2015

LUBA AND APPELLATE COURT CASE SUMMARIES

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I. LUBA BY THE NUMBERS – 2015

In 2015, LUBA issued 80 opinions and of those, 24 opinions resulted in reversal or remand. One of LUBA's performance measures requires that LUBA issue at least 90% of its decisions within the statutory deadline or with no more than a 7-day stipulated delay. In 2015, LUBA issue 69 decisions within this timeline or 86.3%. 13 of LUBA's opinions have been appealed to the Oregon Court of Appeals and 5 of those decisions are pending review. The Court of Appeals has affirmed LUBA's decisions 5 times and reversed twice. The Oregon Supreme Court accepted review in a single case and a second petition for review is pending.

II. CONSTITUTIONAL LAW AND FEDERAL LAW

- Texas Department of Housing Affairs v. Inclusive Communities, Inc. 576 U.S. ___ (June 2015) The Inclusive Communities Project (ICP), a non-profit organization that seeks to promote racial integration in Dallas, sued a state agency charged with allocating HUD-issued low-income housing tax credits to developers who build low-income housing projects. ICP accused the Texas agency of disproportionately allocating the tax credits to properties in poor areas in violation of the Fair Housing Act of 1968 that makes it illegal to refuse to sell, rent "or otherwise make unavailable" housing to anyone because of race, sex or other protected categories. ICP alleged that between 1995 and 2009, the state did not award tax credits for any family units in predominantly white census tracts, and instead awarded tax credits to locations "marked by the same ghetto conditions that the (Fair Housing Act) was passed to remedy." The ICP did not allege intentional discrimination, but rather alleged that issuance of tax credits to properties within solely high-poverty areas results in a disparate impact on minorities, which it said was sufficient to show a violation of the Fair Housing Act. The Civil Rights Act of 1968 and amendments to the Fair Housing Act in 1988 (the Fair Housing Amendments Act or FHAA) as well as cases applying Title VII of the Civil Rights Act of 1964, banned many acts of housing discrimination. These anti-discrimination laws focus not just on the "mind-set of the actors" but also on the "consequences of the actions." By its terms, the Fair Housing Act and Fair Housing Amendments Act were enacted to provide for fair housing and to prohibit unfair discriminatory housing practices. The Court observed: "These unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Suits targeting such practices reside at the heartland of disparate-impact liability." The Court emphasized at some length that the disparate impact test was not formulaic and must be applied flexibly. The Court also specifically expressed concern over the use of racial quotas. The test must require a "causal link" in a case such as the one before it, between the policy and discrimination so as to remove "artificial, arbitrary and unnecessary barriers" to housing.

III. STATEWIDE SUBSTANTIVE LAND USE STATUTES

A. Non- Farm Uses – ORS 215.283

- Central Oregon Landwatch v. Deschutes County, ___ Or LUBA ___ (LUBA No. 2015-034, August 2015). Petitioner appealed a decision authorizing a wedding event facility as a private park on land zoned for exclusive farm use (EFU). ORS

215.283(2)(c) allows "[p]rivate parks, playgrounds, hunting and fishing preserves and campgrounds" on EFU zoned land. Petitioner first argued that a "private park" was limited to private use and could not be open and available for use by the public, by definition and based on precedent in another case. LUBA disagreed, finding that the context of ORS 215.283(2)(c) demonstrates that the adjective "private" is intended to distinguish privately-owned and managed recreational lands from publicly-owned lands. Petitioner also argued that the proposed use was an event venue rather than a recreational use. The county had decided that although a wedding itself was not a recreational activity, outdoor eating, public speaking, listening to musing, singing, dancing and lawn games did constitute recreation and a wedding ceremony that lasted only a fraction of the time in which the event is held is allowed as incidental and subordinate to the recreational activities. LUBA rejected this interpretation; it found that the focal event is the primary use. LUBA identifies a "causation test" - asking whether the elements that fit within the use category occur on the property without the wedding or other event? If the answer is no, the event is the primary use. The county's decision was reversed. This decision is pending appellate review at the Court of Appeals.

- Oregon Coast Alliance v. Curry County, ___ Or LUBA ___ (LUBA No. 2015-006, May 2015). Petitioner appealed a county board of commissioners' decision approving a conditional use permit for an 198-acre, "Scottish style," 18-hole golf course on property zoned EFU. OAR 660-033-0130(2) sets out standards and limitations that apply to approval of golf courses in EFU zones, and describes a "golf course" as including a regulation 18-hole golf course that is "generally characterized by a site of *about* 120 to 150 acres of land." It prohibits "non-regulation golf courses," which are golf courses not meeting the stated definition of "golf course," such as executive or par three golf courses, etc. Petitioner argued that a 198-acre golf course would exceed the "about 120 to 150 acres" allowed by the rule. LUBA rejected the argument, concluding, as the county had, that the terms "generally" and "about" mean that the standard does not impose a strict limit and also that the fact the course will be "Scottish-style" does not mean it is excluded by the rule. Further, Petitioner argued the structures exceed the limitation in OAR 660-033-0130(2), which states, "No enclosed structure with a *design capacity* greater than 100 people, or group of structures with a total design capacity of greater than 100 people shall be approved in connection with the use within three miles of an urban growth boundary" without a goal exception. The county approved a 10,000-square-foot clubhouse, to include a restaurant, lounge, pro shop, locker rooms, administrative offices and storage for golf carts, and a 7,500-square-foot maintenance/storage structure, and two other small structures. The county concluded "design capacity" is not the same as "maximum occupancy," and LUBA agreed. LUBA noted that while maximum occupancy is in some ways related to design capacity, it typically depends on safety considerations, like the number of exits, the presence of fire doors and the width of egress corridors. LUBA reviewed a discussion at LCDC where the rule was modified from "permitted occupancy" to "design capacity" to reflect that permitted occupancy under building and fire and safety codes is determined at the building permit stage, but compliance with the standard is determined earlier in

the development process, when the county considers the conditional use permit application. The committee also noted that a condition of approval may be necessary to limit occupancy to "design capacity" in circumstances where actual or permitted occupancy may be greater than 100 persons. However, the committee did not put a definition of "design capacity" in the rule. The county also concluded that, so long as there were not likely to be more than 100 persons in the structures at one time, the design capacity standard would be met. LUBA disagreed, accepting petitioner's argument that, even if the likely number of people would be fewer than 100, the focus must be on the design capacity. Stated differently, an underutilized building could still have an excessive design capacity. LUBA concluded that to meet the standard, the county must make a finding that the total design capacity of all enclosed structures must not exceed 100 persons. LUBA noted that the rule focuses on *people* and applies only to structures that involve gatherings or assemblies, which excludes the 7,500-square-foot storage structure to the extent it does not provide a place for people to assemble. Substantial evidence to support the necessary finding might include an architect's or building designer's testimony and calculations, building plans or other materials establishing the designed capacity of the structure.

B. Significant Change / Cost Test for Non-Farm Uses on EFU Lands – ORS 215.296(1)

- Stop the Dump Coalition v. Yamhill County, ___ Or LUBA ___ (LUBA No. 2015-036, November 2015). Petitioners appealed a decision approving site design review and a floodplain development permit to authorize expansion of an existing landfill on land zoned EFU. Petitioners argued that two of the commissioners who conducted site visits accompanied by an employee acting as a safety escort violated a local code standards that prohibits site visits to "inspect the property with any party or his representative" unless notice is given. LUBA disagreed, finding the county's interpretation of the provision to require notice only when the decision maker intends to inspect the property with the applicant or his representative in circumstances where ex parte communications are expected, was plausible. Petitioners also argued that the county erred in interpreting OAR 660-033-0130(18)(a) to allow the expansion of an existing landfill on land that, in 1996-when the rule was adopted, was not zoned EFU. This would allow owners to "downzone" to an EFU zone and gain the ability to expand onto high value farmland. After examining the legislative history, LUBA found that the intent was to prevent expansion of a facility existing in a non-EFU zone from that non-EFU zone into an EFU zone that qualifies as high-value farmland. LCDC did not consider the scenario where a facilities is rezoned from an EFU zone to a non-EFU zone and then back to an EFU zone placing the existing facility "wholly within a farm use zone." As such, the rule contains no express temporal restrictions and this assignment of error was denied. In another assignment of error, petitioners challenge the county's findings that the expansion complies with the significant change / cost standard required in ORS 215.296(1). The county found that "accepted farming practices" did not require the consideration of hobby farms. Petitioners argued that the county erred in exclude some common farm practices, and placed the burden of demonstrating that their farm practices

qualified as "accepted." LUBA could not find a single instance where the county did what petitioners alleged. The county defined "surrounding lands" as lands within one mile of the landfill but it also considered impacts on lands more distant that one mile if there was "compelling evidence that a particular impact beyond one mile from the landfill is substantially attributable to the landfill." LUBA found that it was improper to apply a different, and onerous evidentiary standard on some participants but not others based on geographic distance. Petitioners further challenged the county's finding that farm impacts "must be based in large part on quantifiable or verifiable data" such that testimony from farmers about increased costs were discounted if they did not also quantify the amount of increased costs. Petitioners argued that this approach shifts the burden from the applicant how must show that the use will not impact accepted farm practices to requiring that surrounding farms establish that the proposed use will significantly impact accepted farm practices. LUBA agreed, explaining that ORS 215.296(1) does not require identifying "the amount of increased cost or degree of forced change" and that the county improperly shifted the burden to apply a different, more difficult, standard on opponents than it did to the applicant, the party with the burden of proving compliance. For example, the county found that the landfill attracts nuisance birds that adversely impact surrounding farmlands but the county faulted the farmer for failing to quantify the number of nuisance birds attributable to the landfill and the extent of changes or increased costs that are attributable to nuisance birds from the landfill as opposed to other nuisance birds that otherwise might be present. Next petitioners challenged the county giving "great weight" to a longitudinal study concluding that farms devoted to farm operations in the vicinity of the existing landfill have remained stable or intensified in past years when these conclusions have no bearing on ORS 215.296(1) considerations. LUBA agreed, finding "no logical connection" between these two concepts noting that farming has remained viable despite significant changes or because changes have allowed farmers to continue farming. Further, LUBA found that the county's reliance on the study suggests that the significant change / cost threshold is not exceeded unless the farm goes out of business. This set the threshold too high. Finally, the county erred in failing to find the "great deal of time" throughout the year picking up garbage that blows onto a nearby farm as "significant" for purposes of ORS 215.296(1). LUBA said it was the changes the farmer must make to its farm operations to prevent damage to farm machinery and picking up trash that must be "significant" rather than evaluating the amount of trash. LUBA also found that the county erred in discounting a farmer's testimony of impacts the proposed use will have on pheasant raising because it is only a "hobby" rather than a commercial farm use or whether it was only recently commenced. The decision was remanded.

