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Appellate Cases

Court Splits on "Adversity" Element in Prescriptive Easement Decision

The Oregon Court of Appeals decided a significant case on March 18, 2015. *Wels v. Hippe* involved a prescriptive easement. The *en banc* court split, with an eight-judge majority, a concurring opinion from two judges, and a lengthy dissent from five others. The issue was what constitutes "adversity" where the requested easement is part of jointly used and pre-existing roadways.

The facts were generally without dispute. Wels had owned three contiguous parcels since 1998 and acquired a fourth in 2006. Besides a cabin that Wels used recreationally, the parcels were undeveloped. The Hippes, a married couple, owned a 20-acre parcel where they had lived since 1973. Wels, the Hippes, and two additional neighbors, Larson and Woods, drove to their respective properties from Highway 62 via Busch Road and Lewis Creek Road. Lewis Creek Road, the only vehicular access to the Wels parcels, was constructed around 1934, of unknown origin. It crosses the Hippe property as an 18-foot wide dirt road, passing within 60 to 80 feet of the Hippes' house. In 2008, Wels applied for a building permit, and the county required "written confirmation" that Wels had a legal right to use Lewis Creek Road for access. Wels requested a written easement from the Hippes, and this lawsuit followed. The parties stipulated that Wels's use of Lewis Creek Road was "open and notorious," leaving to be determined whether the use was adverse as to the Hippes.

Majority Opinion

The holding in the majority opinion is grounded in elements for establishing adverse use set forth in the oft-cited Restatement (First) of Property, Section 458. Use is adverse "when it is (a) not made in subordination to him, and (b) wrongful, or may be made wrongful, as to him,

and (c) open and notorious." The Hippes conceded that Wels's use was "open and notorious." Citing the nature of Wels's use of the road, the majority also concluded that the "wrongful" sub-element was satisfied because the Hippes could "protect [themselves] by vindicating [their] rights through legal proceedings." Thus, the only sub-element examined by the majority was whether use of the road was not made in subordination to the Hippes.

The Hippes argued that the sole method for Wels to establish non-subordination would be the rebuttable presumption of adverse use arising from open and continuous use of the property for the prescribed period. They further argued that in the case of a pre-existing road of unknown origin, a presumption could be rebutted by showing that Wels's use of the road did not interfere with the Hippes' use. The Hippes cited *Woods v. Hart*, 254 Or. 434 (1969), *Trewin v. Hunter*, 271 Or. 245 (1975), and a number of court of appeals cases for the proposition that there is no adverse use where the road pre-exists the parties' respective ownership of the land, the plaintiff used the road with the defendant's knowledge, and the plaintiff's use did not interfere with defendant's use. These facts establish a friendly arrangement between neighbors, rather than an adverse use.

The majority rejected the defense argument, holding instead that the non-subordination sub-element could be proved either through (1) a rebuttable presumption of adverse use arising from open and continuous use for the prescribed period, or (2) through direct evidence that the plaintiff used the road under a claim of right. The majority further found that there was sufficient direct evidence to support use of the road under a claim of right, in the form of Wels's testimony that he *thought* he had a right to use the road and had, therefore, never asked the Hippes for permission. Because there was direct evidence that Wels used the road under a claim of right, the majority affirmed the trial court's refusal to consider whether the Hippes had rebutted the presumption of adverse use.

As an interesting aside, the majority declined to exercise discretion to take *de novo* review. Rather, the court was bound by the trial court's express and implied findings so long as each was supported by evidence.

Concurring Opinion

Judge Lagesen lodged a concurring opinion, noting that the outcome might have been different had the Hippes not conceded the "open and notorious" sub-element of adverse use. In the case of a pre-existing roadway of unknown origin, the servient owner is only on notice of adverse use if the neighbor's use interferes with the servient owner's use. The concurring opinion uses the "open and notorious" sub-element of adverse use to square the majority's opinion with the holdings in *Woods* and *Trewin*—cases in which non-interfering use of an existing road was found not to be adverse. The concurring opinion would find that a greater showing is necessary to satisfy the "open and notorious" sub-element in cases involving a pre-existing road of unknown origin.

Dissenting Opinion

Judge DeVore authored the dissenting opinion. The dissent recounts the facts and law as applied to pre-existing roads of unknown origin set forth in *Woods* and *Trewin*, then goes through the history of Oregon cases suggesting that cooperative use of a pre-existing road does not support the creation of a prescriptive easement. The dissent's over-riding concern is that the majority opinion creates a "subjective theory of adverseness," allowing a party's subjective belief of a "claim or right" to trump the presumption that cooperative use of a pre-existing road of unknown origin is insufficient to establish adverse use absent interference with the servient owner's use.

The dissent also disagreed that the Hippes had conceded the "open and notorious" sub-element, suggesting instead that they did not intend to concede the law as set forth in *Woods* and *Trewin*, which provided the backbone of the their case. Rather, the dissent suggests that prescriptive easement cases involving common use of a pre-existing road are fundamentally different. In those cases, the plaintiff must show that use interfered with the defendant's use to the point where the defendant is on notice of the adverse use.

The dissent would ultimately have reversed the trial court's ruling, finding that the facts could not establish adverse use. The dissent posited that in this case, Wels failed to prove "something more" that would establish his use of the pre-existing roadway as adverse. The dissent expressly rejected the proposition that a plaintiff's subjective belief could establish this "something more."

