiffs argued that, because Educative had not fully performed its obligations under the land sale contract, Burke still holds title to the property and thus remained an owner as a matter of real property law. The Court disagreed. It concluded that the term "owner" has no fixed meaning in real property law and is instead governed by the text, context, and legislative history surrounding its use in a given statute. Therefore, the Court analyzed the voters intent on using the term "owner" in Measure 49 and determined that only a single person or entity can be considered the owner for purposes of Measure 49 because plaintiffs interpretation would change the "or" in ORS 197.300(18) to an "and." The Court noted that it would be ironic, indeed, if the voters had intended for the choice of a land sale security device—that is, a land sale contract as opposed to a purchase money mortgage or trust deed (where title passes to the buyer on closing)—to result in the protection of some, but, not other, secured land sellers who are otherwise identically situated for purposes of Measure 49. Based on the Court's examination of the text and context of ORS 195.300(18), it concluded that the purchaser under a land sale contract that is in force, not the seller, is the owner of the subject real property for purposes of a qualifying Measure 49 claim.

## B. Needed Housing

- Rudel v. City of Bandon, ____ Or LUBA ____ (Oct. 2011, LUBA No. 2011-032). A local code definition of "foredune," describing the "lee or reverse slope" as part of the foredune and that "the foredune extends easterly from the top surface of the dune to the point where the slope reaches its lowest elevation and the ground becomes relatively flat or horizontal" is sufficiently clear and objective to satisfy ORS 197.307(6). Although petitioners focused on the "relatively" language, LUBA held that pursuant to *Homebuilders v. City of Eugene*, determining whether land is sloped involves little subjectivity or value laden judgment.

  Further, such an interpretation as part of a conditional use permit does not trigger an obligation to evaluate the adequacy of the commercial, industrial and residential lands adequacy under Goals 9 and 10. Such an obligation is only imposed in cases involving a comprehensive plan or land use regulation amendment that is subject to the goals.

  Petitioners also argued that the city's expansive interpretation of the term "foredune" is inconsistent with the Goal 18 definition of "foredune," because it includes the lower slopes of a sloping land form that cannot accurately be described as part of the "ridge" and does not act as a "barrier" to storm waves. DLCD argued and LUBA agreed that the Goal definitions of "dune" and "foredune, active" are not so limited and could include its entire lee, reverse slope or backside. Moreover, the city may regulate dune and foredunes more restrictively than the minimum set by Goal 18, so long as the regulation does not conflict with any administrative rule or statutory requirement. Petitioners' argument that allowing the term "dune" to include the bottom side of a slope would conflict with Goal provisions regulating "interdune areas" or "deflation plains" that occurs at the bottom of the reverse slope of a

foredune. LUBA disagreed that there can be no overlap between the various Goal 18 landform categories and depending where one landform ends and another begins may depend on which landform is more restrictively regulated.

## III. STATEWIDE PLANNING GOALS

### A. Goal 3 - Agricultural Lands/EFU Zones

- Green v. Douglas County, __ Or LUBA __ (April 2011, LUBA No. 2010-106), 245 Or App 430 (September, 2011). Petitioners challenged an approval of a conditional use permit to expand an existing home occupation to host additional weddings and events on lands zoned EFU. ORS 215.448(1) authorizes home occupations that are "operated substantially in the dwelling or other buildings normally associated with uses permitted in the zone…." Petitioners argued that activities conducted under a gazebo or pavilion does not qualify as "in a building" and that the event occurs "substantially" indoors. Focusing on the county's definition of "building" and "structure" coupled with the purpose for limiting home occupations, LUBA found that use of the term "in" suggested that the legislature intended that qualifying structures be enclosed in order to reduce the impacts and externalities of the home occupations. As long as a large or the main portion of the home occupation is carried out inside a dwelling or building, the home occupation complies with ORS 215.448. On appeal the court found LUBA's interpretation of the term "building" was incorrect and determined that "building" should be interpreted by the instruction in the statute itself – e.g. whether it is "normally associated with uses permitted in the zone in which the property is located." Therefore, if gazebos and pavilions are normally associated with farm dwellings or other agricultural uses permitted by the applicable zoning district, then they are the type of buildings for housing a home occupation under ORS 215.448(1).

  LUBA went on to find that that the requirement that the home occupation be "operated by a resident or employee of a resident" with less than five employees is not satisfied when caterers, parking attendants, bartenders, florists, and photographers, or other agents of the persons letting the facility are sufficiently similar to employees to violate the limitation.

  Petitioners also argued the county could not issue the amended permit because of past violations given local code provision prohibiting further development until all violations are rectified. The court held that the county's interpretation of the local rule, and LUBA's affirming the same, was not a sufficient interpretation because it did not identify and explain in writing the county's understanding of the meaning of the local legislation. The county's bare conclusion that the ordinance provision was immaterial spoke to the scope of the provision but not its meaning. Although the county claimed that it had made an "implicit" interpretation of the ordinance, the court disagreed because an implicit interpretation can occur when the ordinance could have only one possible meaning. But here, the county's application of the local ordinance did not have that quality because there were a number of ways that the provision could apply to the conditional use permit conditions. The county's reasoning for arriving at its interpretation of the ordinance was not clear from the

findings. Therefore, the county was owed no deference in its interpretation. The case was remanded.

- Central Oregon Landwatch v. Deschutes County, __ Or LUBA __ (December 2010, LUBA No. 2010-042). Petitioner appeals a county decision that approves a Transportation System Plan (TSP) map amendment and an exception to Goal 3 to authorize a new county arterial across rural EFU zoned property. When approving an exception to permit construction of a transportation facility on rural agricultural land, OAR 660-012-0070(4) requires that a county identify reasons that justify not applying state policies that require preservation of farm land for farm use and a demonstration that the exception is required to satisfy a transportation need that is identified in the county's TSP and cannot be accommodated through measures that do not require an exception. Petitioner argued that the county's findings regarding OAR 660-012-0070(4) were inadequate and not supported by substantial evidence. LUBA found that none of the transportation needs identified by the county were contained in the county's TSP. The county attempted to rely on a need found in the City of Redmond's TSP, but LUBA would not allow such reliance until the county amended its own TSP with an adequate factual base to justify extending the road in question. LUBA further ruled that since the TSP does not identify the extension as a transportation need, the county violated Goal 2's requirement that the TSP remain internally consistent. LUBA also ruled that the county's alternatives analyses to look at whether under, OAR 660-012-0070(4), the transportation need cannot reasonably be accommodated though one or a combination of the following not requiring an exception: a) alternative modes of transportation; b) traffic management measures; and c) improvement to existing transportation facilities; or that under OAR 660-012-0070(5) considering alternative locations not requiring an exception were inadequate. Since the decision would be remanded and it appeared the county did not understand how the rules are to be applied, LUBA provided guidance. Further, the county's findings did not provide reasons justifying the exception. In addition, LUBA ruled that the county's decision did not expressly address whether the proposed street extension would cause a connecting road to operate below the minimum acceptable performance standard identified in the county's TSP. The decision was remanded.

- Waste Not of Yamhill County v. Yamhill County, __ Or App __ (December 2010, No. A146170). Petitioners appealed a decision by the county approving a comprehensive plan amendment, a zone change, and an exception to Goal 3 to allow expansion of the Riverbend Landfill. Petitioners had a number of concerns with the proposed expansion of the landfill, but LUBA chose to focus on a single issue – whether the county's decision to take an exception to the land use Goals is even possible when landfills are allowed on Goal 3 protected lands. LUBA concluded that, because Goal 3 expressly allows landfills in farm land, no exception is possible. In this case, the county comprehensive plan and land use regulations disallow landfills on EFU zoned lands. LUBA reversed the county's approval relying on DLCD v. Yamhill County, 183 Or App 556 (2002) where the Court of Appeals held that reasons exceptions are not available if the Goal allows a use. LUBA concluded that Goal 3 enables the county to adopt a comprehensive plan that enables the construction of landfills on EFU land. The county's choice not to include landfills in its comprehensive plan does not allow the Goal exception process as a way around

the comprehensive plan. Neither the county, nor LUBA made any mention of ORS 197.732(3)(a) authorizing DLCD to adopt rules to allowing exceptions to uses otherwise allowed by the goals.

The applicant and county appealed this decision arguing that LUBA erred in relying on DLCD v. Yamhill County because House Bill 2438 passed in 2005 overruled the appellate court case. In response, Waste Not argued that the applicant and county failed to preserve this argument before LUBA. The Court affirmed LUBA's opinion finding that the Goal exceptions process does not allow the county to take an exception to its own comprehensive plan provisions. In addressing the applicant's contention that House Bill 2438 overruled DLCD v. Yamhill County, the Court ruled that the applicant had not preserved this argument before LUBA. The Court found that moreover, the county did not expressly take an exception to allow a landfill on high-value farmland, and concluded that LUBA cannot be faulted in failing to affirm an action not taken. It may very well be that the applicant's intended use, expansion of a landfill on agricultural land, is a use precluded by Goal 3. The goal inhibits nonfarm uses on agricultural land that are not "defined by commission rule." OAR 660-033-0120 disallows landfill expansions on "high-value farmland" unless the expansion is of an "[e]xisting facility wholly within a farm use zone." The existing landfill is not within a farm use zone. The county, however, did not take an exception to allow a landfill on high-value farmland; the exception findings do not even identify the soil characteristics of the three exception tracts.