C. Non-Conforming Uses – ORS 215.130 and Implementing Local Codes

- Wal-Mart Stores Inc. v. City of Hood River, ____ Or LUBA ____ (LUBA No. 2015-004, July 2015). Petitioner appealed a city decision that approved its application to alter an existing retail store as a nonconforming use, but concluded that it lost its vested right to construct the expansion. In 1991, the city approved a site-plan review for the construction of a commercial retail store and a "future

expansion." In 1992, the retail store was constructed. In 1997, the city amended the subject zone to prohibit commercial uses, making the existing store a non-conforming use. In 2011, petitioner applied to the city for a non-conforming use for minor alterations of the store and to construct the expansion approved in 1991. The city approved the application. Opponents appealed that decision to LUBA and it was remanded. On remand the city concluded that the nonconforming use discontinuance prohibition for uses that are discontinued for 12 months applies to the vested right to construct the expansion and the vested right was lost between 1997 and 2011. On appeal, petitioner argued that the city's findings were inadequate because the findings do not explain how the discontinuance standard can be applied "retroactively" to extinguish a vested right. Petitioner also argued that the county misconstrued the discontinuance standard in the first instance. First, LUBA pointed out the petitioners failure to demonstrate that these arguments were preserved in its opening brief rather it raised these issues in a reply brief in violation of OAR 661-010-0030(4)(d). LUBA pointed out that this is a relatively new rule and that LUBA would overlook the error this time but may not do so in the future. With regard to the merits, respondents argued that any analysis of discontinuance under ORS 215.130 or a local code implementing the statues involves looking back in time to determine the status of the nonconforming use, and whether that non-conforming use has been lost due to discontinuance. LUBA agreed, finding that it was entirely possible for a nonconforming use to be discontinued prior to the date that the applicant seeks a verification of the lawful existence and scope of the nonconforming use, and prior to the date the local government issues a decision verifying the non-conforming use. Although this case was not subject to ORS 215.130, LUBA found the local interpretation of the local code plausible Further, the findings discussed the relevant facts, apply the local code to those facts and concluded that the vested right to complete the expansion was discontinued.

- Rogue Advocates v. Jackson County, ___ Or LUBA ___ (LUBA No. 2014-100, March 2015) Petitioner appealed a hearings officer decision denying an application to verify an asphalt batch plant operation as a lawfully established nonconforming use. LUBA affirmed. The county's decision was a hearings officer's decision on remand from *Rogue Advocates v. Jackson County*, __ Or LUBA __ (LUBA No. 2013-11 103, April 22, 2014) (*Rogue I*). Intervenors wished to establish, as a nonconforming use, a concrete batch plant that was operated from 1988 to approximately 2000 as an *unverified* nonconforming use in the county's Rural Residential-5 zone. At some point prior to April 2001, the concrete batch plant was replaced by an asphalt batch plant operation on the property and intervenors made additional unapproved alterations to the plant. The hearings officer denied intervenors' application for nonconforming use verification after concluding that the post-2001 changes to the operation constituted unapproved alterations that themselves required land use approvals. The hearings officer found that an asphalt batch plant is essentially the same use as a concrete batch plant, and that the conversion or replacement of the concrete batch plant with an asphalt batch plant was not an alteration of the use and that the 2001 change from a concrete to an asphalt batch plant did not constitute an alteration of the lawful nonconforming use. In *Rogue I*, LUBA disagreed and

remanded for a verification of the nature and extent of the lawful nonconforming batch plant use, without consideration as part of the verified use any unapproved alterations that occurred between 1992 and 2002. On remand, the hearings officer again denied intervenors' application to verify the current asphalt batch plant as part of the verified nonconforming use, but petitioner (the *opponent* of the batch plan), having prevailed before the hearings officer, nonetheless appealed to LUBA again, concerned that the hearings officer had verified the "nature and extent" of the concrete batch plant use as that plant existed in 1992. LUBA concluded that the opponents had misunderstood the purpose of the hearings officer's recitation of evidence concerning the 1992 concrete batch plant.

D. Firearms Facility Training Uses on EFU Land - ORS 197.770

- H.T. Rea Farming Corp., v. Umatilla County, ___ Or LUBA ____ (LUBA No. 2014-077, February 2015). Petitioner appealed a county board of commissioners' decision approving an expansion of an existing shooting range. ORS 197.770 allows a "firearms training facility" that was in existence on September 9, 2005, to continue operating and to add five new structures. Petitioner argued that ORS 197.770 allowed continued operation but not expansion. LUBA agreed, finding the sole authority to approve an expansion comes from OAR 660-033-0130(2)(c) authorizing counties to approve the "maintenance, enhancement or expansion" of certain "existing facilities" including an ORS 197.770 firearms training facility, subject to certain standards. The county code implements OAR 660-033-0130(2)(c) by allowing all of the listed public, park and quasi-public uses listed in the administrative rule except a firearm training facility. Rather than determine whether the administrative rule was inconsistent with ORS 197.770, as one LUBA referee suggested in a concurring opinion, LUBA remanded finding that the county chose not to provide for the expansion of an existing firearms training facility.

E. Needed Housing – ORS 197.307

- Group B, LLC v. City of Corvallis, ____ Or LUBA ____, (LUBA No. 2015-019, August 2015). Petitioner challenged a city decision that denied its application for planned development approval for a 10-unit apartment building. The key issue was whether the needed housing statute at ORS 197.307, requiring the application of clear and objective approval standards, applied to the proposed multi-family development. The city denied that application on three grounds: (1) inconsistency with a condition of a previous design approval that prohibited a building on the subject property; (2) inconsistency with planned development standard that required that the development be compatible with surrounding development; and (3) inconsistency with cul-de-sac standards that prohibited using the adjacent street from serving this development. No party challenged whether the subject housing qualified as "needed housing" as housing necessary to meet the need for housing within an urban growth boundary at particular price ranges and rent levels or that the second reason for denial, requiring compatibility, was not clear and objective. Rather, the city's position was that Condition 12 of previous development approval that restricted the siting of a different building so as to be

set back from an adjacent street no less than 135 feet from the south property line, served to preclude this development from occupying the previously identified setback space. The city denied the application because petitioner could not satisfy condition 12 and had not demonstrated that a modification to condition 12 would satisfy the compatibility standards. Petitioner argued that condition 12 was not "clear and objective" because, although it clearly prohibited the previous development, it did not specify that it prohibited other development. Because condition 12 was ambiguous on that point, Petitioner argues that it cannot be applied as a basis to deny the proposed needed housing. LUBA found that ORS 197.307(4) governs the city's application of condition 12, either as a condition, even though it was a condition to a prior approval, or as an approval standard, because the city treated it as one. LUBA agreed with the petitioner's finding that condition 12 mentioned no other development or buildings nor did it necessarily imply that no other building would be allowed. However, LUBA also found no indication that the city did not intend to restrict all development from within the setback area and, given that two diametrically opposed interpretations were possible, LUBA found that condition 12 was not clear and objective. The city went on to argue that ORS 197.307(4) does not preclude the city from applying condition 12 as interpreted as a basis to require petitioner to obtain a modification or nullification of the 1981 condition pursuant to a compatibility finding. In other words, the city argued that the applicant had the option of proceeding under the clear and objective setback requirement or proceeding under discretionary standards to modify the requirement. Petitioner argued, and LUBA agreed, that at no time has the city offered a "clear and objective" path for approval for needed housing on the area subject to development. The city also argued that petitioner is bound by the choices of its predecessor-in-interest who designated the property for planned development rather than pursue other options. LUBA said it would agree with the city if the 1981 proposal had involved needed housing and the applicant chose the planning development process to gain approval of that needed housing, in lieu of a clear and objective path. Even though ORS 197.307(6) had not yet been adopted in 1981, the two track framework would have still controlled. However, the 1981 approval was for an assisted living facility and did not qualify as needed housing.

In a separate assignment of error, petitioner challenged the city's denial based on a local code section identifying street designs that "shall be considered," including restricting cul-de-sacs to serving no more than 18 dwelling units. The subject property was served from a cul-de-sac that served 17 dwelling units not including the proposed apartment building. Petitioner argued, and LUBA agreed, that the local standard was highly discretionary because it applies to the design of local streets and not to approval of development that is served by streets that are already designed. Further, the regulations were hortatory and only required that the city "consider' various street designs and that cul-de-sacs "should" not serve more than 18 dwelling units.

Finally, petitioner challenged the city's finding that a variance was necessary because the subject development must comply with maximum setback standards that was impossible given the 40-foot long flagpole connecting the subject

property to the street. Petitioner argued that these standards did not apply because they were adopted after the subdivision was created pursuant to ORS 92,040, which provides that only laws in effect at the time an application is made for a subdivision inside an urban growth boundary "shall government subsequent construction on the property." The city responded that ORS 92.040 did not apply because, at the time of subdivision, the applicant did not provide a tentative plat of the proposed development on the subject property because no development was proposed. LUBA found that, although the city did not evaluate any development against whatever criteria would be applied to proposed development of lots at the tentative plat stage, it was reasonably clear by the retention of a flag portion of the lot that no development was intended to be located in the pole portion of the site. LUBA reversed the decision and approved the application.

F. Moratoria – ORS 197.520

- Kovash v Columbia County, ____ Or LUBA ____ (LUBA No. 2015-040, September 2015). Petitioner appealed a county adopted moratorium under ORS 197.520 on the establishment of new or the expansion of existing marijuana facilities in the county. The purpose of the county's moratorium was to delay the development of county land use regulations for recreational and medical marijuana until the state regulations were adopted. As part of identifying options for avoiding the moratorium, the county found that delay was necessary given Oregon's two separate marijuana programs have staggered time lines for implementation. To comply with OMMA, the county would have to adopt regulations for medical marijuana dispensaries by May 1, 2015 and then revisit those regulations around January 2016, when it implements regulations for recreational marijuana. LUBA found that this effort to avoid duplicative measures was not the type of irrevocable public harm that a moratorium may be used to protect. The county had approximately 14 months before it adopted the moratorium to adopt regulations to regulate medical marijuana dispensaries. With regard to recreational marijuana, the county adopted a moratorium on uses that are not allowed in the county until January 1, 2016, a date that has yet to pass. Therefore, the ordinance was invalidated.

