Oregon Land Use Law
The Seminar Group
December 1, 2022

2022 LAND USE CASE REVIEW

A REVIEW OF SIGNIFICANT CASES FROM THE FEDERAL COURTS, OREGON SUPREME COURT, OREGON COURT OF APPEALS, AND OREGON LAND USE BOARD OF APPEALS

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The presenters would like to thank the Oregon State Bar Real Estate and Land Use Section ("RELU") and contributors to the RELU Digest, who assisted in the preparation of these materials. These materials are reprinted as revised with permission from RELU Digest. Special thanks goes to Judy Parker with the RELU Digest and Savannah Terp at the Seminar Group.

I. FEDERAL COURT CASES

Ninth Circuit Rejects Takings Claim for Tenant Relocation Fees

***Ballinger v. City of Oakland*, ___ F.3d ___ (9th Cir. 2022)**

By Edward J. Sullivan

Citing the housing crisis, the California city of Oakland established a tenant relocation ordinance. This ordinance requires landlords to pay tenants a relocation payment when retaking occupancy of their houses after a lease's expiration. The Ballingers, a military couple moving out of state, had rented their home. Upon return to the city, the Ballingers wanted to move back into their house but the ordinance required them to pay their evicted tenants $6,000 in relocation fees. They sued the city, alleging that the relocation fee was an unconstitutional taking of their money — for private rather than public purpose — without the just compensation they thought would be owed. (Of course, they hoped to challenge the law rather than receive compensation.) They also argued in the alternative that the fee was an unconstitutional exaction of their home as well as seizure of their funds under the Fourth and Fourteenth Amendments.

The trial court dismissed their suit and they appealed to the Ninth Circuit, which affirmed. The court held the relocation fee was not a taking of an identifiable property interest but rather a regulation of the landlord–tenant relationship. The court also rejected the Ballingers' theory that the ordinance was an exaction on the use of their house.

II. OREGON COURT OF APPEALS CASES

Cannon Beach's Ocean Shore Setback – Clear and Objective?

Roberts v. City of Cannon Beach, 316 Or. App. 305 (2021)

By Rebekah Dohrman

Petitioners applied for a development permit to construct a new single-family home in Cannon Beach on a lot abutting the ocean shore. The lot falls within the city's oceanfront management overlay zone and is subject to an ocean shore setback that leaves a portion of the lot unbuildable except for a deck, ocean access stairs, or fencing. Citing failure to meet the setback standard, the city denied petitioners' permit. LUBA affirmed the city's decision.

Petitioners took issue with three terms found in the applicable code: "average," "Oregon Coordinate Line," and "lot." Petitioners contended that these terms were ambiguous and thus as applied violated ORS 197.307(4). Petitioners relied on *Tirumali v. City of Portland*, arguing that when a term is considered apart from its context and is capable of a different meaning than the one advanced by the local government, then the standard is not clear and objective.

The Oregon Court of Appeals rejected the argument that any time a term, contained in a housing approval standard, is removed from its context and has more than one meaning then the standard cannot be clear and objective. Instead, the court agreed with LUBA and found that the city's standard is clear and objective. The clear and objective standard has two parts: 1) objectivity, applicable regardless of state of mind, and 2) clarity, easily understood without obscurity or ambiguity. The ultimate question, the court pointed out, is whether the standard is clear and objective, viewed in context. Viewed in such context, the mere existence of imprecise or ambiguous terms in a standard does not necessary resolve whether that standard violates the

statute. The court pointed out that the statute in *Tirumali* was not ORS 197.307(4) and was not applicable to this matter.

Petitioners' arguments relied on *potential* ambiguity in various terms when considered without reference to their context and to the purpose of the ordinance. The court affirmed LUBA's decision and agreed that the city's setback ordinance was a clear and objective standard.

Appellate Court Finds LUCS Form Lacks Formality

Scott Inc. v. City of Ontario, 316 Or. App. 633 (2021)

By Judy Parker

In Oregon, cannabis production and sales are regulated on the state and local levels. Applicants for a cannabis license work with the Oregon Liquor and Cannabis Control Commission but must also request a Land Use Compatibility Statement from the local city (or county, if the potential premises are not in city limits). Under state law and the OLCC's own regulations, the local governing body must return the LUCS within a certain period of time. This is not a land use determination but rather flags to the OLCC whether such use might ever be allowable. That is, if the LUCS states that the intended land use is allowable as either an outright permitted use or a conditional use, the OLCC will continue the application; if the LUCS is returned in the negative, the OLCC "may not issue a license."