- Linn County Farm Bureau v. Linn County, __ Or LUBA __ (June 2010, LUBA No. 2010-006) and after remand to Linn County __ Or LUBA __ (May 2011, LUBA No. 2011-001). Linn County's Parks and Recreation Department proposed a state park on a 175 acre agricultural parcel. The proposed park called for low intensity day uses like trails and picnic tables as well as high intensity uses like a 196-space RV park with individual hook ups and other supportive infrastructure. Petitioners challenged the high intensity uses by arguing that the county was required to take a Goal 3 exception to allow the RV Park. Although the state park planning rules (OAR 660-034-0035 and 0040) allow local parks on agricultural land, LUBA found that such allowance is only for low intensity uses if the county has not undergone the rigorous master park planning process. LUBA remanded for the County to modify the plan to avoid intense uses or to take a Goal 3 exception.

  On remand, the RV Park proposal was modified to remove individual septic hookups to individual RV camp sites. The new proposal would meet septic disposal needs for campers via central restrooms and RV dump stations. Petitioners appealed arguing the septic disposal system was still of such an intensity that a Goal 3 exception was required. LUBA validated the county's finding that the infrastructure for the centralized septic system is significantly less than that needed for individual septic hookups. LUBA noted the lack of direction provided by LCDC in interpreting OAR 660-034-0035 and 0040. In light of the lack of interpretive guidance, LUBA affirmed the County's approval finding the new septic system reduced the intensity of the use and ruled that a Goal 3 exception was no longer required.

## B. Goal 4 - Forest Lands

- Central Oregon Landwatch v. Jefferson County, __ Or LUBA __ (January 2011, LUBA Nos. 2010-080, 083, 084). Petitioners challenged the county's approval of 15 cabins on a 56.7 acre parcel and authorization to construct 15 accessory structures up to 200 square feet, claiming that the development does not qualify as "private accommodations for fishing" allowed as a conditional use on forest lands under state and local law. State regulations at OAR 660-006-0025(4) sets out the conditional uses that are allowed in a forest zone subject to standards at OAR 660-006-0024(5). In relevant part, private accommodations for fishing must consist of no more than 15 guest rooms, occupied temporarily for the purpose of fishing, during authorized fishing seasons, and accommodations must be located no more than one-quarter mile from fish-bearing Class I waters. Based on legislative history presented by the petitioners, LUBA found that private accommodations for fishing were intended to be relatively modest and limited-scale uses to ensure compatibility with forestry operations. LUBA ruled that the cabins constitute dwellings under state and local law because they include permanent provisions for living, sleeping, cooking and sanitation. That the dwellings may not be permanently occupied does not convert what are functionally 15 single family dwellings into 15 guest rooms. LUBA ruled that the 15 cabins do not constitute 15 guest rooms because the authorization is for a single fishing lodge with as many as 15 guest rooms. Although LUBA noted other structural variations might be possible, individual cabins are not what the legislature contemplated. Further, the county's approval violated the state law because it approved exclusive owner-occupancy of the 15 cabins instead of meeting the state law requirement to make the accommodations available to "guests." Further LUBA explained the term "guest" cannot be reasonably understood to include exclusive occupancy of a "room" by its owner. Rather LUBA ruled that the term "guest room" had to be given some effect by the county. Looking to the state law's allowance of temporary use, LUBA ruled that in similar situations LCDC has signified that temporary use of a campground site is limited to 30 days within any consecutive six-month period. Therefore, LUBA ruled here that fishing accommodations that provide any continuous occupation of a "guest room" for much longer than 30 days within a given period of time is likely to be inconsistent with the intended character of a "guest room" and the requirement that occupation be "temporary." As for the one-quarter mile limit, LUBA ruled that the relevant inquiry is to the entire lake, not only those portions of the lake within one-quarter mile of the accommodations. LUBA's decision reversed the county approval because the development proposed is not authorized in a forest zone and is prohibited as a matter of law.

## C. Goal 5 - Natural Resources, Scenic and Historic Areas, and Open Spaces

- Protect Grand Island Farms v. Yamhill County, __ Or LUBA __ (September 2011, LUBA No. 2011-035). Petitioners appealed a comprehensive plan amendment that added a 224.5 acre site to the county's inventory of significant mineral and aggregate resource sites under Goal 5. Petitioners claimed that the county's conclusion that the site contained significant aggregate resources was not based on substantial evidence. Thereafter a battle of the geologic experts ensued. LUBA found that the property owner had provided expert geologic information that the site contained ten times the

minimum amount of aggregate needed to meet the "significance" threshold under state law. LUBA further found that petitioners did not point to anything in the Goal 5 rule or elsewhere to support its argument that any particular standards govern the method of obtaining samples to base estimates on the amount of aggregate needed to determine significance. Petitioners also challenged the county's decision based on an argument that even if the site is found to be significant, if more than 35% of the proposed mining area is made of Class II or of a combination of Class I and II soil, the site is not significant under state law. All of the soils on the proposed site are Class II soils. In that circumstance, in Yamhill County under OAR 660-023-0180(3)(d)(B)(ii), the aggregate resource is not significant unless the "average thickness of the aggregate layer within the mining area exceeds 25 feet." The site has two layers of sand and gravel separated by a layer of clay. The county concluded that nothing in the language of the rule precludes it from considering aggregate that is located beneath the clay in determining the "thickness of the aggregate layer." Petitioners challenged this conclusion by arguing that, as a matter of law, only the aggregate layer found closest to the surface of the mining area can be considered to determine the thickness. However, LUBA agreed with the county's interpretation because it is not inconsistent with the text or purpose of the rule to consider the intervening clay layer to constitute "overburden" for purposes of mining the lower aggregate deposit as proposed.

## D. Goal 9 - Economic Development

- Gunderson, LLC v. City of Portland, __ Or LUBA __ (January 2011, LUBA No. 2010-039, 2010-040, and 2010-041). Petitioners appealed a decision by the city to adopt amendments to the city's comprehensive plan text and maps and the city's zoning code text and maps. The city adopted the North Reach River Plan (NRRP), placing a River Environmental (RE) overlay along riverfront properties on a 12-mile stretch of the Willamette River from the Broadway Bridge to the Willamette River's confluence with the Columbia River. Petitioners challenged one possible choice of mitigation in the RE zone that would require property owners to dedicate 15% of the site to on-site vegetation. Petitioners claimed the 15% requirement would reduce the availability of land for industrial development in contravention to Goal 9. The City's alternative to the 15% dedication was payment of a fee in lieu of dedication; however, the fee would be used to purchase land in the RE overlay, which would also run afoul of the same prohibition on reduction of available industrial land under Goal 9. In addition, the redesignation of a 42-acre site from Industrial Sanctuary to Mixed Use Employment similarly violated the prohibition. Any reduction of industrial land must be quantified and not reduce the inventory of industrial lands below that acknowledged as necessary in the city's plan. LUBA agreed and found that the city had not even quantified the supply of industrial land necessary to meet Goal 9 requirements and the city could not take a position that the NRRP will not impact the industrial land supply. The city only had a draft economic opportunities analysis (EOA) discussing industrial land supply in the record because the city had not yet adopted the analysis as part of its comprehensive plan. Therefore, the EOA could not be relied on to support the conclusion that industrial land would be unaffected. Nonetheless, in an attempt to provide the city with a roadmap for future action LUBA then considered the Petitioners allegations that the 2009 draft EOA did not provide an

adequate factual base on which the city could base its decision. LUBA provided significant direction to the city on remand on shortfalls in the EOA that would require a remedy before Goal 9 compliance of the NRRP could be considered.

- 1000 Friends of Oregon v. Land Conservation and Development Commission (City of Woodburn), 237 Or App 213 (Sept. 2010). In a challenge to a decision by the City of Woodburn to expand its UGB to provide land for industrial uses, the court was asked whether including additional lands to provide "market choice" for industry violated Goals 9 and 14. Under Goal 9 implementing rules, OAR 660-009-0025 requires identification of the amount of land needed to accommodate industrial uses and also designation of those lands for industrial uses. In general, the total acreage of land designated must equal the total projected needs for each industrial use identified. Goal 14 contains a similar requirement that the UGB cannot contain more land than a locality needs for future urban growth. In this case, the City found, and LCDC agreed, that providing market choice for lands was part of a successful industrial development strategy and consistent with Goal 9. The court disagreed. First, it found that LCDC failed to articulate the perimeters or meaning of the term "market choice." "Given the variety of the industries that the city targeted and the diversity and multiplicity of the site that the city designated," LCDC had an obligation to explain the reasons that the degree of market choice employed was consistent with Goal 9. Second, LCDC failed to make any findings explaining why a UGB that includes more industrial land than will be developed during the planning period is consistent with Goal 14. The case was reversed and remanded to LCDC for further consideration.