IV. STATEWIDE PLANNING GOALS

A. Goal 2 - Land Use Planning

- Squier v. Multnomah County, ___ Or LUBA ____ (LUBA No. 2014-074, February 2015). Petitioner appealed a hearings officer's decision on a request for an interpretation. The hearings officer had concluded that an exception to statewide Planning Goal 14 (Urbanization) was not necessary to convert a boat moorage and facilities in an existing marina to allow a houseboat moorage at a maximum density of one houseboat per 50 feet of waterfront. Goal 14 generally prohibits urban uses of rural land, including urban levels of residential development, absent an exception to the goal. The county's MUA-20 zone allows houseboats in certain rural areas of the Multnomah Channel subject to a density standard of one for each 50 feet of the waterfront. Petitioner argued that this

density standard constituted an urban use that required an exception. The county hearings officer concluded that no exception to Goal 14 is required because the county code was acknowledged shielding direct application of either goal 14 or OAR 660-04-0040, the rural residential rule. First, LUBA agreed with the petitioner that OAR 660-004-0040 does not constitute complete implementation of Goal 14 with respect to residential development of rural lands. Therefore, no inference can be drawn by the rule's silence with regard to floating homes or how Goal 14 would apply. Second, petitioner argued that the ordinance imposing the density standards, after the *Curry County* decision were not acknowledged and therefore, Goal 14 applied directly. Although LUBA found that this ordinance was not acknowledged, LUBA found that a subsequent ordinance that repealed and readopted the previous ordinance established the prerequisite acknowledgment. Repealing and re-adoption of an ordinance does not serve to "de-acknowledge" the previous ordinance.

- Ooten v. Clackamas County, ___ Or LUBA ___ (LUBA No. 2014-069, November 2014), ___ Or App ___ (A158369, February 2015). Intervenor sought a comprehensive plan and zone change from Rural (RRFF-5) to Rural Industrial (RI) to allow an existing paving business and automobile, truck and heavy equipment storage repair. The RRFF-5 designation was established in 1980 through an exception to Goal 3. OAR 660-004-0018(1) provides that exceptions to one goal do not allow other uses or activities other than those authorized by the exception. Changes in the types of uses or activities require compliance with OAR 660-004-0018(2), requiring an analysis of compliance with the other goals, whether the use will commit adjacent resource lands to uses not allowed by the application goals, whether the proposed use is compatible, consistency with the unincorporated communities rules of OAR 660-022-0030 and industrial uses that were planned and zoned for those uses on January 1, 2004. Petitioner argued that, because the proposed industrial uses that would continue were not the same as those allowed in the RRFF-5 zone, a new exception to Goals 3 and 4 was required under OAR 660-004-0018(2). The county concluded that, due to the 1980 exception, Goals 3 and 4 no longer applied to the property. LUBA agreed with the petitioner – the 1980 exception took an exception to Goals 3 and 4 only for the uses that were then allowed in the RRFF-5 zone. LUBA went on to find that the requirement that the proposed uses be the "same as the existing land uses" did not allow consideration that the uses "currently exist" on the property. The Court of a Appeals affirmed this analysis. Remand was also necessary because it was not clear what uses were justified as part of the 1980 exception. LUBA found that this was not a collateral attack on the 1980 exception because it did not serve to insulate all future changes in the plan and zoning designation. Next, Petitioners challenged the county's application of a number of comprehensive plan policies providing that lands could be designated rural industrial where "areas have a historical commitment to industrial uses." LUBA agreed with the county's finding that existence of the business for the past 45 years was sufficient, without regard to whether some of the uses were legally established. That said, LUBA did remand that portion of the decision allowing for the inclusion of a new driveway where there was no evidence of its historical existence. LUBA further rejected the county's decision for failing to adopt adequate findings explaining how

allowing industrial levels of development under the RI zone would be consistent with the rural character of the area. Finally, Petitioner challenged the county's Transportation Planning Rule analysis that was premised on a traffic study comparing the current traffic generated from the subject property against the most intensive developable uses allowed in the RI zone. The analysis showed that the amendment would have a "significant affect" that could be mitigated by some roadway improvements. Petitioner argued, and LUBA agreed, that the proper baseline for comparison is the most traffic-generative use reasonably allowed in the RRFF-5 zone and not the current use of the property that is arguably not permitted.

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

- Oregon Department of Fish and Wildlife v. Crook County ____ Or LUBA ___ (LUBA No. 2015-044, November 2015). Petitioner appealed a decision that changed the zoning for a one square mile property from EFU-1 to Rural Aviation Community (RAC) and adopted an amendment to the RAC zone text to allow for the construction of dwellings near an existing airstrip. In the first assignment, petitioner argued that the county erred by failing to give petitioner notice of the hearing on remand and that the notice was misleading in that it stated that the remand hearing would be on the record and limited to the applicant and LUBA appellants, whereas the county in fact allowed additional evidence and allowed other persons to testify. An ODFW wildlife biologist learned of the remand hearing, attended but did not testify. LUBA has always required that a party who wishes to assign procedural error at LUBA have entered an objection to the procedural error locally and the failure to do so in this case resulted in LUBA rejecting the procedural challenge. As to the merits of the decision, the county amended its Goal 5 program to protect deer winter range under OAR 660-023-0040 and -0050 and made a decision to fully allow the residential uses rather than protect the more limited value wildlife habitat. The county did this by amending its RAC zone to make it consistent with a wildlife plan policy setting residential densities at one per 80 acres. The new RAC zone included a maximum density limitation of 80 acres but it also included a methodologyy allowing one dwelling per 10 acres-similar to the one used for non-farm dwellings that is based on a wildlife density determination based on a one mile study area and subtracting out different categories of developed land and leaving a total density study area of at least 2000 acres. LUBA found this approach was inconsistent with the wildlife policy because mandating a one-mile study area, when the policy itself with regard to what qualifies as critical deer habitat is ambiguous regarding permissible methodologies that the county failed to justify under Goal 5. Further, automatically excluding lands from the study area because they are developed would allow development to exceed the policy density standard and the county failed to explain why developed lands were excluded. LUBA remanded the decision for the county to either repeal its wildlife policy or demonstrate how the amendments are consistent with that policy and Goal 5.

- Rogue Advocates v. Josephine County, ___ Or LUBA ___ (LUBA No. 2014-095/096, October 2015). Petitioners appealed a county decision approving an

application for comprehensive plan text amendments, plan and zoning map amendments and a site plan review, to allow development of an aggregate mine. Petitioners argued that the county failed to property identify conflicts with other Goal 5 resources on the property and failed to minimize those conflicts based on the economic, social, environmental and energy (ESEE) analysis. As an initial matter, LUBA found that the county erred in accepting new evidence prior to making a decision, without allowing petitioner an opportunity to respond to that new evidence when such a request was made below. On the merits, the county by requiring that it correctly interpreted the ESEE requirement of OAR 660-023-0180(7) a conflicts analysis if, in the future, some person proposes new uses in the impact area that could conflict. LUBA disagreed, finding nothing in the language of the rules allowing the county to not conduct an ESEE analysis or to postpone the analysis to some future date. Rather, the focus must be on the uses that could be permitted within the applicable zone. Further, LUBA found that the county's findings failed to adequately address potential impacts to deer and elk from proposed heavy truck traffic and whether this traffic could adversely affect a nearby bridge. The decision was remanded.

- King v. Clackamas County, ____ Or LUBA ____ (LUBA No 2015-022, September 2015). The owners of the former Bull Run powerhouse and adjacent day-use park and elementary school; all designated local historic resources-received comprehensive plan and zoning amendments allowing for a variety of educational, cultural and commercial uses. The owners argued and the county agreed, that the uses allowed under Goal 4, generally limiting the use of forest lands to forest uses, would not provide sufficient economic return to preserve and maintain the historic structures and thus, a reasons exception to Goal 4 was granted. The petitioners argued that Goal 5 does not mandate the preservation of historic resources *per se*, but rather encourages local government to adopt programs to protect historic resources and the need to generate revenue through adaptive reuse of the structure is not a sufficient reason for an exception. LUBA disagreed finding that "absent a lawful economic use of some kind, it is unreasonable to expect that the property owners will continue to maintain the historic structures, in which event the structures will effectively be demolished by neglect over time. That outcome is inconsistent with the intent of Goal 5." Creating a connection between economic return necessary for historic preservation to success as a requirement of Goal 5 could provide an additional helpful tool for property owners searching for alternatives to demolition.

- Delta Property Company LLC v. Lane County, ____ Or LUBA ____ (LUBA No. 2013-061, May 2014) *rev'd in part* 271 Or App 612, ___ P3d ___ (Jan. 2015) and affirmed on remand. Petitioner Delta Property Company, LLC. appealed the county's decision denying its request for a special use permit to mine gravel and aggregate resources on EFU-zoned land adjacent to Delta's existing mine. LUBA affirmed. The key issue in the case was the identity and scope of inventories of mineral and aggregate natural resources in the Metro Plan and the Lane County Rural Comprehensive Plan (RCP), and whether petitioner's proposed mining expansion site must be on one or both inventories to qualify for the requested special use permit. The Metro Plan is a regional comprehensive plan adopted by

Lane County and the cities of Eugene and Springfield in 1980. The area subject to the Metro Plan includes the area outside the UGB but inside the Metro Plan area, referred to as the "donut" and includes the subject property. In the donut area the Metro Plan is the comprehensive plan, and both the City of Eugene and Lane County must agree to amend the Metro Plan there. The Lane County Land Use and Development Ordinance (LC) includes the land use regulations that govern development in the donut area. Lane County is free to amend the LC in the donut area without any requirement that the City of Eugene agree. Goal 5 as it existed in 1980 required local governments to do a number of things to comply with Goal 5. First, it required that local governments to prepare inventories of, among other things, "mineral and aggregate resources." Second, where uses were identified that conflicted with inventoried mineral and aggregate resources, the "economic, social, environmental and energy" (ESEE) consequences of the conflicting uses had to be determined and programs developed to achieve the goal. Third, Goal 5 Guideline A(6) anticipated that the inventory of mineral and aggregate resources would lead to protection of sites for mineral and aggregate removal. Goal 5 Guideline B(9) anticipated that mineral and aggregate sites would be planned for a primary use (presumably mineral and aggregate extraction and processing), as well as "interim" uses until the mineral and aggregate resource was needed and "transitional" and "second use" after mineral and aggregate extraction and processing was complete. The first Goal 5 administrative rule was not adopted until 1981 – after the Metro Plan had been acknowledged.