Commentary

This case simply adds to the confusion about the proof necessary to establish a prescriptive easement over a pre-existing roadway. Moreover, it highlights how this area of law is increasingly becoming a trap for practitioners. Here, by apparently conceding the "open and notorious" sub-element of adverse use, defense counsel opened the door to allow the trial court, the majority, and the concurring judges to allow a plaintiff's self-serving testimony of his unilateral and subjective belief to trump well-established Oregon law on how to prove adverse use of pre-existing roadway of unknown origin. The effect of the majority's opinion may be narrowed by focusing the defense on both the non-subordination and the "open and notorious" sub-elements of adverse use.

In addition, this case points up a distinction between prescriptive easement claims in general and those involving commonly used roads. However, the decision to be made by a practitioner becomes more difficult. Will the court apply the subjective test of claim of right as discussed by the majority? And if so, how would the defense rebut this claim? Finally, what is the "something more" that would be required by the dissent?

Under the court's ruling a practitioner must decide whether to proceed or defend a common road/prescriptive easement claim based on the "subjective" claim of right or the "something more" positions identified in this decision with no way of knowing how a future court might rule. This dilemma may be resolved by the Supreme Court (assuming a Petition for Review is accepted). In the absence of further decisions, it does seem appropriate that the legislature could and should approach this issue much as they previously did with adverse possession (see ORS 105.605-105.620). As a matter of public policy, when dealing with commonly used roads, should the law place a burden on the claimant ("something more"), or should the law maintain the status quo ("subjective claim of right")?

The final takeaway is that the litigation costs of this case, like most cases involving adverse possession and prescriptive easements, likely far exceed the value of the real property at issue. This serves to reinforce our duty as real estate practitioners to push our clients to resolve these cases quickly and efficiently without resorting to litigation. My first suggestion to a client who comes to me with an easement dispute is to buy a good bottle of Scotch and sit down with his or her neighbor to try to work the whole thing out.

Paul Trinchero and Alan Brickley
Wels v. Hippe, 269 Or. App. 785 (2015).

Oregon Real Estate and Land Use Digest

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Existing Goal Exceptions Do Not Always Authorize New Uses Without a New Goal Exception, and "And" Means "And"

> Editor's note: A summary of LUBA's order appeared in the most recent issue of the *RELU Digest*. The editor (not the author) mistakenly identified the property owner as Bruce Goldson, who was actually not the owner but a consultant. Petitioner's counsel, David Petersen, pointed out the error. In gratitude, we asked him to summarize the court of appeal's opinion, and he graciously agreed.

The property at issue in *Ooten v. Clackamas County* was designated Rural in the county's Comprehensive Plan pursuant to exceptions to Statewide Land Use Planning Goals 3 and 4 taken in 1980. In 2014, the county approved comprehensive plan and zoning amendments authorizing rural industrial uses on the property, and in doing so concluded that no new exceptions to Goals 3 and 4 were required.

Ooten appealed to LUBA, which remanded back to the county. In doing so, LUBA rejected the landowner's argument that the 1980 exceptions meant that Goals 3 and 4 no longer applied to the property. Instead, LUBA held that a goal exception only authorizes certain uses specifically authorized by the exception, and concluded that the record and the county's findings were insufficient to establish that the proposed plan amendment and zone change came within the scope of the 1980 exceptions.

The landowner appealed, and the court of appeals agreed with LUBA. First, the court concluded that a goal exception is not a categorical exemption from future application of the goal to the subject property in all circumstances. Instead, a goal exception only authorizes "uses, services, activities, densities and facilities" that are "recognized or justified by the applicable exception." OAR 660-004-0018 establishes the process for determining whether a new goal exception is required when changing the authorized use of exception land, but the county failed to apply that process and to develop an adequate factual basis for doing so.

The landowner also challenged LUBA's interpretation of OAR 660-004-0018(2), which lists four requirements that must be met before a change in use to exception land can be approved without a new goal exception. In 2011, LCDC had deleted the word "or" following the third requirement in the list, changing it to "and." The court of appeals declined the landowner's invitation to nonetheless read the word "and" to mean "or," which would mean that satisfaction of any one of the four requirements would be sufficient to justify proceeding without a new goal exception. Instead, the court agreed with LUBA that the list must be read in the conjunctive; that is, all four requirements must be met before the county could proceed without a new goal exception.

Ooten largely reaffirms the court's decision in *Doty v. Coos County*, 185 Or. App. 223 (2002), that goal exceptions do not provide blanket exemptions from applicability of the subject goals for all purposes and for all time. Instead, a local government changing land uses on land subject to a previous goal exception must apply OAR 660-004-0018 to determine whether or not a new goal exception is required. And, the word "and" will not be read to mean "or"—especially when the text has recently been changed from "or" to "and." The Conjunction Junction train hasn't left the station yet!

David J. Petersen
Ooten v. Clackamas County, 270 Or. App. 214 (2015).

The State's Property Interest in Wildlife

What's worse than coming home from deer hunting without a deer? Coming home from deer hunting without a deer *but* with a conviction for violating state hunting laws and committing second-degree criminal mischief. The Oregon Supreme Court recently addressed this scenario in *State v. Dickerson*. The case required the court to decide whether wild deer are "property of another" for purposes of Oregon's criminal mischief statute, ORS 164.354.