## E. Goal 12 - Transportation Planning Rule

- Setniker v. Polk County, 244 Or App 618 (August 2011). CPM proposed a sand-and-gravel extraction and processing facility, as well as a cement and asphalt processing plant, on part of a parcel zoned exclusively for farm use. Petitioners, the Setnikers, own property adjacent to the parcel. The county approved the development and petitioners appealed to LUBA. LUBA remanded to the county. Both parties appealed. At issue were a few of the bases for remand - that the county failed to apply the county procedures and code standards applicable to the proposed comprehensive plan amendment and failed to demonstrate compliance with the Transportation Planning Rule.

  First, the Court ruled that LUBA correctly determined that the appropriate legal standards were the ones in effect when the county ruled on CPM's application and not those in effect when CPM originally submitted the application. The Court reviewed the interplay between the TPR and the goal-post rule. If the goal-post rule applied, then the degradation would be measured as of the end of the planning period that was in effect when CPM first submitted the application in 2001. That date was 2020. If the goal-post rule did not apply, then, because the county had adopted a new transportation system plan with a 2030 horizon, projected impacts would be measured as of that later date. The Court ruled that the goal-post rule does not apply to zone changes or permit applications that are consolidated with a comprehensive plan amendment. Therefore, the applicable planning horizon was 2030.

Second, the Court ruled that LUBA misinterpreted the TPR's mitigation requirements. At the time of CPM's application the intersection in question was operating adequately, but after the application the intersection would fail within the 2030 timeframe. Based on this significant fact, Petitioners' analysis of the TPR concluded that the county could not possibly achieve compliance with the TPR without imposing additional mitigation measures that would not only mitigate the effects of CPM's project, but would also mitigate the existing and projected failures that are independent of that project. The Court agreed that mitigations were required that take into the account projected failures independent of CPM's project based on the plain language of OAR 660-012-0060(1) and (2). Subsections (1) and (2)(e) require measures that ensure a facility's consistency with its function, capacity, and performance standards, that is, that ensure that the facility will not fail. Subsection (3) creates an exception: "Notwithstanding sections (1) and (2)," the local government does not have to require measures ensuring that the facility is in compliance with standards, etc., if the facility was already out of compliance when the application was filed, it would be out of compliance by the end of the planning period in the transportation system plan, and the amendment will itself mitigate its own adverse impact. Here, the exemption does not apply because the before project operation of the intersection is in compliance with the standards. Therefore, CPM must mitigate for projected failures of the intersection.

- Root v. Klamath County, ___ Or LUBA ___ (April 2011, LUBA No. 2010-079). As part of challenging a destination resort, petitioners alleged that the county erred by adopting a purely *pro forma* finding of significant affect and conditioned the approval to comply with the TPR when a destination resort is proposed. LUBA concluded that this approach (1) is inadequate to satisfy the TPR because the analysis of significant affect helps determine how much and (2) what kind of mitigation measures must be adopted to assure that allowed uses are consistent with the capacity of the transportation facilities. LUBA went on to say that even if the county had imposed a condition of approval prohibiting development of a destination resort until after the TPR was adopted, such a condition would not comply with the TPR. The determination of how to address significant effects may not be made subsequent to plan amendment approval. In footnote 15, LUBA offers a solution of imposing an overlay restricting development that must be removed through a subsequent PAPA process. This solution is problematic in the destination resort scenario as these maps may not be amended more frequently than every 30 months. Another solution LUBA identified is for LCDC to amend the TPR to identify circumstances where TPR deferral is acceptable.

- Willamette Oaks, LLC v. City of Eugene, __ Or LUBA ___ (March 2011, LUBA No. 2010-062). First, the City's approval included a trip cap recorded with the zone change so that traffic from proposed development would not exceed the maximum trips that the intersections can accommodate. Petitioner argued that the TPR requires consideration of an unmitigated traffic impact analysis. LUBA disagreed, finding that the traffic impacts from unconditional zoning need not be considered when conditioned zoning is proposed. Imposing the trip cap did not defer compliance with the TPR. Rather, the TPR is fully satisfied by the trip cap and any modification or

increase in the number of trips under the trip cap would require a new application. Second, Petitioner challenged a condition requiring the construction of a bridge without an amendment to the TSP to identify the bridge as planned for in the TSP. LUBA explained that if the decision required an improvement that was inconsistent with the TSP, it would be required to amend the TSP to make it consistent or would otherwise violate Goal 2. However, in this case, the TSP identified a hierarchy of transportation improvements and did not mention the bridge. Therefore, construction of the bridge is not inconsistent with the TSP and does not trigger a TSP amendment.

## F. Goal 14 - Urbanization

- 1000 Friends v. LCDC, 244 Or App 239 (July 2011). Petitioners appealed LCDC's approval of an expansion of the urban growth boundary (UGB) of the City of McMinnville in periodic review which redesignated previously rural lands for different types of urban uses. The primary issue in the case was the relationship between ORS 197.298, a statute that prioritizes the types of land that can be added to a UGB and the Goal 14 UGB factors. Based on projected growth, the city assessed its residential, industrial and other land needs for the next 20 years under ORS 197.296 and determined it needed to expand the UGB by 1,188 gross acres, including 890 buildable acres. Petitioners' appeal challenged the city's application of Goal 14 and ORS 197.298 alleging (1) the city did not apply the Goal 14 standards completely or consistently; and (2) the city ruled out some land for consideration by defining its land needs too particularly at the front end of the ORS 197.298 prioritization (for example, the City assessed land needed for use as a Neighborhood Activity Center (NAC) or for particularized residential land needs) in a way that less exception land was available for the city's particular needs and more agricultural land was included in the proposed UGB than otherwise would have been included had the city's needs been defined more generically (such as high, medium or low density residential needs which are required to be inventoried by "type and density range" under ORS 197.296(3)) and "buildable" under ORS 197.295(1). Standards for commercial and industrial land needs are provided under Goal 9 as well.

  The Court analyzed the process for categorizing land needs that arise from periodic review for purposes of the application of ORS 197.298 to large-scale expansion of a UGB. The first step is to determine how much land is needed. That determination is made by the application of the two Goal 14 "need" factors – 1) demonstrated need to accommodate long-range urban population growth requirements consistent with LCDC goals; and 2) subcategorizing that needed land into housing, employment opportunities, and livability. In this case for example, the city's use of the defined qualities of a particular use, the NAC (e.g. size, location to downtown, and urban form) as a basis to rule out higher-priority land, failed to address separate types of land needs of its component uses. The proper first step is to determine the land needs of each land use, then examine the available land to determine if it is "inadequate to accommodate [each] amount of land needed." If there is insufficient land within the UGB, then those land needs must be satisfied in a UGB expansion under the priority system established under ORS 197.298.

The second step is to locate and justify the inclusion of land to fill that quantified need. Because ORS 197.298(1) states that the priority system is "in addition to any requirements established by rule addressing urbanization" (i.e., Goal 14 and its implementing rules), the court determined that the priority lands analysis must be done before either the application and balancing of the Goal 14 locational factors or the exceptions to the priority system under ORS 197.298(3). Thus, the priority system which placed prime resource lands as the lowest priority, may not be balanced with the Goal 14 locational factors at this step.

This step involves the application of both certain Goal 14's locational factors and ORS 197.298(3) to the candidate lands resulting from the first step. ORS 197.298(3) must be applied at this stage, given the statutory direction that the subsection applies to the candidate lands when "land of higher priority is * * * inadequate to accommodate the amount of land estimated in ORS 197.298(1)." However, before that application, the candidate lands under ORS 197.298(1) may be modified through the application of Goal 14 factors 5 ("Environmental, energy, economic and social consequences) and 7 (compatibility of the proposed urban uses with nearby agricultural activities), which parallel two Goal 2 exception standards that must be applied under Goal 14 (i.e., the consideration of environmental, energy, economic and social consequences and compatibility). Only after these factors and standards are applied are the remaining Goal 14 factors and ORS 197.298(3) applied.

On review of LCDC's analysis in this second step, the Court held that LCDC improperly applied ORS 197.298(1) in approving the city's resort to lower-priority land because of the relatively higher costs of providing a particular public facility or service to the higher-priority area. Further, LCDC's order did not explain why the failure of an exception area to accommodate the need for a NAC justifies its exclusion from the expansion area when lower-priority land is being added to accommodate a less specific need for residential land.

The third step involves a determination of which candidate lands to include under Goal 14, where Goal 14 is independently applied after land has been prioritized under ORS 197.298 as adequate to accommodate the identified need. This analysis works to make choices among land in the lowest rung of the priority scheme and to justify the inclusion of the entire set of lands selected under ORS 197.298. It is at this point in the analysis that cost efficiencies in the provision of public facilities and services become relevant (Goal 14 locational Factor 3 – provision of public facilities and services and Factor 4 – efficiency of land uses) along with the other Goal 14 locational factors.

