

Oregon Land Use Law – Year in Review (2009)

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Destination Resorts & RV Parks

Friends of Marion County v. Marion County, 233 Or App ____ (A143149, 2/3/2010)

Clarifies that destination resorts may be approved under either the Goal 8 statutory provisions (ORS 197.435 to 197.467) or by taking exceptions to Goals 3,4,11 and 14; if the applicant secures the required goal exceptions, then the resort proposal need not comply with the Goal 8 statutory requirements.

Affirms LUBA's decision allowing a "reasons" exception to be justified by a purported "need" for golf course overnight housing outside the UGB, despite existence of similar resorts inside UGBs – quite disturbing, in light of purposes and policies behind Goal 14, among other things.

The real problem in this case is that the preliminary (conceptual) approval of the resort happened back in 1982, without a time limit for completion (or even commencement of the housing development), so both LUBA and the courts are reluctant to "change the rules," even though, in fact, many rules and circumstances have changed in the intervening 30 years. The legislature (or DLCD) should be requiring time limits on these permit approvals, but legislative will seems to be going the other way, as, during the last legislation session, the state approved allowing cities and counties to grant automatic extensions – without public comment opportunity – for all developments that had been approved but not yet begun or completed, due to "the economic downturn." This seems ridiculous, in light of the fact that "economic upturns" would not likely be considered valid justification for shortening the time limits on permits!

Baxter v. Coos County, LUBA 2008-219 and 2008-221, 4/30/2009

An "RV Park" development that includes a convenience store, a caretaker's residence, a recreation center, and more than 150 spaces for "park model RVs," that would be permanently sited for vacation and rental use, at density of about six units per acre, is "urban" development and cannot be legally sited outside the UGB without violating Goal 14, regardless of whether or not the "park model" units are considered "residential" or "recreational vehicles" or otherwise. The issue is the urban nature of the development, under the *Curry County* factors, not the "residential" or "recreational" nature of it.

In addition, Goal 11 prohibits a shared "sewer system" for the development outside the urban growth boundary.

We are likely to see more proposals for “park model RV parks” trying to slip in as “campgrounds” and other such allowed rural uses, whereas, in reality, they are essentially destination resorts.

Goal 12 Transportation Planning Rule (TPR)

Willamette Oaks, LLC v. City of Eugene, 232 Or App 29 (A142351, 11/18/2009)

Clarifies that the TPR, which requires analysis of traffic impacts for any change in zoning or comprehensive plan designation, must be analyzed in conjunction with the decision on the zone change or comprehensive plan amendment; cities and counties are no longer able to defer the analysis, via a “condition of approval,” to a later permitting process.

The analysis of goal compliance in general and Goal 12 TPR compliance specifically has been more and more often deferred to later stages of development approvals, despite clear statutory language that zone changes and comprehensive plan amendments always have to demonstrate goal compliance. Especially egregious examples are where a county or city approves a zoning or comprehensive plan designation change for a large area covering multiple properties, as Crook County did when adding “destination resort overlay zoning” to nearly the entire Powell Butte area of the county, essentially pre-approving large-scale resort development and thousands of new homesites without any analysis of the overwhelming levels of traffic such developments could generate. This decision puts a stop to that practice. Look for developers to lobby the state legislature for a “fix” to *Willamette Oaks*.

Urban Renewal Plans

Abeel v. City of Portland, LUBA 2008-117, 1/30/2009

When adopting an urban renewal plan under ORS 457.095(1), it is not necessary that every single property in the urban renewal district be “blighted,” only that the area as a whole is blighted in one or more of the ways described in ORS 457.010(1). When adopting an amendment to the urban renewal plan, depending on the time that has lapsed, new findings that the area, as a whole, remain blighted may need to be adopted. Here, after ten years and significant changes to the plan area boundaries, new findings were necessary.

Friends of Urban Renewal v. City of Portland, LUBA 2008-116, 1/2/2009

An urban renewal plan area may be comprised of multiple non-contiguous blighted portions, but, under ORS 457.085(2)(j), the public building projects in each portion must have some benefit to the blighted area, as a whole.