The Facts

A father and son were driving home after an unsuccessful day of deer hunting when the son spotted two deer. It was an hour and a half after sunset, which meant it was too late to shoot deer legally. But the father and son were undeterred. The father angled his truck toward the deer to illuminate them with the truck's headlights. The son jumped out of the truck and fired a shot at each deer, hitting them both. Unfortunately for the father and son, their success was short-lived because the "deer" were decoys set up by Oregon State Police. Two state troopers witnessed the entire scene, and the son admitted to shooting the decoys.

The Procedural History

A jury found the father guilty of attempting to take a wildlife decoy, use of unlawful hunting methods, and second-degree criminal mischief. He appealed only the conviction for second-degree criminal mischief, and the court of appeals affirmed.

The Supreme Court's Analysis

The supreme court started its analysis with the text of the criminal mischief statute, ORS 164.354(1)(b). Under that statute, a person commits second-degree criminal mischief if, "[h]aving no right to do so nor reasonable ground to believe the person has such right, the person intentionally damages property of another." The phrase "property of another" means "property in which anyone other than the actor has a legal or equitable interest that the actor has no right to defeat or impair, even though the actor may also have such an interest in the property." ORS 164.305(2). The state argued that wild deer are property of the state, which makes them "property of another." In contrast, the father argued that the state's sovereign interest in wild deer is "regulatory, not proprietary, in nature" and, as such, wild deer are not "property of another" for purposes of the criminal mischief statute. He also argued that "the legislature intended the phrase 'property of another,' as used in the criminal mischief statute, to refer to more common types of property interests, rather than an interest held by the state by virtue of its sovereignty."

The supreme court agreed with the state that "the state's sovereign interest in wild animals is in the nature of a 'legal * * * interest' within the meaning of ORS 164.305(2)." The court provided three primary reasons for reaching this conclusion. First, "the legislature has declared that '[w]ildlife is the property of the state.'" Second, "the state can obtain compensation for damages done to wildlife," which indicates that the state has a property interest in the wildlife. Third, "Oregon courts have long used the metaphor of a trust to describe the state's sovereign interest in wildlife."

The Case's Significance

The primary significance of this case is the court's rejection of the argument that the state's sovereign interest in property, such as wildlife, does not amount to a "legal or equitable interest" in property. The result in this case suggests the court may view the scope of the state's sovereign interest in property as being similar to (if not indistinguishable from) the scope of the state's interest in property acquired by the state in its proprietary capacity.

Kirk Maag

State v. Dickerson, 356 Or. 822 (2015).

Is Short-Term Rental a Residential Use? [1]

Our online world feeds the growth of owner-direct rentals, particularly for vacation property. Services like VRBO, Airbnb, Craigslist, a local web-based service named Vacasa, and even the back pages of our good-old paper *OSB Bar Bulletin* list dozens of short-term vacation homes for rent by owners. With this growth comes increasing friction from neighbors, traditional property managers, or others who object to the disruption of unmanaged guests or to the basic idea of short-term rentals. The issue is not new but seems to be driving new litigation. This note compares recent Washington cases with analogous caselaw in Oregon.

1 The authors thank LeAnne Bremer for her help with the case summaries in this article.

General CC&R "Residential Use"

In *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241 (2014), the Washington Supreme Court found short-term rental was not a prohibited "commercial use" and was even a protected right of unit owners that could not be limited by an HOA rule. The Chiwawa Communities Association is a planned residential community in Chelan County with a mix of permanent and vacation residents. As is typical of planned communities or subdivisions, the developers recorded covenants to govern the general plan of development. The covenants contain many detailed restrictions on the use of the lots within the community, but give the owners the power "to change these protective restrictions and covenants in whole or in part" by majority vote.

For years, residents rented their homes to unrelated persons on a short-term, for-profit basis until a number of residents became concerned about the proliferation of short-term rentals. As a result, a majority of the association voted to amend the covenants, barring all rentals of less than six months. Owners opposed to the amendments sued. Once the case reached the Washington Supreme Court, the court considered whether the prohibition on short-term rentals was consistent with the intent and purpose of the original covenants and the general plan for development.

The court initially analyzed whether the drafters had intended to permit vacation rentals without any durational limitation. If so, then the owners could not amend the covenants to prohibit them without creating a new covenant. Based on a lengthy analysis of the language of the covenants and the rules of contract interpretation, the court concluded that the original covenants permitted short-term rentals because they were a residential rather than a commercial use, even though the short-term residents paid rent.

The original covenants allowed the owners to "change" the covenants in whole or in part by majority vote, but the court read that provision to mean that the owners could change existing restrictions only as consistent with the general plan for the community. The court concluded that owners could not vote to add entirely new restrictions that were inconsistent with the general plan and that had no relation to existing covenants, unless there was unanimity. The reasoning of the court is that the rule protects "the reasonable, settled expectation of landowners by giving them the power to block 'new covenants which have no relation to existing ones' and deprive them of their property rights."

This issue can easily be avoided with precise drafting that gives owners the right to approve new restrictions by majority vote, if that is the desire of the covenant drafter. There may be cases, however, in which a developer wishes to limit the owners' ability to amend.