Based on LCDCs errors in applying the first and second steps, the Court held that:

- The city need not consider a composite of urban services under ORS 197.298(3)(b), but must only consider those "urban services" that could be constrained "due to topographical or other physical constraints." "Urban facilities and services" under Goal 11 does not require consideration of water systems or roads and therefore inefficiencies in the provision of roads is not a sufficient basis to exclude an area.

- Incompatibility of a proposed residential use of an area with nearby industrial and institutional uses is a legitimate consideration in applying ORS 197.298(1).

- The application of ORS 197.298(1) requires more than the consideration of pedestrian circulation.

- LCDC's reliance on the city's findings that applied only Goal 14 locational factors to exclude some exception land was in error because it conflated the Step 3 analysis with the Step 1 and 2 analyses.

- In its findings, the City failed to evaluate whether a larger area with lower-class soils, could reasonably accommodate the city's identified need for residential land instead of the lower-priority land added for that purpose, as such an evaluation was necessary under ORS 197.298(1).

- LCDC erred in not dealing with petitioner's contention that the city's findings were insufficient under ORS 197.298(1) because the city did not address whether the consequences and compatibility concerns about bringing additional tax lots into the boundary should have been mitigated by including a differently configured area. That determination was necessary to LCDC's conclusion that the city's findings demonstrated compliance with the statute.

- LCDC erred in not requiring additional findings on Goal 14, Factor 7 (compatibility of proposed urban uses with agricultural lands). The Factor 7 findings were inadequate to exclude some land from consideration because they were not sufficiently descriptive of nearby agricultural uses to allow comparison among the candidate sites and were inaccurate as to the redrawn boundaries of the resource areas.

Thus, the Court remanded the matter to LCDC.

## G. Goal 15 - Willamette River Greenway

- Gunderson , LLC v. City of Portland, 243 Or App 612 (June 2011). Petitioners, several industrial property owners along the Willamette River in Portland, appealed LUBA's decision regarding Goal 15 (see Goal 9 heading for LUBA case summary). In part, Goal 15 requires state and local governments to protect, conserve, enhance and maintain the natural, scenic, historical, agricultural, economic and recreational qualities of lands along the Willamette River. Further any intensification of uses, change in uses or developments must be consistent with the Willamette Greenway Statute and Goal 15. Goal 15 requires inventories and data be collected on the nature and extent of resources, uses and rights associated directly with the Willamette River Greenway. Goal 15's inventory requires data gathering for lands currently committed to industrial, commercial and residential uses. The Court held that LUBA erred in characterizing petitioners' Goal 15 arguments below as solely relating to the city's attempt to make boundary amendments when the city adopted the North Reach River Plan (NRRP) because petitioners expressly argued that an inventory was necessary to determine compliance within the Greenway boundaries, independent of the boundary

amendments. Therefore, the case was remanded to LUBA to address the adequacy of the city's Goal 15 inventory. Petitioners also argued that the NRRP violated the Goal 15 requirement that "lands committed to urban uses within the Greenway shall be permitted to continue as urban uses" and that Goal 15 protects existing urban uses within the Greenway from more restrictive local regulation. As to those contentions that Goal 15 operates to implicitly prohibit local governments from imposing regulations on existing uses in the absence of a "change of use" or "intensification," the court was not persuaded because petitioners had no statutory support for the claim. Rather what petitioners would have to demonstrate under Goal 15 is that the NRRP will permit urban uses, as the Goal states, "to continue as urban uses."

### H. Goal 18 - Beaches and Dunes

- See Rudel v. City of Bandon, ____ Or LUBA ____ (Oct. 2011, LUBA No. 2011-032) above.

## IV. PLAN AMENDMENTS / ZONE CHANGE

- Hawksworth v. City of Roseburg, __ Or LUBA __ (September 2011, LUBA No. 2011-033). Petitioner appealed an ordinance that amended the city's urban growth boundary (UGB) to include a 4.45 acre parcel and to apply the city's low density residential comprehensive plan map designation to that property. LUBA considered whether the city could base the plan amendment on population projections and a buildable lands inventory (BLI) that had not been adopted as part of the city's comprehensive plan. Goal 14 requires UGB amendments be based on demonstrated need and its implementing regulations require such amendments to be consistent with a coordinated 20-year population forecast. The city did not rely solely on population projections and the inventory of land needs in the city's 1982 acknowledged comprehensive plan. The city found that the population had grown in the city over the last 20 year. But even if it were reasonable to surmise that the city no long has a 20-year supply of buildable land because the UGB the city adopted almost 30 years ago included only a 20-year supply of buildable land at the time it was adopted and the UGB has not been significantly amended since it was adopted, the city may not approve this UGB amendment without first amending its comprehensive plan to include an updated 20-year population projection. LUBA remanded the city's adoption of the ordinance so that the city could adopt an updated population forecast and BLI before amending its UGB.

## V. TYPES OF PERMITS

### A. Destination Resorts

- Central Oregon Landwatch v. Deschutes County, __ Or App __ (A148199, August 2011). Petitioner appealed LUBA's final opinion that rejected petitioner's facial challenge to the validity of Deschutes County Ordinance 2010–024 that provides for the remapping of lands that are eligible for the siting of destination resorts. In 2010, the county adopted two ordinances. Ordinance 2010–024 amended the county comprehensive plan goals and policies concerning destination resorts. Ordinance

2010–025 adopted procedures the county would follow in remapping areas that are eligible for destination resort siting. Neither ordinance adopted any amendments to the county's acknowledged map of lands that are eligible for destination resorts. The ordinances alter the county standards and procedures by which that map may be amended in the future and allow mapping to be done in accordance with state law. The Court reviewed whether the ordinance contravenes the statutory scheme by allowing the 160–acre minimum site size criterion that applies to siting approval decisions under ORS 197.445(1) to be satisfied, by multiple ownerships, at least at the mapping stage under ORS 197.455. Petitioner claimed that only a single tract under single ownership could be considered as a mapped site for a destination resort under the statutory scheme. However, the Court concluded that no such limitation on ownership was mentioned in the statutory scheme. In particular the Court noted that state law requires the county to map sites, not tracts. Therefore, the single-ownership requirement for a tract in a part of the law could not be used to apply the single ownership requirement to a "site."

- Oregon Coast Alliance v. Curry County, __ Or LUBA __ (May 2011, LUBA No. 2011-006). Petitioners appealed a decision for a tentative master plan approval, tentative subdivision approval, and tentative subdivision plat approval for a destination resort that includes a golf course, lodge, equestrian center, and 175 lodging units and a land division into 11 lots – 10 residential and one large remainder lot. Petitioners argued that the county failed to properly delineate the coastal shoreland boundary on the property. The county's comprehensive plan instruction for delineating the shoreland is similar to the Goal 17 requirements and identifies the extent of coastal shorelands to include 1) lands which are directly affected by the hydraulic actions of a coastal water body, and 2) adjacent areas of geologic instability. The county adopted a shoreland boundary based on the applicant's expert submittal showing a narrow proposed shoreland boundary line. Based on this boundary line, the county found that none of applicant's property would be affected and Goal 17 did not apply to the proposal. The petitioners challenged the county's adopted shoreland boundary claiming it had misconstrued the applicable law in determining the boundary was based solely on those lands directly affected by hydraulic actions of coastal waters. LUBA agreed with petitioners and held that the county's designation should have started with the county's comprehensive plan coastal shorelands map. Although the map is small in scale, it does generally depict the shoreland boundary along most of the applicant's property as immediately adjacent and parallel to Highway 101, with discernible land areas westward of the dotted line in many places. On remand, the shoreland boundary would need to reflect both lands directly affected by hydraulic actions of coastal water and adjacent areas of geological instability. A geologic hazard analysis will be required.

  In addition, petitioners challenged the county's reliance on the applicant's economic benefit analysis that only looked at benefits but not possible negative economic impacts. The economic analysis requirement is governed by local code adoption of state law amendments to ORS 197.460. LUBA agreed with petitioners finding that an economic impacts analysis provided to comply with the ORS 197.460 requirement must evaluate both positive and negative economic impacts. But LUBA went on to explain that neither the local code nor state law supply a standard to apply in

approving or denying the proposed resort based on the economic impact analysis. Nonetheless, since the applicants provided supplemental information in response to petitioners concerns below, LUBA denied petitioners argument.