A recent applicant requested a LUCS for a retail cannabis dispensary in the city of Ontario. The property is zoned I2 Heavy Industry but is within 500 feet of a residential area. While a retail cannabis business is not permitted as an *outright use* in Zone I2 Heavy Industrial, it is allowable as a *conditional use*. However, the city has an ordinance prohibiting any such cannabis businesses within 500 feet of residential areas. The putative cannabis dispenser had not obtained its CUP at he made his LUCS request. The city denied the LUCS by checking a box on

the city's pre-printed form that said, "The proposed land use has been reviewed and is prohibited." The comments on the LUCS indicated that the applicant had not applied for the requisite CUP. Thus, per statute, the OLCC denied the cannabis application.

The applicant challenged the denial in trial court, arguing that the use in that zone was allowable. The city argued, though, that the applicant's failure to obtain a CUP and the proximity to the residential area would have ultimately rendered the use prohibited. The trial court entered a judgment that affirmed the city's decision that the use "was prohibited." And after all, at the time of the LUCS request, to use the property without a CUP was, indeed, prohibited.

On appeal, the issue centered on whether such a denial was a proper reading of the law, given that the applicant *could have* applied for a CUP and thus was not prohibited outright. The court found that statutorily, the only options for the local governing body were to state to the OLCC that there was a potential outright use or a potential conditional use or no permitted use whatsoever. Thus the city overstepped in denying — perhaps too early — the LUCS at the outset. The court ignored the issue regarding whether other issues might have rendered any land use application futile, such as proximity to residential areas.

The court signals the unfortunate reality that the statute is written for the benefit of the OLCC, not the applicant. This opinion helps the OLCC in the process of not moving forward to suit itself, but does not help applicants navigate the murky interplay of local and state requirements.

Dry Camping, Tuff Life

County of Klamath v. Ricard, 317 Or. App. 608 (2022)

By Judy Parker

A parcel of land in Klamath County had no connection to the city's sewer system and no house. The owner lived in a Tuff Shed and collected water in a gravity-fed cistern. When he applied to the county for a septic permit, an inspector cited him for prohibited discharge of wastewater. Discharge of water is regulated by OAR Chapter 340, written by the Oregon Department of Environmental Quality. OAR 340-071-0130(3) states that a person may not discharge "untreated or partially treated wastewater or septic tank effluent directly or indirectly onto the ground surface or into public waters." The landowner left the property that day, May of 2019, and thus did not further discharge any untreated wastewater to the ground. Five months later, the inspector returned to the property. Still seeing the cistern collecting water, the inspector cited the landowner again, stating, "There is no such thing as dry camping," and thus he was producing wastewater. This led to a second violation, this of OAR 340-071-0130(2), which reads, "All wastewater must be treated and dispersed in a manner approved under these rules."

The landowner contested the citation and associated fines. The county argued that the mere presence of the cistern equated to treating wastewater — after all, if the property was not connected to city water and did not have a septic system, then by common sense, any water discharge would violate the rule. And although the county did not (and could not) prove that any wastewater was discharged between May and October of 2019, the trial court found for the county (without explanation).

On appeal, the landowner argued that the county must prove the rule violation. The county renewed its argument that a property owner violates the rule by "having the ability to

disperse wastewater, without the approved means to treat the same." While the court of appeals acknowledged deference to the DEQ in interpreting its own rules, the court did not find plausible that a hypothetical discharge of water could rise to the level of being a citable offense. That is, hypothetical wastewater cannot be discharged — only actual wastewater can be discharged. And absent humans, there could not be wastewater discharge in the first place.

The court also made a distinction between the regulation of wastewater and properties, noting that while DEQ probably wanted to require that all properties be connected to a city sewer system or have a septic sewer permit, the rules instead regulated wastewater discharge, not the properties themselves. It offered several ways for DEQ to amend its rules but came to the same conclusion that the landowner had argued: without proof of actual of wastewater discharge, the county could not fine him.