The Oregon Supreme Court reached a similar result in *Yogman v. Parrot*, 325 Or. 358 (1997). The use restriction in question read as follows: "All lots within said tract shall be used exclusively for residential purposes and no commercial enterprise shall be constructed or permitted on any of said property." The owners lived in Portland and rented the property on a short-term basis to vacationers. A neighbor who objected to this use of the property brought suit. The court reviewed the restriction and focused on the words "residential" and "commercial enterprise." First, finding that the term "residential" was not dispositive of the issue, the court moved on to the more critical discussion of "commercial enterprise." The court held the term, as used in the restriction, was ambiguous:

> If a "commercial enterprise" is any undertaking or systematic purposeful activity involving business dealings of any kind, then the covenant covers defendants' use of the property, because the short-term vacation rentals systematically and purposefully generate revenue from arm's-length transactions. On the other hand, if a "commercial enterprise" requires a business organization that has profit as its primary aim, then the covenant does not cover defendants' use, because the facts shown do not demonstrate that defendants are a business organization or that they have profit as their primary aim (as would be true, for example, of a bed-and-breakfast business).

Given no clear direction from the context of the restriction, and no good evidence of the parties' intent, the court concluded that the term "commercial enterprise" was ambiguous, and that the ambiguity required a strict construction of the restriction. The court thus found in favor of the defendants, allowing the short-term rental to continue.

Rental Use Restrictions in Condos

Taking direction from the *Chiwawa* decision, another Washington court addressed rentals in condominiums, questioning whether a cap on the number of units that can be rented constituted a residential use restriction. If so, the Washington Condominium Act requires a 90 percent vote of the unit owners to impose or lift a rental cap. This question comes up frequently in practice, and the Washington Court of Appeals recently reaffirmed this rule in *Filmore LLLP v. Unit Owners Ass'n of Centre Pointe Condo.*, 333 P.3d 498 (Wash. Ct. App. 2014).

The supreme court reasoned in *Chiwawa* that since the amendment created new covenants, rather than changed existing ones, 100 percent approval was required. Never mind that the difference between a new covenant and a changed covenant is murky at best, the *Filmore* court cited the case to support its ruling that requiring 90 percent approval on "a new leasing restriction scheme that substantially alters the status quo protects condominium owners' reasonable and settled expectations."

Although Oregon courts have not addressed a similar case, *Royal Aloha Partners v. Real Estate Division*, 59 Or. App. 564 (1982), is instructive. Here the court held that an attempt by the Real Estate Division to regulate sales of time-share interests in a condominium was not permitted as the interest conveyed was not a fee interest, but merely a right of use. It is clear that since 1982 matters have changed, including the underlying statutory delegation of authority to the Real Estate Agency and new administrative rules governing time-share activity, but *Royal Aloha* does provide some indication that Oregon courts would follow the recent Washington decisions. In both states, the courts appear willing to protect owners' ability to take advantage of the economic attraction of direct, short-term rentals.

Dustin R. Klinger and Alan Brickley

Cases from Other Jurisdictions

New York's Highest Court Rejects Novel Sign Code Challenge

People v. On Sight Mobile Opticians is a zoning enforcement action by the Town of Brookhaven against a defendant who posted a sign on public property advertising its business. A sign code provision prohibited the posting of any sign on such property, save those by public agencies and those relating to traffic regulations, fire zones, and parking restrictions. The business contended the provision was unconstitutional because the zoning code as a whole favored commercial over non-commercial messages by allowing commercial advertising in almost all zones but barring non-commercial speech in most contexts in which commercial speech was allowed. The New York Appellate Division reversed the conviction on those grounds and found the unconstitutional portions of the ordinance could not be severed. The prosecutor sought review in the New York Court of Appeals.

On review, the court of appeals found the prohibition of placement of signs on public property was a discrete regulatory topic that could be separately described and severed. The court considered only that particular prohibition, finding it to be a content-neutral ban on signs on public property and citing *Members of the City Council v. Vincent*, 466 U.S. 789 (1984), as dispositive. Cities may lawfully ban private signs on public property for traffic safety and aesthetic reasons. The lower court action in dismissing the complaints for enforcement was reversed.

Edward Sullivan

People v. On Sight Mobile Opticians, 2014 WL 7069518 (NY App. Dec. 16, 2014).

Circular Lien Priorities: Utah Adopts the Majority Rule

The Utah Supreme Court recently addressed the effect of subordination agreements on non-party creditors, an issue yet to be decided in Oregon or Washington. In *VCS, Inc. v. Countrywide Home Loans, Inc.*, the Utah court adopted the majority rule, called partial subordination, when dealing with circular lien priorities. Under the majority approach, creditors who are parties to a subordination agreement swap places, while the priority of a non-party creditor remains unaffected. The minority rule, called complete subordination, adjusts the priorities of all creditors,

elevating the non-party's claim and dropping the subordinating creditor to the bottom of the priority chain. Because Oregon courts have yet to address this issue, practitioners should carefully consider whether to include all creditors in a subordination agreement.