- Root v. Klamath County, __ Or LUBA __ (April 2011, LUBA No. 2010-079). Petitioners appealed a decision to amend its comprehensive plan and zoning map to apply a Destination Resort Overlay to approximately 90,000 acres. ORS 197.455(2) imposes a mapping requirement to determine which "tracts" may be suitable for the destination overlay. Petitioners argued that the county erred in failing to assess the eligibility of properties on the basis of "tracts." Although LUBA has said that if the area does not include any of the circumstances that would limit a resort overlay, the study evaluation need not focus on tracts, in this case there was evidence of sensitive big game habitat in close proximity to the lands proposed to be added to the map of eligible lands. The county's maps and list of properties contained insufficient detail to evaluate the properties as "tracts." Second, LUBA found that reliance on background inventories supporting a 1994 destination resort ordinance as support for designating this additional land when the 1994 ordinance was not contained in the record and are over 16 years old provided an inadequate factual base to support the county's decision.

  Petitioners also challenged a county finding that the destination resort would not affect an existing Goal 5 resource based on a previous ESEE determination allowing conflicting uses on lands near the proposed lands. LUBA agreed finding nothing in the record to suggest that the previous ESEE analysis considered the lands in question. The applicant's expert testimony is called into question by some of the maps triggering the need for a more detailed examination to explain her conclusions. LUBA also found that Goal 5 was not satisfied by an *ad hoc* listing of possible mitigation strategies identified by the expert to mitigate off-site impacts such as roads serving the destination resort.

- Central Oregon Landwatch v. Deschutes County, ___ Or LUBA ___ (March 2011, LUBA No. 2010-075 and -076). Petitioners challenged ordinances amending the county's plan and policies concerning destination resorts and a map amendment identified lands suitable for destination resort siting. LUBA found that ORS 197.455 imposes no tract minimum size standard for excluding lands from eligibility, and therefore multi-tract sites of 160 acres or more is not inconsistent with state law.

**B. Outdoor Mass Gatherings**

- Devereux v. Douglas County, __ Or LUBA __ (September 2011, LUBA No. 2011-059). Petitioners appealed a county decision granting a temporary use permit for a one-day outdoor concert to be held on land zoned exclusive farm use. LUBA dismissed the appeal because it lacks jurisdiction. LUBA can only hear cases that involve a land use decision. ORS 197.015 excludes from the definition of land use decision the authorization of an outdoor mass gathering defined in ORS 433.735. Under ORS 433.735 counties can adopt a different definition of outdoor mass gather and Douglas County has adopted a more expansive definition. Therefore, LUBA considered whether a decision authorizing an outdoor mass gathering under a county

definition adopted pursuant to ORS 433.735 constitutes the "authorization of an outdoor mass gathering as defined in ORS 433.735" for purposes of the exclusion to the definition of land use decision. In considering the statutory scheme as a whole and relevant legislative history, LUBA determined that the legislature intended to exclude outdoor mass gatherings authorized under a county definition from those land use decisions that are appealable to LUBA. Of particular significance to LUBA was that under ORS 433.767, county-defined outdoor mass gatherings are subject to the same ORS 433.750 procedures and standards as statutorily-defined outdoor mass gatherings. Thus, county-defined outdoor mass gatherings are necessarily subject to ORS 433.750(5) which provides an express and exclusive remedy of appeal to the circuit court. LUBA also found that subsequent amendment to ORS 197.015(10) and the outdoor mass gathering statute were consistent with this view. For example, one amendment added extended mass gatherings that continue in excess of 120 hours states and defines such gatherings as land use decisions subject to appeal to LUBA.

## C. Signs

- Onsite Advertising Services, LLC v. Washington County, __ Or LUBA __ (June 2011, LUBA No. 2010-113). Petitioner challenged county's denial of sign permit applications arguing that content based restrictions in one portion of the sign ordinance worked to preclude application of the size-based restrictions based on a reading of the severability clause to sever the entire sign code rather than excise only those portions of the sign code containing content based restrictions. LUBA, relying on Clear Channel Outdoor, Inc. v. City of Portland, 243 Or App 133, *infra*, noted that the "critical questions is whether and how the enacting body would have severed the unconstitutional law, had it been aware of the constitutional infirmity." Given that the county responded by passing a new sign ordinance excising content based restrictions but retaining the size based restrictions suggested an intent to keep the size restrictions in place. For this reason, the county's decision was affirmed.

- Clear Channel Outdoor Inc. v. City of Portland, 243 Or App 133 (May 2011). This case involved the constitutionality of the city's sign code. The disputed sign code provisions relate to the city's past attempts to regulate billboards and painted wall signs--as opposed to painted wall murals. Other questioned provisions limited the size of signs and contained adjustment criteria--that is, the standards for adjusting the requirements of the sign code. After an initial ruling by the circuit court that portions of the city's sign code were facially unconstitutional, the city adopted curative amendments to excise the declared illegality. As a result of the curative code amendments as well as the nature of the constitutional deficiency in the sign code, the circuit court subsequently refused to grant plaintiff's requested injunction. The court also refused to award damages and attorney fees to plaintiff. On appeal, plaintiff contended that, in light of unconstitutional provisions in the initial and the amended sign codes, the entire code was unenforceable. Therefore, according to plaintiff, it was entitled to injunctive relief directing the city to issue its permits. The Court of Appeals affirmed the circuit court's ruling finding that the unconstitutional portions of the sign code were severable and the remainder of the code could still be enforced. The court then considered the difficult task of which portion of the sign code to sever and found that because the City Council had previously adopted the unamended

versions of the definitions of "sign" and "painted wall decoration," it was able to conclude that the council would have wanted the definitions to revert back to their prior versions if the amendment itself was held to be unconstitutional. As a result of excising that amendment, the sign code in its unamended version contained a definition of sign and was still enforceable. The court also decided to excise the exemption from the sign code for painted wall decorations because only a small number of murals would be affected by the removal of the exemption which the court did not think would be unpalatable to the city.

The plaintiffs complained that the city failed to identify the ill effects of billboards and how the code would remedy those effects thereby violating its free speech rights. However, the court concluded that the sign code is a valid content neutral time, place and manner regulation. The court focused on the interest of the government served by the content-neutral permit and fee requirements (defraying the regulatory costs) and the reasonableness of those requirements, including the availability of alternative channels of communication. The court found that the purpose section of the sign code which focused on public and traffic safety, avoiding nuisances, and preventing signs from dominating the appearance of commercial and industrial areas, adequately explained the city's interest in regulating the size of signs. It further concluded that ample alternatives for communication were available to the plaintiff including the 499 nonconforming billboard structures continuing in operation and its ability to distribute its message in a variety of ways, including radio and television advertising. Thus, in its severed format, the sign code was enforceable and its content neutral application provided the city with ample means to deny plaintiffs sign permit applications.

- Karuk Tribe of California v. Tri-Met, 241 Or App 537 (March 2011). This case involved a request by a tribe to place an advertisement on Tri-Met buses addressing salmon restoration efforts. Tri-Met rejected the advertisement based on its advertising policy to accept only certain types of commercial advertisements and public service announcements for display. In particular, Tri-Met found the ad to contain "political campaign speech." The Court of Appeals concluded that Tri-Met's rejection of the advertisement was improper because Tri-Mets conclusion was based on the application of a policy that explicitly regulated expression based on its content and such regulation is impermissible under Article I, section 8 of the Oregon Constitution guaranteeing freedom of expression.

## D. Wind Turbines

- Mingo v. Morrow County, __ Or LUBA __ (June 2011, LUBA Nos. 2011-014, 2011-016, and 2011-017), LUBA considered the Department of Environmental Quality's (DEQ) noise control regulations in OAR chapter 340, division 35. The case involved Morrow County's conditional use approval for a wind energy facility in 2005 which required that the facility comply with DEQ's noise control regulations. The facility, Willow Creek Wind Energy Center, began operations in 2008. Before and after the center commenced operation, noise complaints were filed with the county. The planning department initiated a public process before the planning commission and a battle of the experts began regarding sound level increases at four properties near the facility. Ultimately, the County Court decided that the Williams' residence suffered

from excessive noise impacts, but none of the other three residences were affected. The parties appealed to LUBA. OAR 340-035-0035(1)(b)(B)(i) provides that wind facilities may not "increase the ambient statistical noise levels, L10 [six minutes in one hour] or L50 [30 minutes in one hour], by more that 10 dBA (decibels) in any one hour." For wind energy facilities, the allowable 10 dBA increase can be measured in two ways:

"The increase in ambient statistical noise levels is based on an assumed background L50 ambient noise level of 26 dBA or the actual ambient background level. The person owning the facility may conduct measurements to determine the actual ambient L10 and L50 background level." OAR 340-035-0035(1)(b)(B)(iii)(I).

In Mingo, LUBA was only concerned with the L50 ambient statistical noise level.* Under the OAR 340-035-0035(1)(b)(B)(iii)(III), the L50 ambient noise level with the wind turbines in use must not exceed 36 dBA (26 + 10), if the assumed background ambient noise level of 26 dBA is used. Alternatively, the rule explains that the ambient noise level with the wind turbines must not exceed the sum of 10 dBA and the actual L50 ambient level without the turbines.