The Aurora Airport Saga Continues

Schaefer v. Marion County, 318 Or App 617 (2022) and *Schaefer v. Marion County*, LUBA No. 2020-108 (July 7, 2022)

By Joseph Schaefer

Marion County approved a comprehensive plan amendment and related permits authorizing private development of a multistory office and aircraft hangars on EFU property next to the Aurora State Airport. LUBA affirmed, except for failure to adopt Goal 6 findings. (LUBA No. 2020-108, October 12, 2021). At the Court of Appeals, petitioner argued the application was not expansion of a public use airport within the meaning of the Transportation Planning Rule (OAR 660-012-0065(3)(n)) as LUBA had concluded, and therefore was not exempt from Goals 3, 11 and 14. The Court of Appeals agreed with petitioner and reversed, reasoning that the procedure for expanding an airport was found in OAR 660-013, which the

county had not applied. The court also ruled that LUBA had mistakenly rejected the petitioner's contention that the proposed uses would increase the intensity of uses and facilities on existing exception land next to the airport, in violation of OAR 660-004-0018(4)(b).

Upon remand LUBA analyzed the County's alternative findings on the goal exceptions. LUBA denied the petitioner's assertion that OAR 660-012-0060(5), which states that the presence of a transportation facility shall not be a basis for an exception on rural lands, precluded the exceptions which expressly rely on the adjacent airport. LUBA sustained the petitioner's argument that the county's alternatives analysis wrongly excluded land available for lease at the Salem airport, and wrongly excluded land at airports outside Marion County.

III. LUBA SUMMARIES

Residential Development Applications

***Community Participation Organization 4M v. Washington County*, LUBA No. 2020-110 (Sept. 29, 2021)**

By Gordon Howard

LUBA remanded a decision by Washington County amending the county's Community Development Code Significant Natural Resource provisions. Washington County adopted the amendments partially in response to an enforcement order issued by the Land Conservation and Development Commission. The order directed the county to adopt clear and objective provisions protecting identified significant natural resources in response to residential development applications.

This controversy arose out of amendments the state legislature made to ORS 197.307(4) in 2017 eliminating limitations on the sweeping requirement for local governments to adopt only

clear and objective standards for review of residential development applications. Where the statute previously had limited the requirement to "needed housing" on "buildable lands," the amendment to ORS 197.307(4) eliminated those terms, thus requiring the application of clear and objective standards to all applications for residential development. As a result, LUBA and the Oregon Court of Appeals determined that several Washington County provisions regulating development on significant natural areas designated as such in the county's inventory of riparian areas under Statewide Planning Goal 5 were no longer applicable because they were not clear and objective. This decision addresses whether the code amendments Washington County adopted to address the issue comply with ORS 197.307(4); LUBA determined that they do not.

First, LUBA determined that the term "clear and objective" found in OAR 660-023-0050(2) for Goal 5 implementing regulations has the same legal meaning as the term as it is used regarding housing development in ORS 197.307(4). LUBA noted that LCDC adopted the rules found in OAR 660-023 in 1996, 15 years after the legislature first introduced the term in ORS 197.307, and so the commission would not have assumed a different meaning for the term as used in state statutes and administrative rules.

Next, LUBA noted that the county's code, adopted in October 2020, requires housing development applicants to submit a habitat assessment for sites containing or within 100 feet of a designated significant natural area pursuant to habitat assessment guidelines. However, the county had not adopted the actual guidelines until December 2020. LUBA agreed with the petitioner that, since the actual guidelines must also be clear and objective, and since the guidelines were not in the record, a remand was required to determine whether the guidelines are clear and objective.

LUBA also remanded the county's decision because the county did not apply the revised code provisions to residential development applications outside of urban areas. The county's assertion that ORS 197.307(4) did not apply to housing outside of urban areas is mistaken, according to LUBA.

LUBA then went on to find that the county's adopted provisions addressing unauthorized tree removal were not clear and objective. The county's code addresses unauthorized tree removal by application of other code standards that include terms that are not clear and objective.

Finally, LUBA determined that the county's adopted ordinance, contrary to the county's assertions, had to show compliance with Statewide Planning Goal 5. The petitioners raised assertions that several county code provisions allowed new uses in significant natural areas, thus requiring the county to analyze the impact of those uses on the resource and consider additional protection measures. Therefore, LUBA's remand also directed the county to put the proposed code amendments through the Goal 5 planning process.