In *VCS Inc.*, America West and Utah Funding provided financing for the development, secured by trust deeds against the property. VCS provided labor and materials to improve real property. As America West and Utah Funding provided additional financing, the two lenders entered into various subordination agreements, including one that subordinated Utah Funding's original loan to America West's additional loan. VCS filed a mechanic's lien after not receiving payment for its work, but after all loans had been made. Under Utah law (as in Oregon), the lien related back to the time of commencement of construction, which in this case was prior to the additional loans but after the original loans. America West's trust deeds were reconveyed and released, leaving only Utah Funding's trust deeds and VCS's lien.

The developer defaulted on the loans. Utah Funding foreclosed, which eliminated VCS's lien. Because the sale proceeds were insufficient to pay Utah Funding, VCS received no payment. VCS filed a lawsuit claiming that its lien was prior to the original Utah Funding trust deed because Utah Funding had subordinated that trust deed to America West's additional loans, which were lower in priority than VCS's lien.

The majority rule of partial subordination says that between A, B, and C (which are entitled to priority in alphabetical order), B's claim is unaffected by A's subordination to C. In making distributions, funds are set aside to satisfy A's claim. Out of the money set aside, funds are first used to pay C's claim in full with the balance going to A. Remaining funds are used to pay B in full, and then C and A. In this manner, A and C swap priority and B is paid as if no subordination occurred. The minority rule of complete subordination elevates B's claim after A subordinates to C's claim. Funds are distributed to C, then to B, and then to A. The subordination is considered "complete" because A's claim is completely subordinated to B and C.

For example, assume A has a claim for $100,000, B for $50,000, and C for $70,000. A subordinates to C. Foreclosure yields $120,000. Under the majority rule of partial subordination, $100,000 is set aside to pay A. Because A has subordinated to C, C is paid $70,000 and A is paid $30,000. Because $20,000 remains, B is paid $20,000 towards its $50,000 claim, leaving C short $30,000. A is left short $70,000. Under the minority rule of complete subordination, B is paid first and receives its full $50,000. C is paid next and receives its full $70,000. Because no funds remain, A does not receive anything towards its $100,000 claim.

The Utah Court deemed complete subordination unfair because it would result in a windfall to B, whom A and C did not include in the subordination agreement and whose claim A and C did not intend to elevate. While the Utah court favored an interpretation that relies on contractual intentions, it seems just as fair to honor the priorities established by lien-priority statutes which generally favor the rights of creditors who are first in time.

Among western states, Arizona and California have adopted the majority approach (partial subordination), Idaho has adopted the minority approach (complete subordination), and Oregon and Washington have yet to decide the issue. Until Oregon and Washington courts address the issue, practitioners should carefully consider priorities when drafting subordination agreements.

Paul Barton

VCS, Inc. v. Countrywide Home Loans, Inc., 2015 UT 46 (Utah Apr. 14, 2015).

Pending in the Legislature

Below is a selective summary of land use and real estate bills currently pending before the Oregon State Legislature.

Urban Growth Boundary Bills

Last year, the headline act of the Oregon Legislature's land use bills was HB 4078, the land use "Grand Bargain," which designated urban reserves, rural reserves, and a new Metro urban growth boundary in Washington County. The

legislature used Metro Council's Ordinance No. 11-4245 (designation of urban and rural reserves) and Ordinance No. 12-UGB-001823 (expansion of the urban grown boundary) as a starting point, then re-designated certain properties as urban, rural, or undesignated and brought certain properties within the urban growth boundary. HB 4078 (2014) did not resolve concerns raised by the Court of Appeals about a proposed rural reserve in western Multnomah County and a proposed urban reserve in the Stafford area of Clackamas County. Pundits and practitioners predicted the 2015 legislative session would be inundated by bills addressing the Grand Bargain and by other municipalities seeking their own legislative fixes to their UGB problems. Many bills attempted to obtain such Legislative relief; however, all of the following bills are either dead by rule or otherwise not expected to progress further this session:

- HB 2649 – validates the City of Woodburn's 2005 ordinance adopting its UGB amendments.
- HB 2458 – amends the urban reserve boundaries established in Washington County by the Grand Bargain.
- HB 3211 – validates urban reserves adopted by Metro and Clackamas County that were omitted by the Grand Bargain.
- HB 3313 – designates the Langdon Farms property adjacent to Lake Oswego as an urban reserve.
- HB 3475 – directs Clackamas County and Metro to review adequacy of lands in the Hamlet of Stafford that are designated as urban reserves and rural reserves and to report the findings to Legislative Assembly.
- SB 851 – directs DLCD and the City of Bend to report to Legislature status of urban growth boundary amendment progress.

The only bill that may still have a chance of passing as of the date of this article is SB 716, which authorizes Clackamas, Multnomah, and Washington Counties each to designate one large-lot industrial reserve of 150 to 500 acres. While SB 716 may be the Legislature's sole concession to expediency, it appears the Legislature continues to hope that ORS Chapter 197A, which was adopted in 2013 and becomes effective on January 1, 2016, will address the need to update the state's urban growth boundary amendment process beyond Metro. To that end, the House of Representatives has passed HB 2456, which provides a clarifying amendment that the provisions of ORS Chapter 197A apply to municipalities outside of Metro with a population of 10,000 or more. The DLCD will likely distribute proposed rules this year to provide for new, simplified methods for growing cities to evaluate the capacity of their UGBs.