One hurdle for LUBA in making its analysis was that the regulations were drafted and adopted by DEQ and the rule assumes that DEQ would administer and enforce the rule. However, since 1991 there has been no DEQ funding to administer and enforce the noise rule, and DEQ has not administered or enforced OAR chapter 340, division 35 for the past 20 years. Nonetheless, Morrow County incorporated and adopted OAR chapter 340, division 35 as its noise regulation, and administration and therefore, LUBA found that enforcement responsibilities fell to the county.

Mingo and others complained to the county that Invenergy, owner of the wind facility, was in violation of the noise regulation. In fashioning a remedy for the violation (and potential violations that could be found on remand), the question arose whether Invenergy had to elect to choose one method of measuring the L50 noise levels:

1) elect to apply the 36 dBA scale; or

2) measure the actual noise level and add 10 dBA.

According to the petitioners, Invenergy would have to choose one method for all testing. However, LUBA looked to the language of the rule and found no such limitation imposed. Instead LUBA found that Invenergy could use either the measured, actual background ambient noise level or the assumed 26 dBA background ambient noise level at individual measurement points when seeking approval for the proposal, and when required to prove that its operating facilities complies with the rule's requirement that the wind energy facility increase background ambient noise levels by no more than 10 dBA. On remand, the battle of the experts will continue.

LUBA did not address the inconsistency in OAR 340-035-0035(1)(b)(B)(i) and (iii)(I) switch from "L10 or L50" to "L10 and L50." However, LUBA did note that the L10 typically represents the loudest and shortest noise events occurring in the

environment, such as nearby car and truck pass-bys or aircraft flyovers. Since the L10 compliance was not challenged LUBA had no reason to resolve the language shift.

## E. Wineries

- Wilson v. Washington County, __ Or LUBA __ (May 2011, LUBA No. 2011-007). Petitioners appealed a decision by the county denying their application for Special Use Approval and Development Review to convert a residence to a winery. The hearings officer found that the driveway to the winery would be located on land zoned exclusive forest conservation (EFC), and wineries are not permitted in the EFC zone, therefore, the application could not be approved. LUBA agreed. LUBA found that its decision in Bowman Park v. City of Albany, 11 Or LUBA 197 (1984) holding that access as part of an industrial use could not be sited in a residential zone supported the hearings officer's conclusion. In addition, in Roth v. Jackson County, 38 Or LUBA 894 (2000) LUBA concluded that because the parcel on which the access to the winery would be located did not allow winery uses, the application could not be approved, explaining that a parcel providing access to a winery is an accessory use to the winery. LUBA distinguished Central Oregon Landwatch v. Deschutes County, 56 Or LUBA 280 (2008) from the current case because it involved a road extension located in a public right of way which could cross the boundaries of many zoning districts. Therefore, LUBA affirmed the county's decision.

## F. Aggregate Mining

- Tonquin Holdings, LLC v. Clackamas County, ___ Or LUBA ___, (Aug. 2011, LUBA No. 2011-026). In this case, LUBA considered challenges from both the mining company as well as the Friends of Rock Creek to a hearings officer's conditional use approval for a new surface mining operation on land zoned RRFF-5. Friends argued that the hearings officer failed to respond to expert criticism that the quarry would substantially impair the conservation uses of the surrounding properties by significantly diminishing the wildlife movement corridor. Although the hearings officer did adopt finding addressing the effects of mining portions of the wetlands and noise impacts to the nearby wildlife refuge, impacts to the wildlife corridors were not addressed. Friends went on to argue that the county failed to require compliance with the "Protection of Natural Features," a Development Standards portion of the local code, in addition to the "Special Use Requirements on Surface Mining." The hearings officer concluded that the additional development standards did not apply because: (1) mining is not construction; (2) mining is not on the list of activities subject to development standard review; and (3) the Special Use requirements entirely displace the development standards. First, with detailed explanation of the doctrine of the last antecedent, LUBA found that the purpose to "insure that natural features of the landscape, such a land forms, natural drainage ways, trees and wooded areas, are preserved as much as possible and protected *during construction*" does not limit the protection obligation to those uses that include "construction." LUBA rejected the hearings officer's plain meaning interpretation that "construction" means the "building of a structure." Second, LUBA disagreed with the hearings officer that mining is not a "commercial or industrial project because the "surface mining"

definition does not characterize the use and therefore does not trigger application of the development standards. Instead, LUBA looked to the definition of "industrial use" to include surface mining as the "processing primary, secondary of recycled materials into a product." Third, the hearings officer erred by entirely displacing the development standards because of the existence of the special use standards when the text of the regulations provides that the development standards may be "modified" with no findings as to where the two standards differed.

### G. Columbia River Crossing

- Weber Coastal Bells v. Metro, __ Or LUBA __ (October 2011, LUBA Nos. 2011-080, 081, 082, 083), *petition for review pending*. Of the 12 assignment of error presented by opponents to the Columbia River Crossing in this case, LUBA affirmed 11 of them. In its most significant ruling, LUBA found that approving a large proportion of highway improvements along with light rail did not violate a 1996 state statute adopted to authorize a light rail project. LUBA reasoned that the scope of the project under the statute includes "any highway improvements" that are described in the Draft or Final Environmental Impact Statement and these improvements need not be related, required by or connected to the siting of the rail line. LUBA agreed with Metro and other respondents that the highway improvements were "associated" with the light rail component in that it could not have been approved if it did not include a highway component as well.

  Where LUBA did remand, it found that Metro erred by relying on the 1996 statute to include within the project that area north of the north shore of Hayden Island and extending to the state boundary, an area that is outside the UGB, because the project boundaries are limited by the statute to those within a UGB. Unlike other land use decisions, the statute requires that LUBA affirm those portions of a Metro Council Land Use Final Order that it does not remand. Therefore, the project was affirmed but for the small portion which Metro has other means of incorporating into the project. All other argument relating to lack of detailed findings and substantial evidence regarding impacts to affected neighborhoods were rejected. This decision is appealable directly to the Supreme Court.

## VI. BOUNDARY CHANGES

- Weyerhaeuser Real Estate Development Company v. Polk County, __Or App __, (November 2011, A148925), __ Or LUBA __ (June 2011 LUBA No. 2011-022). Petitioner sought a series of property line adjustments for four lots that were created by a subdivision plat in 1911. In 1983, the county approved a partition plat creating three parcels; one of these parcels included the area occupied by the lots subject to the current lot line adjustment. The county denied the lot line adjustment request concluding that the 1983 partition had the effect of vacating the three lots and consolidating them. Petitioner argued that no process or action had been taken to eliminate the property lines created by the 1911 plat and per ORS 92.017, the lot lines remain until some action is taken. Petitioner's claimed that the only process for vacating lot lines was through ORS 92.205 to 92.245, which authorize local governments to review subdivisions and determine if they should be replatted.

LUBA rejected petitioner's arguments finding that there are multiple means, both statutory and at the local level, that lot lines can be vacated and a replat is one of them. Recording a new plat can have the legal effect of removing property lines and given that nothing indicated intent to retain the 1911 property lines, the county's decision was affirmed. The Court of Appeals affirmed because the statutes applicable at the time of the 1983 partition had the effect of vacating the previous lot lines. When the partition plat was approved and recorded by the county, the new legal descriptions of those parcels effectively replaced the lines of the previous units of land.

## VII. LOCAL GOVERNMENT PROCEDURES

### A. Permit and Appeal Fees

- Willamette Oaks, LLC v. City of Eugene, 245 Or App 47 (August 2011). Petitioner appealed a zone change and PUD decisions of the hearings officer paying an appeal fee in the amount of $16,229.48. It turned out that amount was $135.37 less than the actual appeal fee, which represented 50% of the application fee, and the petitioner paid the additional fee. Intervenor argued that the appeal must be dismissed because the appeal fee was less than required by the code. LUBA upheld the city's interpretation of its own code to find that nothing required dismissal for underpayment of an appeal fee and there was no notice in the code that failure to include the proper fee would result in dismissal.

  Although the Petitioners tried to object to the amount of the appeal fee, the Planning Commission refused to hear this testimony relying on a local code provision providing that review was on the record. Petitioner argued that the refusal to consider and redact arguments challenging the appeal fee was procedural error. The city responded that the Planning Commission lacked authority to waive the code requirement and allow the evidence or the authority to alter or reduce an appeal fee. Given LUBA's requirement that the initial burden rests on the fee challenger to demonstrate that the fee violates ORS 227.180(c), LUBA found that the local final decision maker must allow the fee challenger to submit argument and evidence challenging the fee. LUBA did not consider the merits of the Petitioner's challenge – whether the fee is based on the "actual or average cost" of processing the appeal. Chair Holston dissented; LUBA lacks jurisdiction to consider whether the appeal fee is excessive because the City's decision is a "fiscal decision."