Petitioner applied, under the new Goal 5 rule, for the expansion of an existing mine, to include an additional 70 acres located on adjacent land. The existing mine is zoned Sand and Gravel (S-G) by the county. The proposed expansion area is designated Agriculture on the Metro Plan Diagram and is zoned exclusive farm use (EFU). After an earlier 2008 failed effort to add the expansion area to the Metro Plan inventory of significant aggregate resource sites (Metro Plan ISARS), as well as designate it Sand and Gravel on the Metro Plan Diagram and have it zoned S-G by the county, petitioner took a new approach, seeking approval from the county under ORS 215.213(2). ORS 215.213(2) authorizes mining of mineral and aggregate resources, subject to ORS 215.298. Its county analogue, LC 16.212(4)(y)(ii), requires that the site must be on an inventory in the Lane County Rural Comprehensive Plan (RCP).

The county hearings officer found the proposed expansion area is not included on the Metro Plan ISARS and the Board of County Commissioners agreed. Petitioner argued that the county erred in concluding that the proposed expansion area is not included on the Metro Plan ISARS. LUBA first concluded that the county's decision was not entitled to deference because the Metro Plan was not adopted by the county alone. When reviewing LCDC's acknowledgment documents, LUBA concluded that: "The Metro Plan has been amended to include a consolidated resource map (Map 3, General Plan Technical Report) . . . . Resources mapped include . . . sand and gravel"). Map 3 is the county's 1C inventory. Like S&GWP Figure E1, Map 3 includes the subject property. On that basis, LUBA sustained petitioner's first assignment of error. On appeal, the Court of Appeals concluded that, by its own terms, ORS 197.829(1), which speaks of "a

local government's interpretation of its comprehensive plan and land use regulations," does apply to a local government interpretation of a jointly adopted plan. The Metro Plan is a comprehensive plan of a local government, "namely the county, and the county, in part provided an interpretation of the Metro Plan in its decision in this case." The Court of Appeals remanded for LUBA to conduct an analysis that gives due deference to the County's interpretation of the Metro Plan.

Although the subject property is included on the Metro Plan ISARS inventory, and thereby satisfies ORS 215.298(2), it is not included on the county's RCP inventory, which means it cannot be mined without violating LC 16.212(y)(ii). However the RCP does not apply in the donut, while the Metro Plan ISARS does. Petitioner argued that the county made a mistake when it adopted the language in LC 16.212(y)(ii). LUBA first observed that in cases of mistake, the proper path is to amend the code language rather than ignore it in the course of reviewing an application. LUBA then discussed ambiguities in LC 16.212(y)(ii) that could have allowed the county to conclude it should not be applied. However, the county maintained that it could impose restrictions on mining under ORS 215.213(2). LUBA agreed, and denied petitioner's second assignment of error and the Court of Appeals agreed.

On remand subject to the proper standard of review, LUBA found that the Lane County Board of Commissioners interpretation that the Mero Plan Technical Report Map 3 is not viewed as the Metro Plan 1C inventory was plausible and the county's decision was affirmed.

C. Goal 10 - Housing

- Seabreeze Associates Limited Partnership v. Tillamook County, ___ Or LUBA ___, (LUBA No.2014-106, April 2015) LUBA remanded a legislative decision adopting a Coastal Hazards Overlay zone which limits land divisions and development on lands subject to coastal erosion in the rural unincorporated community of Neskowin. Under Statewide Planning Goal 10, a local government must inventory its buildable lands and provide an adequate supply of land to meet its identified housing needs. Buildable lands are defined as urban or urbanizable land and generally do not include land in a rural unincorporated community, or RUC. The issue LUBA addressed in this case was whether the county's application of an overlay zone to a RUC affected the county's housing capacity and required the county to assess its ongoing compliance with Goal 10. Petitioner challenged a county ordinance applying a Coastal Hazards Overlay zone (the Nesk CH zone) to Neskowin, a RUC. As adopted, the Nesk CH zone limits land divisions, construction on newly created lots, and new accessory dwelling units, among other developments. Petitioner argued that application of the Nesk CH zone would reduce Neskowin's housing capacity and thus required the county to evaluate its ongoing compliance with Goal 10. The county and DLCD argued that, although the county's comprehensive plan notes there are "additional housing opportunities" in RUCs like Neskowin, they argued this did not make land within Neskowin part of the county's needed housing inventory. They also pointed to the adopted Neskowin Community Plan, which was acknowledged for

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

D. Goal 16 – Estuarine Resources

- Oregon Coast Alliance v. City of Brookings, ___ Or LUBA ___ (LUBA No. 2015-037, October 2015) Petitioner challenged the city's decision on remand approving an annexation, comprehensive plan amendment, zone change and shorelands boundary amendment to allow residential development within the Chetco River estuary. Goal 16, Implementation Requirement 1, requires a "clear presentation of the impacts proposed by the proposed alteration" including identification of the expected alteration, the resources effect, impacts on water quality and methods that would avoid or minimize adverse impacts. The city found that residential development allowed under the proposed zone would not result in adverse impacts as compared to the commercial and industrial uses potentially allowed under the former commercial / industrial zoning designation. LUBA agreed, finding that the potential adverse impacts must be those that would result from development under the proposed residential zone. Further, the additional findings adopted on remand were drafted by the city attorney who, petitioner argued, was not a qualified expert to evaluate the potential impacts on estuarine resources, particularly testimony submitted by representatives from the National Marine Fishery Service. The city responded, and LUBA generally agreed, that Implementation Requirement 1 does not necessarily require that the impact assessment by prepared by experts. However, it does require some explanation of the impacts to be expected and efforts to avoid those impacts and the city failed to respond to testimony that development may adversely impact salmon species in the adjacent estuary through pollution from stormwater runoff. LUBA found that answering this question is likely to require some level of scientific or professional expertise. In sum, LUBA agreed with the petitioner that the city's finding failed to describe the expected extent of the impacts of storm water runoff on water quality and living resources, and failed to identify methods sufficient to "avoid or minimize adverse impacts." Similarly the city failed to address the impacts from pesticide use and remand was necessary for the city to adopt adequate findings supported by substantial evidence.

V. LOCAL GOVERNMENT PROCEDURES

A. Standing

- Devin Oil Co., Inc. v Morrow County, ____ Or LUBA ____ (LUBA No. 2015-023, August 2015). This case involves a decision by the county extending a previously approved site plan. Respondents moved to dismiss this appeal and argued that the extension decision fall within the exception to LUBA's jurisdiction for a decision "that is made under land use standards that do not require interpretation or the exercise of policy or legal judgment." The local code contains a provision allowing an extension to a "zoning permit for construction" and a separate code section requiring that a building permit be issued within one year of site review approval. Petitioner argued that the county's interpretation that a 12-month extension was available for a site plan approval required the exercise of legal judgment and LUBA agreed. In cases where a local government does not hold a hearing, in order to establish standing, ORS 197.830(3) requires that "a person adversely affected by the decision" appeal the decision within a certain time. Respondents argued that petitioner failed to demonstrate that is "adversely affected" by the extension decision because the adverse impacts that will result from the extension decision are negative economic impacts to its business that currently operates on several property located in the city of Boardman, approximately five miles from the subject property, rather than adverse physical effect to its properties from the county's decision. The appeal was dismissed. This case is currently on appeal.

B. Notice Issues

- McKenzie v. City of Portland, ___ Or LUBA ___ (LUBA No. 2014-099, March 2015). Petitioners challenged the City's approval of a conditional use permit to expand Japanese Garden in Washington Park. Washington Park is more than 400 acres in size and the City provided notice to all landowners within 400 feet of the three tax lots within the park that would include the expanded Japanese Garden. Several residents who lived within 400 feet of other portions of Washington Park appealed, arguing that they were entitled to notice. LUBA's decision turned on the meaning of the phrase "property which is the subject of the notice" and LUBA concluded that it was reasonable for the city to rely on tax lot boundaries for determining the boundaries of the "property which is the subject of the notice."

- Dilley v. City of North Bend, ___ Or LUBA ___ (LUBA No. 2014-061, January 2015). Petitioners appealed a city council decision dismissing the petitioners' notice of appeal because it failed to establish "party status" as required by the local code. "Party status" was interpreted by the city council to include appearing orally or in writing before the planning commission or requesting notice of the decision and suffering an adverse effect. First, LUBA found that the submittal of written testimony after the record closed was insufficient to confer "party status." With regard to requesting notice of the decision, LUBA found that signing the public comment sign-in sheet, when the city used that sheet as a mailing list to provide notice of the decision, was sufficient to establish that notice of the

decision was requested. The matter was remanded for a determination of whether petitioners were adversely affected by the decision.

C. Local Government Decision-Making

- Smith v. City of Gearhart, ___ Or LUBA ___, LUBA No. 2014-058 (April 1, 2015). The city approved a conditional use permit allowing Smith to use a barn on her property to hold events. Under the city's code, a permit expires one year after it is granted if no substantial construction has occurred or if no permit extension has been approved. Shortly before the one-year period expired, the city approved Smith's request to extend her permit for an additional six months. Smith applied for a second six-month extension, which the city administrator denied. Her request was precautionary in part because she also claimed the project would be substantially complete before the first extension expired. Smith appealed the administrator's decision to the city council and, at the conclusion of the appeal hearing, one councilor moved to approve the additional six-month extension. No one seconded the motion and it died. The council took no further action on Smith's appeal. On appeal to LUBA, Smith argued her request for the permit extension was a "permit" under ORS 227.160(2) and the city erred by failing to make a decision on her application. LUBA agreed with Smith and rejected Gearhart's argument that her application became void under ORS 227.178(4) because she failed to submit missing information. The record showed the city administrator never told Smith her application was incomplete. Moreover, the city administrator denied her extension request less than two weeks after Smith submitted it, undercutting the notion that he needed additional information to make a decision. Finally, in her city council appeal, Smith stated she did not intend to submit any additional information, which meant the administrator should have deemed her application complete under ORS 227.178(2). LUBA also agreed with Smith that the city council's failure to make a decision on her appeal violated state law and city code. Both required the council to make a decision and adopt findings that explain the basis for its decision. Given the council's inaction on her appeal, LUBA sent the matter back to Gearhart and directed the council to decide Smith's appeal and determine whether her project satisfies the "substantial construction" standard.