Forest Template Dwellings

Friends of Yamhill County v. Yamhill County, 229 Or App 188 (A141390, 6/24/2009)

Confirms that the use of the word “parcel” in the template dwelling statutes, read in conjunction with the definition of “parcel,” which requires that the parcel have been lawfully created, means that only legally created parcels can be counted in the template dwelling test.

Measure 37 / Measure 49

Welch v. Yamhill County, 228 Or App 124 (A140952, 4/29/2009)

Confirms that LUBA has jurisdiction for appeals of decisions approving subdivisions pursuant to Measure 37 / Measure 49, separate from the decisions approving either the waivers or the vesting determinations.

Cyrus v. Board of County Commissioners, 226 Or App 1 (A133381, 2/18/2009)

All pending cases about the validity of Measure 37 waivers were rendered moot by the passage of Measure 49, because Measure 49 extinguished all Measure 37 rights (*Corey v. DLCD*, 344 Or 457 (2008)). The applicants are required to proceed only under Measure 49 (either via DLCD elections or by seeking a “vested rights” determination), and the petitioners would then be able to challenge those decisions pursuant to the procedures of Measure 49, rather than by continuing their challenges of the Measure 37 waiver via Measure 37 procedures.

Pete’s Mountain Homeowners Association v. Clackamas County, 227 Or App 140 (A140272, 4/1/2009)

Measure 49 renders the “goal post statute,” ORS 215.427(3)(a), inoperable as to applications based on Measure 37 waivers. Where Measure 49 and the “goal post statute” conflict, the latter (Measure 49) controls. Measure 49 supersedes both Measure 37 and the “goal post statute.” (Note, however, that the Court of Appeals confirmed that a previous “goal post statute” decision, *DLCD v. Jefferson County*, 220 Or App 518 (2008) (“*Burk*”), was limited to interpreting the effect of the death of the Measure 37 waiver holder on the continuing validity of the Measure 37 waiver and did not address the goal post statute’s effect at all.)

Note that the Court of Appeals specifically held that, because all Measure 37 appeals were rendered moot, any issues about the validity of the waivers were fair game for appeals based on Measure 49. This includes a number of “Measure 37 interpretation” issues that had not yet been decided, like whether Measure 37 allow authorization of subdivision of property as a “use.”

Hoffman v. Jefferson County, LUBA 2008-090, 11/18/2009

Measure 37 waivers are not “licenses” that cannot be withdrawn. Holders of waivers are not allowed any rights other than what is specified in Measure 49.

DLCD v. Jackson County, LUBA 2009-025 and 2009-027, 6/4/2009

Stayed federal court decision holding that Jackson County Measure 37 waivers are licenses that cannot be withdrawn has no effect on either state Measure 37 waivers or even on Jackson County Measure 37 waivers, since the decision was stayed and thus specifically “not to be relied upon.”

Fees for Local Appeals

Sommer v. Josephine County, LUBA 2006-150, 3/18/2009

ORS 215.422(1)(c) limits the amount counties can charge for local appeals fees to no more than the actual cost of the appeal or the average cost of such appeals. ORS 227.180(1)(c) limits appeals fees set by cities similarly. The local jurisdiction can not merely add up the costs of running the whole planning department and then set fees that are “driven entirely by hope-for revenues and have no obvious connection to costs” of processing appeals.

Mazarol v. City of Bend, LUBA 2009-038, 7/29/2009

Petitioners may challenge the fee schedule directly – in a “facial” challenge to the decision approving the fee schedule – without having to show any pending appeal. Alternatively, petitioners may wait until they undertake an appeal and are charged a fee they believe violates the law and then make an “as applied” challenge to the fee schedule. This decision expressly overrules *Cummings v. Tillamook County* and *Maxwell v. Lane County*, which seemed to indicate that “as applied” challenges were not allowed, and instead adopts the recent reasoning in *Young v. Crook County*, which allows for “as applied” challenges but also shifts the burden of production to the petitioners in those challenges.

1000 Friends of Oregon v. Crook County, LUBA 2009-077, 12/17/2009

Determining the “average” cost of all appeals or a specific subset of appeals (“such” appeals, as the statute directs) requires some sort of arithmetic calculation of the average set of numbers, meaning the sum of the numbers in that set divided by the count of the numbers. “Average” cost of appeals is not the same as “estimated” cost of appeals.