  On appeal, the city argued the position presented in Chair Holston's dissent. The Court agreed that the City's decision was not subject to LUBA's jurisdiction and reversed LUBA's decision as to the resolution of the fee issue. The Court recounted its decision in Young v. Crook County, 224 Or App 1 (2008) – that, when local land use regulations give a party the opportunity to submit evidence to establish a prima facie case that an appeal fee violates ORS 227.180(1)(c), the party must take advantage of that opportunity in order for subsequent appellate review bodies to address the merits of the appeal fee challenge. In the case of the City of Eugene's code, no such opportunity is offered to submit evidence to establish a prima facie case that an appeal fee violates state law. Therefore, a challenge to the appeal fee is not

part of the land use decision and LUBA had no grounds to remand the decision to the county to consider a challenge to the appeal fee.

## B. Hearings

- Jones v. City of Grants Pass, ___ Or LUBA __ (Aug. 2011, LUBA No. 2011-013). During its final argument to the city council, the applicant's attorney seeking approval for a cell tower, asserted that a shorter tower, no lower than 65 feet tall would meet the applicant's service objectives but would not allow for collocation opportunities. During deliberations, after the record was closed, a motion to approval the shorter 65 foot tower failed. At that point, a councilor asked the applicant's attorney whether a 75-foot tower might allow for the location of an additional carrier. More discussion followed with a question by a councilor to city staff about how often the city receives application for cell towers. At that point, Petitioner objected requesting an opportunity to respond. The request was denied. After further deliberation, a motion to approve the 65-foot tower passed. Petitioner argued that the city erred in allowing intervenor and staff to testify and denying his right to respond. LUBA found that the testimony regarding the collocation opportunities on a 75-foot tower and the expected level of future applications was new evidence that required allowing other parties to respond. The assignment of error was sustained. Next, petitioner asserted that the council failed to comply with Robert's Rules of Order when the council voted on a motion that was identical to a motion that ha previously been made during the meeting and failed. LUBA found that because Robert's Rules was neither incorporated into the city's charter, the Code or any other provision of local or state law, the city had no obligation to comply with those rules.

## C. Conditions of Approval

- Willamette Oaks LLC, v. City of Eugene, ___ Or LUBA ___ (Aug. 2011, LUBA No. 2011-027). Petitioner challenged three approvals: (1) a modification of a previously approved tentative planned unit development, (2) a final planned unit development; and (3) a tentative subdivision approval. Petitioner argued, and LUBA agreed, that a requirement that the modification is consistent with the conditions cannot be satisfied by removing or modifying the conditions in the original approval. LUBA also agreed with petitioner that the findings were inadequate in failing to evaluate whether the change in use from residential to an assisted living facility as it results in an increase in the number of employees and visitors beyond that anticipated in the initial approval. Finally, re-attaching the same conditions of approval to the final PUD review that were contained in the tentative approval violated a requirement that the "final PUD conforms to the approved PUD plan and all conditions." The decision was remanded.

## D. Local Appeals

- Lang v. City of Ashland, __ Or LUBA __ (November 2011, LUBA No. 2011-067). Petitioner appealed the city's conditional use approval of for a live/work space. The city's code required that the appeal notice include an identification of the specific grounds for which the decision should be reversed or modified. The petitioner's

appeal simply stated that he was relying on the detailed written document he had submitted during the planning commission's review of the application. The City Council denied his appeal for failing to submit a notice of appeal that specified the grounds for appeal, finding that the code did not allow incorporation by reference to a document in the record as a method for specifying the grounds for appeal. LUBA affirmed the City Council's interpretation of the code to require that the notice of appeal must contain the grounds for reversal or modification on its face to ensure that the grounds for appeal are clearly stated because the city's interpretation was plausible under Siporen. LUBA also recognized appellate case holdings that where a land use regulation makes it clear that requirements to perfect a local appeal are mandatory, those requirements must be given effect and appeals may be dismissed where a local appellant deviates from a mandatory requirements.

**E. 120-Day Rule and Mandamus**

- Stewart v. City of Salem, 241 Or App 528 (March 2011). On December 2, 2008, Stewart, the realtor, responded to the city's notice that additional information was missing from a partition request, asking that the city deem his application complete. Two days later, the realtor submitted an alternative partition plan and asked that the city include it as another option as part of its review. The city responded with a letter telling realtor that he had until December 11 to ask the city to process the original application or to withdraw the original application and proceed with the revision. On December 8, the realtor left a voicemail with city staff asking that it process the original proposal. On April 1, 2009, the city had not yet issued a decision and on April 2, the realtor filed an alternative writ of mandamus under ORS 227.179(1). The City argued that the writ was premature as the 120 day limit did not expire until after April 7, 2009, which is 120 days from the date the realtor asked the city to proceed with review of the original application. The circuit court agreed with the city finding that the realtor must not have actually considered the application complete on December 2, 2008 since the second plan was filed two days later. The Court of Appeals reversed finding that the date an application is deemed complete sets a mandatory obligation requiring the city to take final action within 120 days. The Court acknowledges that ORS 227.178 does not contemplate situations where the applicant takes an action after the application is "deemed complete" that leaves the city in a position in which it is uncertain how to proceed, the decision suggests that so long as an applicant wishes to proceed with the original application , the original completion date remains in effect.

- Leathers Oil Company v. City of Newberg, ___ Or LUBA ___ (March 2011, LUBA No. 2010-093). Intervenor informed the City orally that it "waived" the 120-day deadline and the City took more than 365 days to issue its decision. Petitioners argued that this oral "waiver" was insufficient to extend the deadline and that pursuant to ORS 227.178(5), the City's failure to take action on the application within 365 voided the application. LUBA disagreed. LUBA explained that because ORS 227.178 allows for waiver of the 120-day deadline, such an obligation is voluntary and can waive the deadline entirely, even if such waiver occurs orally. LUBA also went on to find that ORS 227.178(5) does not specify what consequences flow from a written extension of the 120-day deadline and since this was a complete waiver case,

rather than a written extension case, LUBA found that nothing prohibits such a voluntary waiver.

## VIII. LUBA JURISDICTION, PROCEDURES AND RULES

### A. Jurisdiction

- Jacobsen v. City of Winston, __ Or LUBA __ (September 2011, LUBA No. 2010-074). Douglas County administers building permits for properties located within the city. The city planning director issued a decision approving a building permit for construction of a loading dock expansion at a bottling plant. The decision was then referred to the county building department. Petitioner appealed the city's decision. LUBA dismissed because it lacked jurisdiction under ORS 197.015(10)(b)(B) that provides that a land use decision does not include a decision by a local government that approves or denies a building permit issued under clear and objective land use standards. The city's form for the application required the city to determine whether the subject property was a lot of record. LUBA reviewed the city's code for lot of record determinations and found the standards to be clear and objective.

- Jones v. Douglas County, ____ Or LUBA ____ (April 2011, LUBA Nos. 2010-098, -099, - 100, -101, -102 and -103). In 1995, intervenor's owner in interest obtained a lot of record approval to construct a home. No notice of the application or decision was sent. The day after the approval was granted, the property was conveyed to intervenors. For every year thereafter intervenors filed and received a "Ministerial Decision Extension Request" extending the one year validity of the approval. During the year 1997, the county granted the request after the one-year approval period had expired. In 2010, intervenors returned to the area and began making improvements to construct their home. In the fall of 2010, petitioners claimed that they learned about the approval and filed LUBA appeals of the initial lot of record approval and a few but not all of the one-year extension approvals. Petitioners argued that the original approval and extensions were discretionary land use decisions and could be appealed, in some instances, 15 years later because "actual notice" was required under ORS 197.830(3)(a). The three year statute of ultimate repose set out in ORS 197.830(6)(b) does not apply in cases where notice was required but not provided allowing for a potentially endless appeal period. LUBA found that the 1995 approval did allow for the exercise of discretion and therefore, was a land use decision subject to LUBA jurisdiction. LUBA also reaffirmed its holding that under *Frymark v. Tillamook County,* the actual notice standard is not satisfied when petitioner's receive information from other sources or from conversations with government staff. Rather, it requires receipt of the actual notice of the decision or the decision itself. LUBA disagreed that the extension currently in place or the building permit obtained while the appeal was pending mooted the appeal. As for the extension approvals, LUBA found that pursuant to OAR 660-033-0140(3), a decision extending a permit decision on agricultural or forest land is not a land use decision and therefore the extension decisions were dismissed. HB 3166 passed in the 2011 legislative session provides for a 10-year outside limit on filing appeals in cases where notice was required but not provided.

- Bard v. Lane County, ___ Or LUBA ___ (February 2011, LUBA No. 2010-091). Petitioners appealed an administrative approval of an extension of a special use permit where the County had accepted a local appeal, a hearings officer dismissed the local appeal finding that the code does not authorize a local appeal and the board of county commissioners declined to allow an additional hearing. LUBA found that the petitioners' failure to appeal the administrative decision directly to LUBA was not fatal. When there is uncertainty about whether an appeal is available, the test is whether the local government will "provide an appeal" and if so, a challenger need not also directly seek review by LUBA. LUBA went on to find that where the initial permit becomes void if an extension is not secured, obtaining the extension is required in order to re-approve the permit. The decision was deemed a statutory land use decision because determining whether the applicant's delay in development was the result of "reasons for which the applicant was not responsible" required the exercise of discretion.