D. Exhaustion / Waiver of Issues

- Dion v. Baker County, ___ Or LUBA ___ (LUBA No. 2015-052, November 2015). Petitioner appealed a county board of commissioners' decision approving a modification to a conditional use permit for an existing rock quarry on remand from LUBA. In appealing the planning commission's decision to the board, petitioner identified three reasons for her appeal: (1) the planning commission failed to address all elements of the LUBA remand; (2) the planning commission failed to address the approval criteria; and (3) the planning commission's failure to adopt findings based on substantial evidence. Petitioner did not appear at the appeal hearing. The board of county commissioners denied the appeal, finding that the arguments were not specific enough for the county to respond. At LUBA, the county argued that by failing to identify issues in the local notice of appeal,

petitioner failed to exhaust her local remedies. ORS 197.825(2)(a). LUBA agreed explaining that the reasons for the appeal were so generally phrased that a decision maker could only speculate exactly what aspects of the decision were being challenged. LUBA went on to find that the petitioner failed to challenge the commissioners' primary findings that the local notice of appeal failed to identify any reason for appeal and instead challenged the merits of the decision.

E. Remand Proceedings and Law of the Case

- Gould v. Deschutes County, ____ Or LUBA ___ (LUBA No. 2014-080, January 2015), *rev'd* --- P3d ---- 272 Or App 666 (August 2015). Petitioner appealed a county declaratory ruling, on remand, that the designation resort conceptual master plan (CMP) has been initiated before the two-year deadline. For a permit to be "initiated," the county found that the conditions of the permit have been "substantially exercised and that failure to comply with any conditions was not the applicant's fault." The CMP was approved with 38 conditions and, in *Gould VII*, LUBA found that the conditions could be considered as a whole and did not require completion of each individual condition. However, LUBA also found in *Gould VII*, that the hearings officer erred in finding that a number of the conditions did not need to be completed because resort approval was a 3-step process and compliance would be achieved through final master plan approval. On remand, the board of county commissioners, considering this question for the first time, found that it could deviate from LUBA's interpretation and craft one of its own. LUBA disagreed and explained that, under *Beck*, neither a hearings officer nor the board of commissioners is free to revisit and continue consideration of interpretive issues that were resolved by LUBA in a previous appeal. Further, LUBA found errors in the county's findings that the 42 CMP conditions, when viewed as a whole, have been "substantially exercised." A finding that 19 of the 42 conditions have been fully implemented without more explanation explaining how the conditions where weighted to make such a finding is inadequate. LUBA went on to explain that the county's finding that the remaining unsatisfied conditions were irrelevant because they require final master plan approval was the same exercise that LUBA rejected in *Gould VII*. Second, LUBA affirmed the county's interpretation of the "fault of the applicant" prong of the "initiated" standard being the complexity and time consuming nature of the process that resulted in the applicant being unable to complete all of the CMP conditions in two years. The case was remanded.

  On appeal, Court of Appeals found that the county failed to explain why the complexity of the process or the nature of the contingent conditions made it impossible for an applicant to comply with the conditions within two years. The interpretation that the applicant is excused from fault solely because the process is too complex failed to take into account the applicant's efforts to avoid such a contingency made the county's interpretation implausible. Although the local government has the first bite at the interpretation apple, judicial efficiency allows LUBA to make an interpretation binding on a local government when it fails to appeal an adverse decision.

VI. LUBA JURISDICTION, PROCEDURES AND RULES

A. NITA Formalities

- Mackenzie v. City of Portland, ___ Or LUBA ___ (LUBA Nos. 2014-089/099, March 10, 2015). Petitioners challenged a city council decision approving a conditional use permit and environmental review to expand the Japanese Garden from 9.1 acres to 12.56 acres within the city's Washington Park. The expanded Japanese Garden will occupy 12.56 acres on portions of three tax lots, which together total over 25 acres. The city treated this 25-acre area as the "site" for purposes of city code provisions that require notice of hearing to be mailed to landowners within 400 feet of the "site." The petitioners in No. 2015-099 lived more than 400 feet from the 25-acre area, but within 100 feet of other portions of Washington Park. They did not receive mailed notice, and did not appear during the city proceedings. On September 18, 2014, the city council issued its final decision. On November 3, 2014, the petitioners in No. 2015-099 filed their appeal of the city council decision. The city and intervenors argued LUBA lacked jurisdiction over LUBA No. 2015-099 because it was filed more than 21 days after the date the city's decision became final. Petitioners argued that their appeal was filed timely because it met the alternative deadline provided in ORS 197.830(3). ORS 197.830(3) provides that a person who is adversely affected by a land use decision may appeal the decision to LUBA within 21 days of either (1) the date of actual notice of the decision or (2) the date the person knew or should have known of the decision where no notice is required. Even if a hearing is held, ORS 197.830(3) treats a situation where a local government fails to provide the required notice as one where the local government has failed to provide the hearing as to the person who should have, but didn't, receive notice. ORS 197.763(2) requires notice of hearings be given to owners of record of property within 100 feet of the "property which is the subject of the notice," where the subject property is inside an urban growth boundary. The Portland City Code (PCC) requires notice be given to owners of property within 400 feet of the boundary. However, failure to provide notice of hearing to persons entitled to notice required only under a local ordinance does not trigger ORS 197.830(3). LUBA discussed at length the ambiguity associated with the phrase "property which is the subject of the notice," before stating that "the property which is the subject of the notice" includes at least the lots or parcels the applicant owns or controls and on which development is proposed, plus any additional off-site areas to be developed, if the applicant acquires a property interest in the off-site development. Accepting tax lot boundaries as parcel boundaries, in the absence of any demonstration to the contrary, LUBA concluded that petitioners' properties were not within the 400-foot notice area required by the PCC, whether that notice was measured from the boundaries of the 12.56 acres that included the additional development or from the boundaries of the 25-acres comprising the three tax lots. They were within 100 feet of portions of Washington Park, but LUBA rejected the proposition that the 100-foot notice area required by ORS 197.763(2)(a) should be measured from the boundaries of one ownership comprised of contiguous parcels, rather than from the boundaries of the lots or parcels that are proposed for development. LUBA dismissed No. 2015-099.

- Oakleigh – McClure v. City of Eugene, 269 Or App 176 (2015). Trautman participated in the initial hearing and submitted written testimony to the hearings officer, but hearings officer failed to provide notice of decision to Trautman. Trautman then received no notice of appeal hearing before the planning commission or notice of the City's final decision. Other parties appealed and, during course of record objections, the city realized the notice issue and finally provided notice of decision to Trautman. Trautman moved to intervene but LUBA rejected intervention under ORS 197.830(7), which requires intervention within 21 days of the filing of the notice of intent to appeal. The Court of Appeals reversed, requiring LUBA to address Trautman's arguments on intervention. The Court of Appeals concluded that the notice of intent to appeal is "filed" only when all persons receive notice of that filing.

B. Jurisdiction

- Bishop v. Deschutes County, _____ Or LUBA ____ (LUBA Nos 2015-027, 028, and 030, September 2015) The appeals concerned appeals of a series of land use compatibility statements (LUCS) concluding that a proposal to transfer irrigation water to two newly constructed reservoirs required a conditional use permit for surface mining from the county. Intervenor moved to dismiss the appeals under ORS 197.015(10)(b)(H)(iii), which excludes certain LUCS decisions from the definition of a "land use decision." This exception applies when a proposed action "requires future land use review under the acknowledged comprehensive plan and land use regulations implementing the plan." The key question for LUBA was whether the county correctly categorized the action to require subsequent review so as to fall within the exception. LUBA found that given its deferential standard of review, the county's conclusion that the construction of reservoirs to store water required further land use review and therefore, it fell within the exception. LUBA rejected the petitioners argument that the exercise of discretion and the need for interpreting code language, in order to determine how to characterize the use, excluded it from the exception. Two of the appeals were transferred and one was dismissed.

C. Record

- Truth in Site Coalition v. City of Bend, ___ Or LUBA ___ (Order, LUBA No. 2014-098, February 2015). Petitioner filed a record objection arguing that the city did not re-arrange the documents with the record with exhibits attached to the "parent" documents that they were originally attached to. Rather, the city organized the table of contents to reflect the order in which materials were presented to the city. As result, the page numbers listed in the table of contents are not in numerical order and require skipping around within the approximately 5,700 page record to locate various attachments. LUBA rejected that this flipping imposed an undue burden on the petitioner finding that the table of contents adequately described and allowed documents to be located with reasonable effort.

D. Time Limits

- Stop the Dump Coalition v. Yamhill County, ____ Or LUBA ____ (LUBA No. 2014-023, May 2014). On April 11, 2014, LUBA issued an order settling the record noting that if petitioners had other objections, they could file further objections within 14 days. On May 6, 2014, intervenor filed a motion to dismiss because the petition for review was not filed within 21 days. On May 8, 2014, petitioner filed a record objection. LUBA found the deadline for filing a brief is strictly enforced. LUBA explained, although a late filed record objection does suspend future deadlines, a record objection filed after the deadline for the petition for review has passed does not revive that expired deadline. Failure to comply with the deadlines for filing a petition for review is not a technical deadline. "Time is of the essence" and requires automatic dismissal when an opening brief is filed late.

E. Stays

- Meyer v. Jackson County, ____ Or LUBA ____ (LUBA No 2015-073, October 2015). Petitioners moved to stay a county hearings officer decision that denied their application to alter a nonconforming use, pending a final opinion by LUBA. Petitioners claim of irreparable injury in being forced to shut down or face county enforcement fine of $800 daily was sufficiently onerous that they would not be able to remain in business if those funds were incurred during the pendency of the appeal. LUBA agreed that the threat of injury was significant but struggled to determine whether the conduct the petitioner sought to bar was sufficiently probable or rather just merely threatened or feared. LUBA found that the county's decisions historically to hold off in seeking enforcement while the decisions were pending review at the local level suggested that the county would do the same if the stay was granted in this case. The stay was granted.