Land Use Compatibility Statements May Rely on Comprehensive Plans

***Zenith Energy Terminals Holdings LLC v. City of Portland*, LUBA No. 2021-083 (Feb. 3, 2022)**

By Max Yoklic

Petitioner operates a bulk fuels distribution terminal and asphalt refinery in Portland. The facility is an outright permitted use in the underlying zone. Petitioner sought renewal of its existing Title V Air Quality Permit and the Oregon Department of Environmental Quality requested that Petitioner obtain a Land Use Compatibility Statement ("LUCS") from the City of Portland because Petitioner had modified its historic use of the property by constructing new rail car docks and a marine vapor combustion unit. The City of Portland's LUCS determined that the

facility was no longer consistent with the City's land use plans because it conflicted with newly adopted comprehensive plan goals and policies. Petitioner appealed to LUBA.

Petitioner alleged various assignments of error. First, Petitioners argued that the LUCS relied on provisions of the City's comprehensive plan that were not approval criteria for a land use decision because the facility is permitted as an outright use in the zone. LUBA first determined that just because a use is permitted outright under the zoning code does not "negate the city's obligation to determine compatibility with the" comprehensive plan under OAR 660-031-0025(2)(b). While ORS 197.175(2)(b) requires city land use regulations to implement the comprehensive plan, it does "does not specify particular timing" and LUBA identified no other state laws requiring "completely concurrent enactment of land use regulations with comprehensive plans." Therefore, LUBA rejected Petitioner's argument that the facility was necessarily consistent with the comprehensive plan because it is an outright permitted use in the zone and concluded that the City was not prohibited from considering whether the facility was compatible with the newly adopted provisions of the comprehensive plan.

However, LUBA sustained Petitioner's assignment of error that the City did not provide adequate findings to explain why the facility was incompatible with the comprehensive plan. LUBA reached that conclusion because the City's findings did not provide any explanation as to why the use is not compatible with the provisions of the comprehensive plan cited in the LUCS. Therefore, LUBA remanded to the City to adopt findings as to whether the use is not allowed under the goals and policies in the comprehensive plan and why the use is not capable of existing without "discord or disharmony" with those provisions.

Goal 2: Land Use Planning, "Reasons" Exceptions to Statewide Planning Goals

***Columbia Riverkeeper v. Columbia County*, LUBA No. 2021-097 (May 9, 2022)**

By Gordon Howard

LUBA remanded a decision by Columbia County approving a "reasons" exception to Statewide Planning Goal 3 (Agricultural Lands) to allow rural industrial development on 837 acres in the Port Westward area. The area of the proposed exception is adjacent to an existing 905-acre area already subject to a goal exception for rural industrial development. LUBA had twice remanded the approval, in 2014 and 2018, and the Oregon Court of Appeals had affirmed both decisions.

The petitioners asserted that the county failed to adequately address goal exceptions findings in OAR 660-004-0020(2((d). This rule requires that a proposed reasons exception demonstrate 1) the proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts; and 2) the proposed use as situated is compatible with surrounding natural resources and resource management. This rule provision implements ORS 197.732(2)(c)(d), which requires that "the proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts." The applicant had defined the area of adjacent uses to be 2000 feet from the proposed exception site, and then had analyzed the compatibility with surrounding natural resources within that 2000-foot area. LUBA agreed with the petitioners that the requirement to analyze impacts on natural resources was required beyond the immediate area adjacent to the site of the proposed goal exception. LUBA disagreed with the county's findings that LCDC's administrative rules could not be interpreted to require analysis beyond the immediate adjacent area because such an interpretation would exceed LCDC's authority in regard to the statutory provisions. LUBA noted that LCDC is granted wide rulemaking authority under ORS 197.040(1) to add to base statutory

provisions, as long as those additions don't conflict with the statute. The construction of OAR 660-004-0020(2)(d) lists the "adjacent uses" provisions and the "natural resources" provisions as separate sentences, which indicates an intent to consider the "natural resource" provision separately from the "adjacent uses" provision. And since the applicant and county had not addressed the issues involving potential impacts on natural resources outside of the 2,000-foot adjacent area, LUBA remanded the decision to the county for analysis of such potential impacts.