Planning Bills

There are two additional bills that, if passed, will result in additional administrative rules interpreting statewide planning goals. HB 2633 requires the LCDC to adopt rules to implement statewide land use planning Goal 7 related to natural hazards within two years of enactment. DLCD, in coordination with the Office of Emergency Management and other federal agencies, is expected to establish a program, or modify an existing program, to provide guidance to local governments regarding adaptive planning to reduce risk to people and property due to development in hazard areas. SB 94 is a catch-all measure for a number of concepts related to disaster preparedness that is an outgrowth of the Oregon Resilience Plan, which is designed to better prepare Oregon for tsunami and earthquake risks, among which is a broad authorization of LCDC to adopt rules.

Housing

There are a few landlord-tenant bills still alive in the legislature. SB 390 is an omnibus bill that modifies landlord and tenant statutes. It is the result of in-depth work by the General Landlord/Tenant Coalition. This bill clarifies definitions and terms affecting landlord and tenant relations in a number of ways, including when it would be legal to charge fees and fee assessments. HB 2629 would require owners of rental property subject to federal rural rental housing loans to provide at least one year's notice of date of maturity of loans to tenants, Housing and Community Services Department, housing authorities, and local governments. HB 3129 authorizes a tenant to install and use electric vehicle charging stations for personal, noncommercial use.

Affordable Housing

The change in the Legislature's make-up from a relatively evenly divided partisan group to one controlled by the Democratic Party is likely to be most apparent in changes to affordable housing laws. HB 2564 has passed the House and is pending before the Senate. It repeals ORS 197.309, which prevents local governments from imposing mandatory inclusionary zoning, also known as affordable housing units, as a condition of development. However, amendments to HB 2564 limit such conditions of approval to not "require more than 30 percent of housing units within a residential development to be sold at below-market rates" and offer developers one or more of the enumerated incentives including density adjustments, fee waivers or reductions, and expedited service for permits in exchange for mandatory inclusionary units. Also still alive in the legislature is HB 3082, which creates an alternative definition of "low income" for purposes of nonprofit corporation low-income housing.

Property Tax

The governor signed HB 2487 in April. This law requires a correction of maximum assessed value due to correction of square footage of property to be proportional to the change in real market value of property that is due to correction of square footage. It will become law 90 days after session ends. Still alive and pending is HB 2486, which removes statutory provisions relating to categorization of property tax revenue under Ballot Measure 5 (1990) that were held unconstitutional by Oregon courts.

Planned Communities and Condominiums

The following bills are still pending:

- HB 2559 – Prohibits inclusion, in instrument conveying or contracting to convey real property or in declaration or bylaws of planned community or condominium, of provisions prohibiting installation and use of solar panels for obtaining solar access.
- HB 2585 – Modifies the authority granted to an owner of lot in planned community or unit in condominium to install and use electric vehicle charging station for personal, noncommercial use.

Lending

The following bills affect (or could affect, if enacted) mortgage lending and conveyancing:

- HB 3244 – Provides that a borrower or borrower's agent may rely on lender's payoff statement for amount required to discharge mortgage or perform obligation necessary to request reconveyance of estate of real property described in trust deed until after lender delivers amended payoff statement.
- HB 3488 – Exempts specified instruments that condition transfer of fee simple interest in real property from prohibition on fee, commission, or other payment to declarant or other person upon transfer of interest in real property.
- SB 367 – Makes purchaser at execution sale of real property in planned community or condominium community solely liable for assessments imposed against real property during redemption period.
- SB 462 – Provides that record is effective as financing statement if record satisfies requirements for financing statement and sufficiently provides name of debtor.
- SB 879 – Exempts an attorney who negotiates terms of residential mortgage loan in attorney's representation of client that buys or sells dwelling unit from the requirement to obtain mortgage loan originator's license in order to perform activities of mortgage loan originator.

Procedural and Minor Substantive Rules

As in every session, there are a number of pending bills that are procedural in nature or are relatively minor in their substantive law changes that might impact the real estate or land use practitioner.

- HB 2453 – Provides a process for obtaining permits on state forestlands prior to conducting large commercial events.

- HB 2457 – Allows counties to validate substandard parcels that are divided by a UGB.
- HB 2734 – Authorizes a city or county to organize land bank authority and to take ownership of real property with immunity from legal liability for legacy contamination.
- HB 2830 – Modifies time period for local government to take action on application for permit, limited land use decision, or zone change after remand based on final order of Land Use Board of Appeals.
- HB 2831 – Restricts property line adjustments in resource zones for Measure 49 properties to two acres for high-value farmland or forestland or lands within ground water restricted areas and to five acres for other resource land properties.
- HB 2938 – Prohibits city from requiring consent to annexation of landowner's property in exchange for city providing county service as agent of county.
- HB 3084, HB 3085, and HB 3086 – Relates to the withdrawal of property from Damascus and its disincorporation.
- HB 3212 – Makes law or rule for restricting previously allowed farming practice land use regulation for purposes of certain land use laws in Measure 49 claims.
- HB 292 – Repeals duplicative provision regarding conflict of interest for planning commission members.

LUBA Cases

LUBA Denies Attorney Fees Motion

In July 2014, LUBA issued its substantive ruling in *Parkview Terrace v. City of Grants Pass*, in which the city denied a developer's application to transform Phases II and III of a planned unit development from for-sale townhouses to multi-family rentals. LUBA reversed the denial and ordered the city to grant the developer approval. The decision suggested that the case was ripe for an award of attorney fees; LUBA recently issued an order on the fee motion. The developer sought to recover over $39,000 in attorney fees from the project neighbors.