- Dion v. Baker County, ____ Or LUBA ____ (LUBA No. 2015-052, August 2015). Petitioner appealed the county's approval of a conditional use permit approving intensified mining and batch operation for a period of two years. Petitioner sought a stay arguing that the dust generated from the intensified operation will result in permanent harm to her health. In order to obtain a stay, a petitioner must demonstrate irreparable injury if the stay is not granted. Petitioner stated that she plans to be present at her house approximately 30 days over the next 90 days and the question for LUBA was whether this 30 day exposure to dust would cause irreparable harm. Although LUBA found it was a close question, in addition to bare allegations, the petitioner submitted only third party articles identifying that long term exposure to pollution can cause serious reparatory effects. However, no evidence supported the allegation that 30 day exposure to dust and particulate matter would result in irreparable injury.

F. Attorney Fees

- Parkview Terrace Development LLC v. City of Grants Pass, ___ Or LUBA ___ (Order, LUBA No. 2014-024, February 2015). The developer sought to recover

over $39,000 in attorneys' fees and had originally sought a mandatory fee award against the City of Grants Pass under ORS 197.835(10)(b) because LUBA reversed the City's decision. The standard of review for attorneys' 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. 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 is different from, and inconsistent with, the townhouse development authorized by the City's original approval of the PUD. 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. Although the City had not relied on the developer's letter in its local decision and the neighbors had not complied with LUBA's procedural rules for filing a cross-assignment of error on the basis of the termination letter with the result that LUBA refused to consider the argument on the merits when it reached its decision in July, in the fee order, LUBA ruled these reasons were insufficient to base an award of attorneys' fees. LUBA concluded, that in light of the Board having made only a single-decision based on the cross-assignment rule since the rule's adoption in 2010, that 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." Thus, LUBA ruled that the procedural error on the neighbors' part does not mean their argument on the merits was presented without probable cause.

VII. LUBA SCOPE OF REVIEW

A. Local Code Interpretation and Applicable Standards

- Bend/Sisters Garden RV Resort, LLC v. City of Sisters, ____ Or LUBA ____ (LUBA No. 2014-086, October 2015). Petitioners challenged a city decision approving an application for a temporary use permit to allow the installation of portable pop-up tents where vendors would sell arts and crafts and food no more than 3 consecutive days per week during the summer months. The city's code provides that no temporary use may extend "for a period exceeding 180 days in any 365 period." The city council interpreted this requirement to impose a 180 consecutive day limit. Petitioners argued that this code provision allowed owners as many separate periods of operation as they wish, so long as those separate period of use do not extend beyond a total of 180 days. The city argued, and LUBA agreed, that definition of a temporary use being for a "fixed period of time" that ends at a certain time, undermined petitioner's position that there could be multiple periods. However, LUBA also pointed out that the city's interpretation that the 180-day limit must begin on the day that the permit is issue failed to acknowledge the "in any 365 day period" language in the provision. Therefore, even though the 180-days did not need to start on the day that the permit was issued, it extended for only one, rather than multiple periods, and the city's interpretation on that was affirmed. In a second assignment of error,

petitioner challenged a condition that, as part of obtaining a business license, each vendor must pay the $100 fee for each day of participation, unless a waiver is granted, as exceeding the city's authority to impose conditions or because it was a limited land use decision. LUBA rejected both arguments finding the general grant of authority for conditions in this type of decision included business licensing requirements and that the limited land use decision restriction in approval standards contained in ORS 197.195(1) relates to the role of the comprehensive plan and not local government licensing requirements. Finally, petitioner argued that in imposing the licensing fee, the city failed to concurrently find that the fee was waived because the activity qualified as a "special event." Although not defined by the code, the city responded that a "special event permit" and a "public event permit" were the same thing and, therefore, this use would not qualify because it would occur on public land. LUBA questioned this approach but found that before it needed to reach this issue, remand was necessary for the city to explain its decision. Further, the city's decision failed to explain why a person who has secured a business license as an "event coordinator" has also "secured a special event permit from the city" would not qualify the vendors from a waiver. The decision was remanded.

- Preserve the Pearl, LLC, v. City of Portland, ____ Or LUBA ____ (LUBA No. 2015-046, October 2015). Petitioner challenged a City of Portland decision granting design review approval for a full-block, mixed us development located in the Central City Plan District's River Sub-district. The central issue involved the City's interpretation of a regulation that allows additional building height was consistent with five purpose statements contained in the code. LUBA rejected the petitioner's argument that the proposal had to be consistent with all five purposes or that each of those purposes must be treated as separate approval criteria. The city explained that, given the site conditions, in order to apply this provision in this area of the city, some of the purpose statements had to be deemed inapplicable, when these height bonuses were expressly available in this area of the city. Further, the context for the building height step-down requirements made clear that it was not intended to require a step-down to the Willamette River. The decision was affirmed and LUBA's decision is and currently pending review by the Oregon Court of Appeals.

- Harrison v. City of Cannon Beach, ____ Or LUBA ____ (LUBA No. 2015-016, September 2015). Petitioners appealed a decision by the city approving a zoning map amendment, planned development and variance to allow a four-lot residential development. The subject property contains slopes greater than 20 percent. Petitioners argued that the city misinterpreted its variance and planned development standards when it allowed a development that exceeded the city's slope-density limits restricting development on lots where the average slope is between 20 and 30 percent over 15,000 square feet, resulting in not allowing more than one lot. LUBA found the challenge to the city's application of the variance criteria was waived. Petitioners also argued that, because the subdivision ordinance would otherwise prohibit the allowed density because of the minimum lot size requirements for properties with steep slopes, the planned development chapter cannot allow such development. LUBA disagreed, pointing to the planned

development purpose statement that as to "provide a degree of flexibility" from the traditional lot standards. Therefore, the city did not err in finding that the proposal was eligible for flexible design due to the site's "unique *** topography." LUBA went on to find that the city's decision was correct notwithstanding a planned development regulation that makes clear that the chapter is not intended to "bypass regular zoning provisions solely to allow increased densities, nor is it a means of maximizing densities on parcels of land which have unbuildable or unusable areas." Rather, LUBA found that the property would be allowed to be developed with four dwellings under the regular zoning provisions that apply in the subject zone. It was a provision of the subdivision ordinance rather than the zoning provisions that served to decrease the allowed densities. The decision was affirmed.

- Widgi Creek Homeowners Association v. Deschutes County, ___ Or LUBA ____ (LUBA No. 2014-109, June 2015). Petitioners appealed a decision approving an application for site plan and subdivision approval for a 24-lot subdivision located largely where the Seventh Mountain Resort is which developed and within a small "sliver" located within Widgi Creek. Petitioners argued that the subdivision was inconsistent with the Widgi Creek Master Plan, prohibiting development in this area and setting a limit on the number of new residences that may be developed. The county hearings officer found that the Resort Community Zone code regulations superseded the Widgi Creek Master Plan making it inapplicable. The hearings officer found that the ordinance that adopted the Resort Community Zone made no reference to the Widgi Creek Master Plan, and included no reference that the Widgi Creek Master Plan was "saved" such that it remained in place after the Resort Community Zone was adopted. Therefore according to the hearings officer, the county intended that future residential development would be subject to the Resort Community Zone provisions. LUBA disagreed, finding that the Resort Community Zone ordinances do make reference to the Widgi Creek Master Plan. Further, a general provision of the county code provides that nothing in the code repeals or impairs existing conditional use permits. Although LUBA did not conclude that the Widgi Creek Master Plan was a regulatory document that must be applied directly. LUBA intimated that the Widgi Creek Master Plan may have been intended to support the Goal 4 exception that the county had to approve in order to apply the Resort Community Zone. LUBA found sufficient errors in the hearings officer's findings to require remand. Although LUBA could have interpreted the applicable standards on its own, LUBA found that the ordinance adopting the Resort Community Zones were "exceedingly unclear" and, as a result, remanded the decision to the hearings officer for another opportunity to expressly address and assign significance to all of the relevant conflicting language. Additionally, petitioners argued that the county erred in failing to consider substantive provisions within the Widgi Creek Master Plan limiting the number of residential units. The hearings officer concluded that those arguments represented a collateral attack on two previous site plan approvals. LUBA found that one of those previous approvals had expired and the subject development was very different from the subdivision approved in the other approval. Therefore, to the extent that the hearings officer concludes that the Widgi Creek Master Plan is a regulatory document, she may

also need to consider the residential limitations contained within it. The Court of Appeals affirmed without a decision.

- Stavrum v. Clackamas County, ___ Or LUBA ___ (LUBA No. 2014-101, May 2015) Petitioners appealed a decision by the county approving an application for a conditional use permit for a horse-boarding facility in the county's Rural Residential Farm Forest 5-acre minimum (RRFF-5) zone. ZDO 309.03(F) states that one of the primary uses in the RRFF-5 zone is "stables," provided "such uses are not intended for the purpose of obtaining a commercial profit." The ZDO defines "Stable, Boarding or Riding" as "[p]remises that are used by the public for the training, riding, boarding, public exhibition or display of livestock for commercial or noncommercial purposes." The ZDO then excludes from that definition "[a]n agricultural building, as defined in Chapter 4 of the Uniform Building Code" or "premises used for the boarding, training or riding of three or less livestock other than those of the operator of the premises." The county hearings officer concluded that the horse-boarding facility is not a primary use under ZDO 309.03(F), but is instead a stable that is intended "for the purpose of obtaining a commercial profit" and is allowed in the RRFF-5 zone as a conditional use. The hearings officer relied on a dictionary definition of "commercial," which included "the buying and selling of goods and services," and concluded that petitioners' use of the stable first provides the service of stabling horses in the barn, and second, training horses. Petitioners argued that the term "commercial" is limited to the selling of goods, and does not include services such as boarding and training horses. LUBA concluded that, in the absence of a code definition of "commercial," the hearings officer appropriately relied on the dictionary definition, and rejected petitioners' argument to the contrary. Petitioners also contended that, because ZDO 309.03 includes "management" of "livestock" and "animal husbandry" as primary uses, their application should have been treated as an application for a primary use. The county responded that because intervenor applied for a conditional use, it could only apply the conditional use criteria. LUBA rejected the county's argument, noting that the proper question to ask under ORS 197.835(9)(a)(D) is whether the local government "improperly construed the applicable law," which could include the primary use standards in the ZDO. LUBA also pointed out that a party may submit an application for a conditional use "under protest" to settle an ongoing enforcement matter and then argue that the proposed use is not a conditional use at all, but rather is a permitted use. *See: Recovery House VI v. City of Eugene***,** 150 Or App 382, 946 P2d 342 (1997). Although the county never responded to petitioners' argument concerning primary use, LUBA interpreted the code using its authority under ORS 197.829(2) to furnish an interpretation when the local government fails to do so. LUBA concluded that ZDO 309.03(B)(2) or (7) do not authorize the proposed horse boarding facility as a primary use.