LUBA also sustained a number of specific objections raised by the petitioners to the county's findings regarding its analysis of compatibility with adjacent uses required by OAR 660-004-0020(2)(d). These included 1) analysis of specific, rather than general impacts on agricultural uses in the adjacent area, such as mint farming; 2) failure to address differences in scale between the impacts of existing residential and industrial uses in the area with the potentially much greater impacts of industrial uses from the new area approved for an exception in the analysis; 3) over-reliance on future state and federal environmental permits and county conditions of approval on specific permits to ensure compatibility of proposed uses; and 4) failure to address specific impacts raised by the petitioner, such as soil liquefaction, in the county's findings.

Goal 3, Agriculture, ORS 215.203(1), ORS 215.283; Goal 4, Forest Lands, ORS 215.705 to 215.757, OAR 660-006-0025

***1000 Friends of Oregon et al. v. Clackamas County*, LUBA No. 2021-003 (Jan. 24, 2022)**

By Gordon Howard

LUBA remanded a decision by Clackamas County adopting amendments to its Zoning and Development Ordinance allowing short-term rental use of existing dwellings on rural lands in the county, including lands zoned for agriculture and forestry.

First, LUBA noted that ORS 215.283 (for agriculturally-zoned areas) and OAR 660-006-0025 (for forest-zoned areas) provide an exclusive list of allowed uses, which include "dwellings" or "residences" in some circumstances. Looking at the context of how ORS 215.283(1) allows dwellings on farmlands without any restrictions, LUBA determined that the county did not identify how a short-term rental use fit into that residential context, which is defined by an association with an agricultural use.

LUBA then noted that a short-term rental use might fit into one of the allowed residential types in ORS 215.283(2), but then noted that all these residential uses are subject to a conditional review process requiring a notice, opportunity for public hearing, and findings. The county's adopted ordinance did not include such a conditional review process. Similarly on forest lands, OAR 669-006-0025 refers to the various dwelling types authorized by statute in ORS 215.705 to 215.757 and provides various conditions under which counties may allow such use that require notice, opportunity for public hearing, and findings. The county's adopted ordinance did not include such a conditional review process.

LUBA also noted that various agriculture statutes and forest rules in state law define and regulate campgrounds, lodges, guest ranches, and destination resorts. These statutes and rules also include conditions for such use. LUBA thus determined that the legislature and DLCD did expressly address types of allowed temporary accommodations on farm and forest land, and thus the county had erred in allowing short-term rental use of existing dwellings as a permitted use without conditions.

To summarize, in response to the county's contention that nothing in state law expressly prohibits the use of an existing dwelling on farm or forest lands for short-term rental use, LUBA stated, "The problem with that argument is that it approaches the issue from the wrong direction.

As we explained above, ORS 235.283 and related statutes demonstrate that state law strictly regulates transient lodging on resource land with consideration of its effects on accepted farm and forest practices. The question is not whether the short-term rental use of dwellings is expressly prohibited on land zoned for resource uses. Instead, the question is whether state law expressly allows the short-term rental use of dwellings on land zoned for resource uses. The county has not demonstrated that it does."

Goal 5, Natural Resources, Scenic and Historic Areas, and Open Spaces, ORS 215.446

Crook County v. Oregon Dept. of Fish & Wildlife, LUBA No. 2020-114 (May 9, 2022) and *Crook County v. Oregon Department of Fish & Wildlife*, __ Or. App. __ (2022)

By Max Yoklic

The Oregon Department of Fish and Wildlife ("ODFW") appealed Crook County's approval of a conditional use permit for a photovoltaic solar energy facility, alleging that the developer's mitigation plan failed to satisfy the ORS 215.446(3)(a)(C) requirement that the mitigation plan be "consistent with" ODFW's habitat mitigation policy. Specifically, ODFW alleged that the mitigation plan failed to comply with provisions of OAR 635-415-0020(8). LUBA reversed and the County and developer appealed to the Oregon Court of Appeals.