The standard of review for attorney fee motions in land use matters is whether LUBA finds that a party presented a position without probable cause to believe the position was well-founded in law or on factually supported information. In these circumstances, "without probable cause" means that no reasonable lawyer would conclude that any of the points asserted on appeal possessed legal merit. In order to avoid attorney fees in land use cases, a party must present at least one argument on appeal that satisfies the probable cause standard.

LUBA concluded that one issue raised by the intervening neighbors satisfied the probable cause standard. The neighbors had challenged the city's authority to grant site plan and variance approvals for a development proposal that was different from, and inconsistent with, the townhouse development authorized by the city's original approval. On the merits, the neighbors had argued that the city's PUD regulations have no procedures for terminating a residential PUD and that the developer's unilateral decision to terminate the PUD by sending a letter to the planning department could not be construed as an automatic termination of the original approval.

In its July decision, LUBA refused to consider the neighbors' argument on the merits, because the neighbors had not complied with LUBA's procedural rules for filing a cross-assignment of error. In the fee order, however, LUBA ruled that the procedural error did not mean the neighbors' argument was presented without probable cause. LUBA concluded that because the Board had made only a single decision based on the cross-assignment rule since the rule's adoption in 2010, the lawyer's mistake in not presenting the argument as a cross-assignment of error was not the kind of mistake "no reasonable lawyer would make."

Finally, LUBA looked to the city's code to determine whether the termination argument would pass muster under the probable cause test. LUBA found that if it had reached the merits of the neighbors' argument about authority to grant site plan and variance approvals, the argument would have met the probable cause standard because the code lacks express authorization for termination of a residential PUD once it has been approved. If the argument had been

promoted in accord with procedural requirements, it would have raised an issue that might have been a basis for remand.

Consistent with previous decisions regarding attorney fee motions, LUBA will give the benefit of the doubt to the party that could be on the hook for the fees. This order continues the high bar to recover attorney fees in Oregon land use matters, but, in my opinion, it would have been quite another story if the developer had maintained the fee motion against the city.

Jennifer Bragar

Parkview Terrace v. Grants Pass, LUBA No. 2014-024 (Feb. 25, 2015).

LUBA SHORT SUMMARIES

Local Ordinance Interpretation

In *St. Helens LLC v. City of St. Helens*, the developer proposed to blast away part of a 35-50 foot tall basalt bluff and remove and sell more than 500,000 cubic tons of rock to create a level site for future development. Since one area of the bluff to be removed was within a 75-foot wetland protection zone, the developer needed to apply for a sensitive lands permit. The developer characterized the rock removal as site preparation activities and an integral part of the planned future high-density residential development for the property, an allowed use in the underlying zone. The St. Helens planning commission disagreed and denied the permit, concluding the rock removal is a separate use from the future residential use and is a prohibited mining and/or quarrying use in the base zone.

On appeal, the key question before LUBA was whether the planning commission correctly determined that basalt was a "mineral" and that the proposed rock removal is a prohibited "natural mineral resources development" or "mineral recovery or mining" under the city's code. Like many other jurisdictions' codes, the St. Helens code directs that words have their normal dictionary meaning unless they are otherwise specifically defined. Finding no relevant code definitions, LUBA resorted to the dictionary and, like the planning commission, quickly concluded the definitions of "rock" and "mineral" are broad enough to include basalt. As a result, LUBA affirmed the commission's conclusion that the proposed rock removal is a prohibited natural mineral resources development. LUBA rejected the developer's argument that this interpretation would lead to absurd results by precluding any site preparation activities that involve removing rock. In LUBA's view, normal excavation and grading that is related in scale to proposed development would likely not run afoul of the St. Helens code. Here, it was difficult to characterize the developer's bluff blasting as anything other than mining or mineral removal, given the massive amount of rock being removed when compared to the potentially modest amount of future residential development.

St. Helens LLC v. City of St. Helens, LUBA No. 2014-067 (Jan. 16, 2015).

Local Procedure

North Bend's development code requires an appellant to establish "party status" when filing a local land use appeal, a common requirement in many local land use codes. LUBA's decision in *Dilley v. City of North Bend* addresses whether a citizen can establish party status by testifying only during a general public comment period of a planning commission meeting, rather than during the hearing on a land use application. In this case, Dilley did not submit any oral or written testimony during the commission's hearing on a conditional use permit application. A month later, on the day the commission was scheduled to deliberate, she appeared at the open public comment period that preceded the commission's scheduled agenda items and testified in opposition to the conditional use proposal. The commission then moved on to its agenda and voted to approve the application. Dilley received mailed notice of the commission's decision and appealed that decision to the city council. The council dismissed her appeal after determining she was not a party because (1) she failed to appear orally or in writing at the commission hearing on the application and (2) she didn't request notice of the commission's decision.