- L0138, LLC v. City of Lake Oswego, ___ Or LUBA ___, LUBA No., 2014-092 (April, 2015), *aff'd w/o opinion,* 272 Or App 782 (August 2015) Petitioner challenged a development review permit for a mixed use development including 210 residential units, 6 live/work units and 36,500 square feet of commercial use in three buildings, each of which is 4 stories and up to 60 feet tall. Petitioners'

first argued that the four story buildings were out of scale with the development intended by the term "village character." Relying on the principles of *Siporen*, LUBA looked at the text and context of the disputed provision to conclude that the city's rejection of the idea that the "village character" definition was an approval criterion requiring it to compare the present proposal to development on adjoining lots easily met the *Siporen* plausibility standard. Petitioners' challenge to the height was based in part on a permissive code section ("fourth story may be permitted") and in part of the "village character" argument. LUBA did not reach the permissive versus mandatory argument because it upheld the council's conclusions that "village character" was not a mandatory approval criterion. The third assignment challenged an exception to allow ground floor residential use on a portion of the block where it would not otherwise be allowed. Petitioners argued the plan required high density commercial activity on the ground floor and allowed high density housing only on upper floors. Again relying on *Siporen*, LUBA concluded that the city's reasoning and interpretation of its own code was not inconsistent with the text or context of the code and well within the plausibility standard of *Siporen*. In their fourth assignment of error, Petitioners argued that the traffic generated by the proposal would exceed the capacity of the affected transportation facilities. Petitioners relied on the applicant's traffic report and provisions from the Lake Oswego Comprehensive Plan. The city and intervenor responded that the decision is a limited land use decision and the Comprehensive Plan provisions are not directly applicable approval criteria. LUBA agreed and affirmed the decision.

- Oregon Pipeline Company, LLC v. Clatsop County, ___ Or LUBA ___ (LUBA No. 2013-106, April 2015). The county denied OPC's application to locate an LNG pipeline that would run through the county and in particular, its estuary resource areas. Local code section L5.830(9), the Columbia River Estuary Impact Assessment and Resource Capability Determination, requires a "demonstration that the project's potential public benefits will equal or exceed expected adverse impacts." With regard to "potential public benefits," the county acknowledged OPC's claims that there is a need for natural gas and that the project, including the terminal to be located in the City of Warrenton, would create thousands of construction jobs and hundreds of ongoing jobs in addition to injecting millions of dollars into the local economy. In spite of these "potential public benefits," the county determined that OPC's proposal did not comply with the L5.830(9) benefits-impacts standard. The county reasoned that it was hard to determine how many of the "potential public benefits" could actually be attributed to the pipeline-the subject matter before the county in the application- versus the whole LNG project. The county determined that it was improper to credit the benefits of the whole project to the pipeline project alone. Regarding "expected adverse impacts," OPC stated in its application that horizontal directional drilling minimizes adverse impacts on estuary resources as compared to traditional techniques. However, one of the potential side effects of HDD includes the risk of hydraulic fracturing or "frac-out." Based on evidence from the Oregon Department of Fish and Wildlife, the county determined that leaks due to hydraulic fracturing and subsequent cleanup actions are highly damaging to aquatic resources. Overall, the county determined that the "potential public

benefits" did not equal or exceed the "expected adverse impacts" of the project. On appeal, OPC argued that the county improperly interpreted the word "project" when it limited the "potential public benefits" to the pipeline contained within Clatsop County. LUBA applied a deferential standard of review to the county's interpretation of local code per ORS 197.829(1) and the standard established in the *Siporen* case. Applying this standard, LUBA found that the county's interpretation of "project" was consistent with the context within this particular section of the county's code and was not reversible under ORS 197.829(1). OPC also argued that, although it provided the county with substantial evidence that it would implement safety measures to avoid hydraulic fracturing, the county improperly relied on evidence of adverse environmental impacts associated with other pipeline projects when it determined that OPC's project would result in "expected adverse impacts." LUBA affirmed the decision.

- S. St. Helens LLC v. City of St. Helens, ___ Or LUBA ___ (LUBA No. 2014-067, January 2015), *aff'd* 271 Or App 680, ___ P3d ___ (2015). Petitioner filed an application for a sensitive lands permit to allow the removal of 400,000 to 500,000 c/yds of basalt bluff within a wetland protection zone to accommodate a 48 unit duplex development. The planning commission denied the request, finding that the proposal qualified as "natural mineral resources development," a use category allowed in the heavy industrial rather than the subject residential zones. Petitioner first argued that the planning commission did not have authority to separate the temporary rock removal activity carried out in conjunction with the residential development as a separate use. LUBA disagreed, finding that the planning commission had authority to reach its own conclusion about whether to view this proposal as the use, or part of the use that is authorized in a particular zone. LUBA also disagreed with petitioner's argument that the proposed development, predicated on this amount of rock removal, is the only way that the property can be developed residentially. Petitioner then challenged the planning commission's finding that the proposal includes "natural mineral resources development," particularly the finding that basalt rock is a "mineral" and whether such removal for a housing development qualifies as "mining." LUBA disagreed finding that "minerals" is generally defined in statutes and the dictionary to include "rock," as opposed to be limited to precious metals. The decision was affirmed. On appeal, the Court of Appeals said that it was "inclined to agree" with LUBA's interpretation of the term "natural mineral resources development," but then noted that LUBA had affirmed the city's denial on the alternative and independent ground that rock removal of the volume and scope proposed is not an allowed use in the AR or R5 zone. The Court of Appeals affirmed.

- Devin Oil v. Morrow County, ___ Or LUBA ___ (LUBA No. 2013-110, 2014-010, 2014-011 and 2014-012, December 2014). In these consolidated cases, LUBA reversed the grant of an extension of a conditional use permit and affirmed a site plan review approval. LUBA found the County could not retroactively revive an expired CUP without some indication that the new ordinance was intended to be retroactive. On site plan review, LUBA concluded that there was no requirement that the CUP approval precede the site plan review approval.

- Weston Kia v. City of Gresham, ____ Or LUBA ____ (LUBA No. 2014-085, December 2014) Petitioner challenged a hearings officer's decision approving a special use review application for an equipment shelter for wireless communication equipment. One of the special use review standards was amended before this application was filed to impose setback and collocation obligations on "all wireless communication facility proposals" rather than "towers" and therefore, would apply to the proposed equipment shelter. The hearings officer found that, based on the legislative history, there was a "scrivener's error" and that the regulations should have included the term "tower" after the word "facility." Petitioner argued, and LUBA agreed, that the adopted text did not include this clarifying term, the context indicated that the city knew how to distinguish between wireless communications facilities and a tower and neither the hearings officer, nor LUBA, had the power to correct it.

- South Central Association of Neighbors v. City of Salem, ___ Or LUBA ___ (LUBA No. 2014-083, December 2014). Petitioners appealed a hearings officer's decision approving site plan review and a variance to construct new medical buildings and parking areas. The city approved 264 parking spaces, including 75 additional spaces to serve existing buildings constructed on other lots that are part of a hospital campus. The City found that the maximum number of parking spaces can be based on the total number of buildings and uses on the larger hospital campus under single ownership. Petitioners argued that the city erred in approving too many off-street parking spaces on the property. LUBA analyzed the code standards governing parking, noting that generally off-street parking is to be provided on the same lot with the main building or use coupled with code standards proving for minimum and maximum numbers of parking spaces. Taken together, LUBA found that parking must be provided on the same lot as that building or use and that no other provision authorizes aggregation of lots or sites for purposes of locating parking. Petitioners also argued that the hearings officer failed to require installation of enhanced bicycle lanes and improvements based on provisions in the TSP. LUBA rejected these arguments finding that comprehensive plan policies that are not specifically incorporated within the land use regulations cannot be required in review of "limited land use decisions." Finally, a number of challenges were mounted against the variance granting approval for the removal of a number of significant trees. LUBA found that altering the number of off-street parking spaces could alter the need for the variance and, for that reason, the variance approval was remanded as well.

- Del Rio Vineyards, LLC v. Jackson County, ___ Or LUBA ___ (LUBA No. 2014-054, December 2014). Petitioner challenged a hearings officer's decision approving aggregate extraction related activities on lands zoned largely Woodland Resource (WR). The subject property had been subject to two previous comprehensive plan map and zone change amendments including a condition that prohibits the use of a road on the southwest of the mining site and required an easement over a neighboring property for access. The hearings officer found that the haul road was approved in the previous decisions and, as such, was beyond challenge. LUBA disagreed, finding that one of the rezoning decisions did not authorize use of the haul road and the other described the property taking access

from another easement rather than the subject haul road. Further, the impacts from the haul road must be considered to determine if the proposed use will force a significant change in, or significantly increase the cost of, accepted farming or forest practices. Petitioner also challenged the hearings officer's findings addressing local criteria containing wildfire protection standards that require fuelbreaks and certain access construction standards. LUBA agreed, finding that deferring a determination of compliance to a future inspection by the fire district is inadequate. Further, the findings failed to explain why the standard is met or why the evidence in the record supports a finding that compliance is feasible. Further, in response to fire district concerns about the risk of fire, coupled with a criterion requiring that the proposed use will not significantly increase the fire hazard, the findings relying on a fire district letter to provide fire inspections are inadequate. Additionally, the hearings officer failed to adopt findings that the local roads were adequate to accommodate the proposed use. With regard to a challenge to adverse impacts caused by noise, LUBA found that findings that the noise is not "deafening" or has less of an impact than noise from "jake brakes" does not mean that the noise from the material conveyor will not cause a significant impact on adjacent farm activities.