The Court of Appeals held that LUBA misconstrued the applicable law when it determined that mitigation plans submitted to counties under ORS 215.446 must be consistent with *all* of ODFW's habitat mitigation administrative rules. Rules like OAR 635-415-0020(8), which apply to habitat mitigation plans submitted to ODFW, are not approval criteria for mitigation plans submitted to a county. The Court of Appeals explained that "consistent with" means that a habitat mitigation plan must be "concordant" with ODFW's habitat mitigation policy. Therefore, a mitigation plan submitted to a county must provide "definiteness of future

action" and "completeness and attention to detail", it must achieve the mitigation standards for the habitat category provided in OAR 635-415-0025, and must include "durational considerations as to the development action and the mitigation efforts." The Court of Appeals remanded to LUBA with instructions to consider whether the mitigation plan at issue satisfied those requirements. On remand, LUBA determined that while certain elements were consistent with ODFW's habitat mitigation policy, other elements needed improvement, and remanded to Crook County.

Goal 3: Agricultural Lands, Temporary Health Hardship Dwellings

***Hendrickson v. Lane County*, LUBA No. 2021-117 (Apr. 11, 2022)**

By Gordon Howard

LUBA reversed a decision by Lane County denying a health hardship dwelling on a five-acre parcel zoned for exclusive farm use. The hearings officer had denied the application because Lane County's rural comprehensive plan policy, adopted to comply with Statewide Planning Goal 5, limited residential densities in the area including this property to one dwelling per 80 acres. However, health hardship dwellings are a use authorized under ORS 215.213(1) which applies in Lane and Washington Counties — for the rest of Oregon the applicable statute is ORS 215.283(1). As such they are a permitted use, and thus under *Brentmar v. Jackson County* may not be further limited by local government plans and codes.

Lane County's Hearings Officer had determined that the county's adopted Goal 5 wildlife habitat restrictions were ones that "DLCD placed on acknowledgment of Lane County's comprehensive plan. As such, the requirement is not so much a county requirement but rather a requirement imposed by DLCD and LCDC as a condition of acknowledgment. Therefore, the Hearings Official's imposition of the agency's condition is valid and ensures compliance with Goal 5." And *Lane County v. LCDC*, 325 Or. 569 (1997), provides that LCDC is allowed to

adopt administrative rules for uses authorized under ORS 215.283(1) that impose stricter requirements than the statute. However, LUBA disagreed with the assertion that LCDC's acknowledgment of the county's wildlife habitat protection measure as complying with Goal 5 is the same as or akin to LCDC adopting the measure itself. As LUBA states, "if that were the case, then … every acknowledged county comprehensive plan provision and land use regulation could be applied to deny applications for the uses listed at ORS 215.213(1), in contravention of *Brentmar*." While LCDC has the authority to adopt rules applying wildlife habitat density restrictions to temporary health hardship dwellings in the relevant administrative rules, local governments do not have such authority.

Lane County Landwatch, intervenors in this case, also argued that the table of uses in OAR 660-033-0120, which lists temporary health hardship dwellings as a use that may be allowed under review, and for which "counties may prescribe additional limitations and requirements to meet local concerns," also authorized the county's interpretation. LUBA did not believe that this rule language could be interpreted as an LCDC delegation of its legislative rulemaking authority to prescribe additional criteria for uses allowed by ORS 215.283(1). Such a conclusion would also negate the *Brentmar* decision.

Since the sole reason for the county's denial of the application was outside the range of discretion allowed to a local government under its comprehensive plan and implementing ordinances, LUBA reversed the county's decision.

Goal 3: Agricultural Lands, Commercial Activities in Conjunction with Farm Use

Friends of Marion County v. Marion County, LUBA No. 2021-088, and *Department of Land Conservation and Development v. Marion County*, LUBA No. 2021-089 (Apr. 21, 2022)

By Gordon Howard

LUBA remanded a decision by Marion County approving a conditional use permit for a commercial activity in conjunction with farm use on land zoned exclusive farm use. The proposed use is an "admission fee farm experience program." Both petitioners asserted that the application as defined was not a commercial activity in conjunction with farm use as defined in ORS 215.283(2)(a).