Deference and Standard of Review

Siporen v. City of Medford, 231 Or App 585 (A142541, 11/4/2009)

Western Land & Cattle, Inc. v. Umatilla County, 230 Or App 202 (A141408, 8/5/2009)

Thompson v. LCDC, 227 Or App 120 (A134989, 4/1/2009)

Under ORS 197.829(1)(a), LUBA is required to affirm a local government's or agency's interpretation of its own regulations unless the interpretation is inconsistent with the express language of the rule, and the inconsistency must be not merely with the language read in isolation but also with the language read in context of other related rules. In *Siporen*, the Court of Appeals said that the city's interpretation did seem to be inconsistent with the language of the rule "read in isolation," but that, "when read in conjunction with other contextually pertinent code provisions," the city's interpretation was "plausible," which is all that's necessary for LUBA to be required to affirm the interpretation.

This seems to enlarge the already broad deference cities, counties, and state agencies are granted in their interpretations of their own regulatory code provisions.

ODFW v. Josephine County, LUBA 2008-022, 6/18/2009

Where a local code provision mirrors a state statute, the local officials' interpretation of the local code provision is not entitled to the usual deference for interpretation of local code provisions. Rather, LUBA's standard of review, under ORS 197.829(1)(d), is whether the interpretation is contrary to the state law that the local law implements. That review requires interpretation of state law according to the usual LUBA rules of statutory construction.

Preservation of Issues

Thompson v. LCDC, 227 Or App 120 (A134989, 4/1/2009)

Where issue was clearly raised at the lower level, the fact that it was not framed exactly the same as in the appellate court does not preclude the court from finding that the issue was properly preserved for review. Citing *Gadda v. Gadda*, 341 Or 1, 7-8, 136 P3d 1099 (2006) (shift in focus of interpretation of statute insufficient to defeat preservation).

Waiver of Issues

Stewart v. City of Salem, 231 Or App 356 (A142161, 10/14/2009)

Where an issue is raised during public hearing, even if raised by city staff, the issue is not “waived” for purposes of ORS 197.835(3); the Court of Appeals found it did not need to address – but did not foreclose the possibility – that the city councilors’ initiation of the discussion could also negate the “waiver” claim, as they too might be seen as “participants” in the hearing.

Friends of the Metolius v. Jefferson County, 230 Or App 150 (A141383, 8/5/2009)

Confirms that, where an issue was resolved or could have been but was not raised in an earlier decision that was remanded, the issue cannot be raised in the appeal of the decision on remand (citing *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992)).

This decision shows how narrowly LUBA and the Court of Appeals are interpreting the “waiver on remand” issue. In this case, the county amended the comprehensive plan to designate the Camp Sherman area as an unincorporated community. Under OAR 660-022-0020(2), the county must establish boundaries of the unincorporated community and delineate the boundaries on a map of sufficient scale to indicate which properties are in and which are out. Petitioners appealed the decision, and because the map adopted was too small to meet the requirements of OAR 660-022-0020(2), LUBA remanded the decision. On remand, the county provided a larger scale map, but petitioner appealed again, arguing that, with the larger map, it became clear that the county did not properly establish the boundaries. LUBA rejected the second appeal, holding that the issue could have been and wasn’t raised in the original appeal, despite the fact that LUBA itself had found the map so small as to not provide the detail necessary to identify the boundaries.

Standard of Review for Denial

Stewart v. City of Salem, 231 Or App 356 (A142161, 10/14/2009)

For the first time, LUBA invoked ORS 197.835(10)(a) to reverse, rather than remand, a city’s denial of an application, thus obligating the city to pay attorney fees to the applicant, under ORS 197.835(10)(b). Court of Appeals affirmed LUBA’s reversal, mostly, it seems, because the city failed to argue that the criteria for reversal under ORS 197.835(10)(a) were not met – the city instead argued that its errors were procedural, not substantive, a contention the Court of Appeals rejected. Nonetheless, LUBA’s use of this provision – and the Court of Appeals’ affirming of it – is likely to put even more of a chill on cities’ and counties’ consideration of denial of applications, which is already a rare occurrence.