## B. Record

- Maguire v. Clackamas County, ___ Or LUBA ___ (Aug. 2011, LUBA No 2011-040). A CD that includes a miscellaneous collection of documents and materials submitted into the record as a CD does not need to include a separately listed table of contents because a list of internal exhibits to exhibits is not required. However, LUBA does not that best practices would be to include a written table of contents of the CD so that those who are unfamiliar with the CD can know of its contents.

- Sane, Orderly Development, Inc. v. Douglas County, __ Or LUBA __ (June 2011, LUBA No. 2011-011). Petitioners' objected claiming that the record did include an email message requesting that the six listed attachments be included in the record but copies of the attachments were not included. LUBA has held that items are "placed before" the decision maker if they are either consistent with local regulations or instructions governing submittal. The county had no policy on electronic filing of documents for the record. Based on the fact that other attachments to emails were included, LUBA could not explain why these attachments were excluded. Petitioners' objection was sustained.

## C. Final Opinions and Transfer to Circuit Court

- Devereaux v. Douglas County, ___ Or LUBA ____ (Oct. 2011, LUBA No. 2011-59). Petitioners filed a motion to transfer an appeal to circuit court more than 14 days from the date jurisdiction was challenged and several days after LUBA issued its final opinion and order dismissing the appeal. Although LUBA agreed that OAR 661-0100-0075(1) requiring that motions to transfer must be filed within 14 days from the date the Board's jurisdiction is challenged could be waived as it did not prejudice any parties' substantial rights, LUBA lacks the authority to modify or reconsider a final opinion once it is issued. The motion to transfer was denied.

## D. Attorney Fees / Cost Bills

- Oregon Coast Alliance v. City of Brookings, __ Or LUBA __ (September 2011, LUBA No. 2011-023). The intervenors moved for an award of attorney fees after Petitioners voluntarily dismissed their appeal. Petitioners brought an appeal to LUBA challenging the city's refusal to accept an appeal of a planning commission approval to the city council because petitioners would not pay the full deposit for the actual cost of appeal under the city code. After the record was transmitted to LUBA, the petitioners moved to take evidence not in the record regarding the city's actual or average cost of processing the appeal. LUBA denied the motion because the petitioners failed to demonstrate that the evidence to be elicited was necessary to resolve the limited legal issues raised by their appeal. Thereafter, petitioners sought voluntarily dismissal and LUBA dismissed. On appeal to LUBA the Intervenor claimed that all of the positions petitioners took in presenting the motion to take evidence failed to satisfy LUBA's low probable cause threshold, and therefore, they were entitled to attorney fees. However, LUBA disagreed because the intervenor had not demonstrated that all of the arguments the petitioners presented in support of their motion to take evidence fail to surmount the low probable cause threshold. LUBA found that there is no case law regarding "actual cost" appeal fee schemes and did not fault the attorney for taking the reasonable precaution of moving to take evidence of the actual costs of petitioners' local appeal, in case such evidence was ultimately found to be necessary to provide support for contemplated assignments of error on the merits of the appeal.

- J & G Holdings, LLC, v. Washington County, __ Or LUBA __ (June 2011, LUBA No. 2011-042). ORS 197.830(7)(a) and OAR 661-010-0050(3) requires that a motion to intervene include a filing fee of $100. These regulations do not authorize LUBA to refund intervenors' filing fee after it is deposited, even where petitioner dismisses the case one day later.

- Stewart v. City of Salem, 240 Or App 466 (January 2011) and on remand to LUBA __ Or LUBA __ (May 2011). LUBA denied a motion for attorney fees by petitioner who represented himself *pro se* orally and in writing before the Board. On appeal, petitioner argued that he was entitled to recover the cost of attorney fees expended in obtaining advice regarding the appeal even though the attorney never appeared at LUBA on the petitioner's behalf. The Court agreed with petitioner and reversed LUBA's decision finding that "attorney fees" means the reasonable value of legal services provided by an attorney that are related to the applicant's appeal. On remand to LUBA for consideration of the amount of attorney fees to award, all fees associated with prosecuting the appeal of the city's decision to LUBA were allowed. Allowable attorney fees included preparation for an appeal to LUBA after the city made a tentative oral decision denying the application, fees to review the petitioner's LUBA brief, and fees for the attorney to attend oral argument where he sat in the audience seating area. As to the latter, LUBA ruled that the manner in which petitioner employed his attorney's services for oral argument to LUBA is a matter between petitioner and his attorney regarding the scope of the attorney's services. LUBA found that petitioner's attorney did consult with petitioner at oral argument.

## IX. LUBA SCOPE OF REVIEW

### A. Local Code Interpretation

- Keep Keizer Livable v. City of Keizer, ___ Or LUBA ___ (Aug. 2011, LUBA No. 2011-043). In order to build a "larger format store" with the Keizer Station area, a master plan provision requires that the applicant also construct a certain amount of non-retail/ non-single-family development. This other development must "be constructed before or concurrently with the Larger Format Store." In approving this request, the city imposed a condition of approval requiring that before the occupancy permit for the retail store can issue: (1) that building permits for the mixed use development be applied for and issued; (2)a bond must be posted for completion of the mixed use development; and (3) grading and foundation work must be completed for the mixed use development. Petitioner argued that the city's interpretation was inconsistent with the plain language of the concurrency requirement. LUBA agreed that the only plausible interpretation of the whole text is that the required mixed use development must be "constructed" or "made into a composite whole" before or at the same time the retail store is completed. Board Member Holston filed a concurring opinion explaining that that standard does not require that both buildings be completed exactly at the same time and that a reasonable interpretation might allow the posting of a performance guarantee with a deadline for the city to act on it.

- JCK Enterprises, LLC v. City of Cottage Grove, __ Or LUBA __ (September 2011, LUBA Nos. 2011-045, 046, 047). Petitioners appealed the city's decision of three land use applications to facilitate development of two restaurants on two lots. The petitioners challenged the variance approval claiming that court and LUBA interpretations of "traditional" variance criteria limit variances to truly extraordinary circumstances. LUBA disagreed that the city's interpretation of its variance standards is constrained by long-standing judicial glosses of similar traditional variance standards because a governing body's interpretation of local variance standards is entitled to deference. LUBA then reviewed whether the city's interpretation of the local standards was plausible and thus entitled to deference. One of the variance standards that requires the city to consider whether "strict or literal interpretation or enforcement of the specified regulation [i.e. the prohibition on a street-side drive-through] would result in practical difficulty * * * inconsistent with the objectives of this Code." LUBA found the city erred because it did not consider the correct question. The city considered whether granting the variance to allow a street-side drive through is consistent with one or more of the code objectives. But the correct inquiry is whether enforcing the code prohibition on a street-side drive through would result in a practical difficulty inconsistent with the code objectives. LUBA remanded for additional findings on this criteria. LUBA also remanded the city's approve of the conditional use permits because the variance was remanded. In addition, the city's site design approval was remanded for an unexplained functional classification for a road that differed from the classification in the city's transportation system plan.

- Gravatt v. City of Portland, __ Or LUBA __ (January 2011, LUBA No. 2010-087). Petitioner appealed a city decision that approved a request to divide an existing lot into two parcels. One parcel would contain the existing residence on a total of 9,774

square feet and the second parcel would measure 11,459 square feet and applicant proposed to construct a new dwelling. The petitioner challenged the decision for failure to comply with the city's Landslide Hazard Area Approval criterion. The petitioner complained that the applicant was not locating the new dwelling on the safest part of the site. LUBA sided with the city's hearings officer and found that the city had given some affect to the requirement to locate buildings on the "safest part of the site," because the petitioners position would make it impossible and unworkable to create a large enough lot to meet minimum lot size if required to review the entire site for the absolute safest part of the site. Instead, the hearings officer's interpretation first reviewed the city's standard to establish that the risk of landslide on the site be reasonably limited and then find that the safest part of the site is the area where risk of landslide is shown to be reasonably limited. Therefore, the minimum lot size could be met and landslide risk avoided.

**B. Adequate Findings**

- Oberdorfer v. Deschutes County, __ Or LUBA __ (December 2010, LUBA No. 2010-055). Petitioners appeal a county decision approving a wireless telecommunication tower. Under state and county law, to locate a utility facility such as a telecommunication tower on agricultural land there must be a finding that it is "necessary" to site the facility on agricultural zoned land in order for service to be provided. In this case, AT&T provided evidence to support a necessity finding. Petitioners challenged the necessity finding as not supported by substantial evidence in the record claiming that AT&T's antennas could be sited on Petitioners' tower located on property nearby. LUBA found that the record contained conflicting evidence concerning the capacity of Petitioners existing tower nearby. Based on the conflicting evidence LUBA ruled that is was reasonable to conclude that the existing tower is not available for co-location of AT&T's antennas. LUBA affirmed the approval.