First, LUBA sustained the petitioners' argument that the county's findings did not establish that a "farm use" was occurring on the property. "Farm Use" for the purpose of Oregon law is defined in ORS 215.203(2)(a), and the key phrase in this definition is whether the crops are "for the primary purpose of obtaining a profit in money." The county's findings, based upon the testimony of the applicant, showed only that the applicant grew plants, not that those plants were planted for profit. The applicant's evidence indicated that the clover planted on the site was primarily for use as a "teaching tool" for the educational activities on the site. Additionally, the county relied on evidence that crops had been planted and sold, but not that they had been cultivated for the primary purpose of obtaining a profit in money.

LUBA also sustained the petitioners' arguments that classifying the proposed use as a commercial activity in conjunction with farm use misconstrued applicable law, independent of the problem of whether a farm use was even on the applicant's property. The determination of whether a commercial activity in conjunction with farm use exists is a very specific fact-based exercise. The county asserted that the educational experiences provided at the site could inspire the students to pursue careers in agriculture as motivated and qualified farm workers. LUBA

found such an assertion too remote and speculative to qualify as conjoining the commercial activity to the farm use. In conclusion, LUBA agreed with the petitioners that the commercial activity, even if found to be in conjunction with a farm use, was as proposed the primary use of the property, the "tail wagging the dog."

Finally, LUBA agreed with the petitioners that the county had not properly addressed the "farm impacts test" as set forth in ORS 215.296, a test required to approve a commercial activity in conjunction with farm use. The county's findings did not include the detailed site-specific analysis required to show compliance with the farm impacts test.

Goal 6: Stormwater Management Plan

***Nicita v. City of Oregon City*, LUBA Nos. 2020-037 and 039 (Sept. 21, 2021)**

By Gordon Howard

LUBA affirmed a decision by Oregon City updating the city's stormwater and grading standards and adopting a stormwater management plan. The petitioners included the Northwest Environmental Defense Center. LUBA rejected the petitioners' assertions that the standards and management plan did not comply with Statewide Planning Goal 6, because they allow development that will further violate existing water quality and toxics levels in the Willamette River basin. LUBA first noted that the standards and management plan did not constitute new development in and of themselves, and thus did not lead to further violation of water quality standards requiring Goal 6 findings.

LUBA then declined to overrule current legal interpretation of Goal 6 — that it requires compliance with state and federal environmental standards relating to water quality and does not provide a legal standard independent of those environmental standards. The petitioners offered two LCDC decisions from 1978 and 1980 that appeared to contradict current understanding of

how Goal 6 is implemented by local governments, requiring individual Goal 6 compliance findings for any individual development application. LUBA rejected the petitioners' arguments, first repeating that the standards and management plan did not constitute an actual development application, and then noting that the petitioners were not persuasive "that the Goal 6 legal or factual context has changed in such a way as to seriously undermine the reasoning of our controlling Goal 6 decisions, or that we missed an important argument or failed to adequately analyze the issue in those cases."

Development Moratoria

***Riverview Meadows et al. v. City of Nehalem*, LUBA No. 2021-124 (Apr. 19, 2022)**

By Gordon Howard

LUBA invalidated a decision by the City of Nehalem approving a moratorium on connections to the city's water system for properties outside of the city boundary. In 2010 and 2012, Nehalem entered into service agreements and began providing city water services to two subdivisions outside of the city's boundary. One of these subdivisions is within the city's UGB, the other is not. After the city's water system developed low water pressure problems, the city adopted a one-year moratorium on connections to properties outside of the city boundaries, with the stated intention of extending the moratorium in the future if the property owners in the area affected by the moratorium could not devise a solution to raise water pressure to acceptable levels.

While the city did not file a brief in response to the petition, the city's arguments for complying with state law were 1) the city had no legal obligation to provide water services to properties outside of the city's UGB; and 2) the city had no legal obligation or duty to supply

water to properties outside of the city boundaries. LUBA noted that the moratorium applied to land both outside and inside of the city's UGB. LUBA then rejected the city's second argument by finding the city's code established a process and procedure for water service for properties eligible for city water service. These properties, as discussed earlier, are both inside and outside the city boundaries. The city's process did not allow for a categorical refusal to provide water service to any particular property.

LUBA thus determined that the city had not adopted a moratorium on water service as required by ORS 197.505 to 197.540 despite the city's requirement to do so. Under ORS 197.540(2) the remedy in such situations for LUBA is to invalidate the moratorium, which LUBA did.