Dilley appealed to LUBA and challenged only the council's second conclusion. She argued that by writing her name and address on the "City of North Bend Public Comment Sign In Sheet" at the planning commission, she effectively asked to be given notice of the commission's decision on the conditional use application. She pointed to her actual receipt of mailed notice as evidence North Bend construed her signature on the sign-in sheet as a request to be notified. LUBA agreed, noting the record North Bend filed with LUBA identified the public comment sign-in sheet with the handwritten notation "mailed 4/23/14" as the "Planning Commission Decision Mailing List 4/23/14." As a result, LUBA concluded the city council should not have dismissed her appeal and remanded the decision to North Bend.

Dilley v. City of North Bend, LUBA No. 2014-061 (Jan. 27, 2015).

LUBA Procedure—Timeliness of Appeal

LUBA's decision in *Mackenzie v. City of Portland* addresses the interplay between the notice requirements in ORS 197.763 and the tolling provisions, in ORS 197.830, for filing a LUBA appeal. Under the facts presented here, LUBA concluded Mackenzie's appeal was timely and another appeal filed by Ames, Ashcraft, and Spangler was not.

Mackenzie appeared throughout the local proceedings that led to the Portland council's decision approving a conditional use permit to expand the Portland Japanese Garden. She filed her appeal within LUBA's 21-day appeal period. The Ames petitioners filed their LUBA appeal a month later, arguing they were entitled to notice, failed to receive it, were adversely affected by the council's decision, and had appealed within 21 days of the date they became aware of the decision.

Under ORS 197.763(2)(a), the City is required to mail notice of a quasi-judicial hearing to all property owners "[w]ithin 100 feet of the property which is the subject of the notice." The Ames petitioners argued that since the Japanese Garden is part of the Portland-owned Washington Park, "the property which is the subject of the notice" is the entire 400-acre park. They asserted they live within 100 feet of the park's boundary and should have received notice of the hearings on the Garden's application. Portland's failure to send them notice meant their time to appeal to LUBA was tolled under ORS 197.830(2).

Portland argued, and LUBA agreed, that the relevant property for purposes of ORS 197.763 is the three tax lots, totaling 25 acres, within Washington Park that contain the Japanese Garden, and that the notice area under ORS 197.763 extends 100 feet from the boundary of these lots. LUBA based its conclusion on previous decisions that suggest the "property which is the subject of the notice" is at least the property (lots or parcels) under the applicant's ownership or control and proposed for development as well as any off-site areas to be included in the development—here the 25 acres containing the Japanese Garden rather than the entire Washington Park. Under this formulation, the Ames petitioners lived well beyond the statutory 100-foot notice area. Since they weren't entitled to notice, their time to appeal wasn't tolled under ORS 197.830(2) and LUBA dismissed their appeal as too late.

Mackenzie v. City of Portland, LUBA Nos. 2014-089/-099 (Mar. 10, 2015).

EFU Zones

The question before LUBA in *Smalley v. Benton County* was whether the Smalley's Whisper-n-Oaks Outdoor Wedding and Event Center was a "film and event production facility" with "on-site filming" that is allowed outright in an EFU zone under ORS 215.306(3)(a), or whether it required the county's review and approval, which the facility had never obtained. The Smalleys argued that weddings and events at the facility were often digitally recorded or videotaped and this activity was the functional equivalent of filming a documentary, and thus permitted under the EFU statutes. The county disagreed, as did LUBA, for several reasons.

First, the primary purpose of the facility was to host weddings and other types of events; any filming of these events was incidental. Second, a key element of an exempt film production facility is "production," which LUBA characterized as making a film for broadcast or distribution to others. In the case of the Smalleys' facility, any filming was for only personal use. Finally, the relevant statute, ORS 215.306(4), defines "on-site filming" as film production

that "relies on the rural qualities of an exclusive farm use zone in more than an incidental way." LUBA understood this definition to require more than the fact that customers are attracted to the Smalleys' facility because it is in a beautiful setting; instead, the definition means there is an essential reason why filming must take place on EFU-zoned land. In LUBA's view, that was not the case here and the county correctly determined the Smalleys must obtain county approval to operate their facility in an EFU zone.

Smalley v. Benton County, LUBA No. 2014-110 (Mar. 17, 2015).

Kathryn S. Beaumont

QUINQUE

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

Peter Torres, Multnomah Tree Experts, Ltd.

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

As an arborist, my job has evolved into sales and consulting. The consulting arborist portion often begins with a tree inventory at a site where land division or development is planned. The task is to make space for the client's proposed improvements within the restrictions of each municipality's tree preservation code. The desire is to preserve the best trees in a way that makes biological sense. It is usually a compromise between those two goals.

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

There are two incompatible goals. One is to increase housing density and the other is to preserve more large trees in city lots. In many cases, it means trees will be cut and mitigation payments made. In others, tree protection plans do enable building near trees and still the trees decline over the next 12 years. A third case is that a land owner wants to build a certain structure but is unable to. My favorite solution is when the client designs improvements to fit the site, but that is rare.

Q3. Tell us your professional horror story.

That would be on the tree service side of the job. My crew took down 3 small, dying trees that were meant to be trimmed. I ought to have simply replaced them with new trees for about $1000. I resisted and it became a $15,000 payment.

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

Tree codes produce a lot of consulting business, every day. But on the other hand, they can also discourage property owners from cutting trees that ought to be cut. It's a toss-up.

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

There is usually a way to work out any problem if there is a rational third party who can appreciate both sides of a conflict. Please be that person.