- Tolbert v. Clackamas County (LUBA Nos. 2014-043 and -065, December 2014). The county issued two decisions, one extending a previously approved conditional use permit and the other modifying the conditional use permit to conduct a composting and topsoil mining operation. The property was located within 1500 feet of two schools and the extension and modification requests were filed after June 26, 2013, the effective date of SB 462, a statute that prohibits DEQ and Metropolitan Service Districts from approving commercial composting operations within 1,500 feet of a school. Petitioner argued that the County erred in granting the extension approval in violation of a code standard that required finding that the application remained consistent with the county's ordinances at the time of filing the extension when read together with the compost-specific code standards requiring compliance with all DEQ and Metro Service District rules and regulations. LUBA found that-notwithstanding the fact that no DEQ or Metro rules existed, the language about compliance is advisory only. Therefore, SB 462 did not require denial of the extension because the local code did not require compliance with state statutory requirements and the challenge to the extension approval was denied. With regard to the modification approval, Petitioner argued that the county hearings officer misinterpreted and misapplied a local criterion requiring that the modified proposal be consistent with the prior approval. The modification sought to lessen the intensity of the use by eliminating the composting facility, while maintaining the surface mining operation and that is "consistent" with the previous approval. Although petitioner identified some changes to the surface mining operation LUBA found that the changes were not of a nature or degree to render the modification inconsistent with the original proposal. "Consistent" does not require an exact match, according to LUBA, because requiring such an exact match would make a minor modification nearly impossible. Another local criterion requires a finding that the modification complies with all of the applicable code standards. Petitioners challenged the county's findings on a number of those standards. LUBA denied most of those

challenges except it concluded that the hearings officer failed to require a surface water management plan, when the proposal qualified as a surface mining permit application. The hearings officer further erred when he failed to identify what evidence supported his finding that no surface runoff will escape from the mining pit and the exact location of the water table where a condition requires cessation of mining if the water table is encountered Further, remand was necessary to clarify a condition requiring the construction of a berm, its location, nature and height.

B. Adequate Findings

- Sage Equities, LLC v. City of Portland, ____ Or LUBA ____ (LUBA No, 2015-047, September 2015). Petitioners appealed a city planner's decision denying their application to create two parcels on a 50-foot wide by 100 foot deep lot within the R2.5 zone. Local codes allow a lot to be created with a minimum width of 25 feet when six standards are met. The city found that the one standard that was not met provides that "[o]n balance, the proposed lots will have dimensions that are consistent with the purpose of this section. Petitioners argued that the planner misconstrued the "on balance" requirement because of the 9 purpose factors, city staff concluded that 5 of them were met. LUBA disagreed that the city had to make a decision based on a simple majority of the purposes and that the city could assign greater or lesser significance to some purposes over others, as set out in the city's code or comprehensive plan. However, the findings failed to explain how or why the city weighed the purposes as it did. Purpose 1 required finding that each lot has enough room for a "reasonably-sized attached or detached house." The findings contained a single conclusory sentence that the applicant filed to satisfy this purpose. Pointing out evidence that the proposed parcel would accommodate a house along with real estate listings showing several dozen similarly-sized dwelling on smaller lots near the site, LUBA found that the finding was inadequate. Purpose 2 required that the lot be sized to meet the R2.5 development standards. The findings focused on the off-street parking and shared driveway and concluded that petitioners failed to subject turning diagrams explaining how vehicles would maneuver without hitting a house or parked car. However, LUBA found that the parking and driveway meet or exceed the minimum parking space and driveway standards and the findings failed to respond to petitioners' testimony about how drivers would move within the site. Purpose 4, requiring a small private outdoor area, appeared to be met, according to LUBA because the city does not impose any minimum size requirements on outdoor areas. The decision failed to explain why the proposed 15' x 30' outdoor area would be insufficient or explain why altering or enlarging the parking area or driveway easement, if necessary to meet the parking area or driveway standards would cause non-compliance with the outdoor area requirements. With regard to a separate assignment of error, petitioners challenged the city's reliance on a city forester email concluding that a rear yard tree was a nuisance tree requiring removal, when petitioner had proposed to preserve it and was denied any opportunity to respond to this new evidence. LUBA agreed and the decision was remanded.

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

  Intervenor Fregulia applied for a home occupation permit to use a workshop on his property for his truck maintenance and repair business. The city's code limits a home occupation in an accessory structure to 600 square feet of floor area. Fregulia argued that only the workshop areas actually occupied by trucks and trailers under repair, a work bench, tool chest, supply shelf, and storage area should be counted, and not the surrounding "dead space." By his calculation, the total area used for his business added up to less than 600 square feet. In approving the home occupation, the city's decision generally agreed with Fregulia that dead space should be excluded and also appeared to agree that some additional area beyond the area physically occupied by trucks and equipment should be included as well. Despite the lack of any numerical calculation for the additional area, the city found the truck business would not exceed the size limitation and approved Fregulia's home occupation permit. LUBA identified two flaws with the city's decision. First, the city failed to describe exactly how much of the area unoccupied by trucks, the tool chest, and other business-related structures should be counted in determining compliance with the 600 square foot floor area limitation. The findings simply repeated Fregulia's statement that all work activities would take place within the footprint of the trucks being serviced. The city did not address Petitioner's assertion that Fregulia's statement was implausible because mechanics needed to use additional space to work on the trucks. Second, the record indicated Fregulia did not make the statement the findings attributed to him and, if he had, there was no substantial evidence to support this statement. As LUBA observed, "[n]o reasonable person could conclude that a mechanic can accomplish all tasks associated with oil changes, lubrication, brake maintenance and repair, and replacement of filters, lights and wheel seats entirely with the footprint of a truck or trailer." Additionally, the findings did not address how much of the workshop's floor area should be considered uncounted dead space.

- Oregon Coast Alliance v. City of Brookings, ___ Or LUBA ___ (LUBA No. 2014-087, January 2015). The city annexed two properties as well as amend the comprehensive plan and zoning designation and altered the shoreland boundary to allow for residential development of two properties. Findings that water lines are in close proximity and checking the box that water availability is "adequate," are inadequate to respond to a criterion requiring a finding that "adequate water supply is available to serve the project." Rather, LUBA agreed with the petitioner that the findings must evaluate the availability of water service "relative to capacity." Second, the protection of estuarine resources, required by Goal 16, requires findings of how development actions will impact biological resources, as Implementation Requirement 1 states. The findings were inadequate in failing to respond to federal agency concerns about impacts on adjacent estuarine resources.

- Dion v. Baker County, ____ Or LUBA ____ (LUBA No. 2014-021, December 2014). Petitioner appealed a decision by the county approving a conditional use permit for intensification of an existing quarry. A conditional use permit standard

required a finding that a proposed use will have a "minimal adverse impact" when "compared to the impact of development that is permitted outright." The county adopted 10 pages of findings addressing this criterion and concluded that the impacts of intensified mining would be minimal when considered against the existing mining operation. LUBA remanded, finding that the criterion required consideration of the proposed use against impacts from development permitted outright in the EFU zone. LUBA went on to opine that the net impacts of the proposed use may include only those impacts resulting from the intensification, as opposed to already permitted uses. Petitioner also argued that the county failed to require sufficient evidence that an adequate amount of water was available to control dust. The county board struck petitioner's arguments on this point below because they were based on evidence not in the record before the planning commission. LUBA explained that when a local government adopts findings that an issue has been waived, a petitioner must challenge both the merits of the waiver decision as well as the finding on the merits. Finally, with regard to a criterion requiring a finding that the road systems are adequate to accommodate the proposed use, findings that the existing roads can accommodate a temporary reconstruction project but no findings on how the roads will be impacted by an effective extension on the working life of the mine from 80,000 cubic acres to 500,000 cubic acres are inadequate.

C. Substantial Evidence

- Rushing v. City of Salem, ___ Or LUBA ____ (LUBA No. 2014-079, December 2014). Petitioners challenged a city council decision approving the demolition of Howard Hall, a locally-designated historic building. Petitioners argued that the city council findings were not supported by substantial evidence because the council failed to consider the value of the historic architecture and that the designation of Howard Hall was based not only on its association with the Oregon School for the Blind but also on its architect, John Bennes. LUBA found no support for petitioners' assertions in the record. LUBA similarly rejected petitioners' argument that there are better locations for the commemorative playground in proximity to Salem Hospital when there was no evidence in the record supporting that assertion. The applicable approval standard required only a finding of the value to the community of, the proposed use and did not require any alternative sites analysis. Petitioners second challenge citing to conflicting evidence that the cost to rehabilitate the building was less than the intervenor's claimed was rejected by LUBA noting "that petitioners must do more than cite to evidence that conflicts with the evidence the city chose to rely upon." Petitioners must establish that, considering the evidence in the whole record, no reasonable person would rely upon the evidence that the city did. The council's decision was supported by detailed studies that a reasonable person could rely on. Further, with regard to the local requirement that "the owner made a good faith effort to sell or relocate the resource," LUBA affirmed the City's finding that attempting to lease the structure was sufficient, where only Howard Hall and not the underlying land is a designated resource. The City correctly interpreted this standard to require an effort to either "sell or relocate" and not to both sell and relocate. Finally, LUBA found that a condition requiring construction of a commemorative

garden that is in "substantial compliance" with the proposal, was neither inadequate or insufficient because it included considerable detail about what elements must be contained within the garden to satisfy the substantial compliance requirement.

D. Limited Land Use Decision Scope of Review

- Truth in Site v. City of Bend, ____ Or LUBA ____ (LUBA No. 2014-098, June 2015) *aff'd* 273 Or App ___ August 2015. Petitioners challenged a city decision approving a site plan and design review for a new undergraduate college campus (OSU). Petitioners made a number of interpretational challenges to how the city council interpreted various local code provisions and LUBA affirmed, finding the interpretations plausible. In addition, petitioners argued that the city's approval of an additional access point from Century Drive violated a "No Vehicle Access" street appearing on the recorded plat for the subject property. OSU and the city responded that the plat is not a "land use regulation" as defined in ORS 197.015(11), and LUBA scope of review for limited land use decisions does not include determining compliance for provisions that are not "land use regulations." ORS 197.828(2)(b). In their reply, petitioners argued that the city's adoption of this decision through the ORS 197.763 hearing procedures and petitioners raising additional issues during the proceeding, such as the plat restriction, served to convert what would have been a limited land use decision into a land use decision. LUBA disagreed with the petitioners. The use of ORS 197.763 procedures or raising additional issues does not convert a "limited land use" decision into a "land use decision." LUBA and the Court of Appeals affirmed the city's decision.

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