

LUBA Case Summaries January 2024

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● ***Lifshitz v. City of Portland* (LUBA No 2023-053, Jan 2, 2024)**
(Opinion by Zamudio, Board Member)

Petitioner appealed a city adjustment committee decision approving an adjustment and allowing an increase in the maximum height limit for four buildings in a multi-dwelling development. Petitioner failed to file their petition for review within the time allowed by OAR 661-010-0030(1) or any extension of that time under OAR 661-010-0067(2). Held: Dismissed.

● ***DLCD v. Morrow County* (LUBA No 2023-074, Jan 3, 2024)**
(Opinion by Zamudio, Board Member)

Petitioner appealed a county ordinance amending the county comprehensive plan to change the plan and zone designation of a 247-acre parcel from exclusive farm use (EFU) to general industrial, adopting a limited use overlay zone to limit use of the parcel to a data center, and adopting exceptions to Statewide Planning Goals 3 (Agricultural Lands), 11 (Public Facilities and Services), and 14 (Urbanization) to allow the establishment of a data center. Held: Petitioner requested that this appeal be dismissed. Dismissed.

● ***Planktown Holdings, LLC v. Lane County* (LUBA No 2023-069, Jan 8, 2024)**
(Opinion by Ryan, Board Chair)

Petitioner appealed a county hearings officer decision denying an application for validation of a unit of land under ORS 92.176. Held: ORS 92.176(1) does not require an applicant for validation of a unit of land that was created by sale that did not comply with the applicable criteria for creation of a unit of land to demonstrate that the unit of land’s parent parcel was lawfully created. ORS 92.176(1) is concerned with “the unit of land” that is the subject of the validation application. The hearings officer’s findings were inadequate regarding whether the subject property could have complied with the applicable criteria for the creation of a lawfully established unit of land in effect when the unit of land was created by deed. ORS 92.176(1)(b). Remanded.

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- ***Confederated Tribes of the Warm Springs Reservation of Oregon at al v. Deschutes County*** (LUBA Nos 2023-038/039/041, Jan 12, 2024)
(Opinion by Zamudio, Board Member)

Petitioners appealed a board of county commissioners decision approving the modification of a destination resort final master plan amending the resort's fish habitat mitigation plan and adopting measures that the county determined will satisfy the no net loss standard in Deschutes County Code (DCC) 18.113.070(D). Held: The Tribe did not preserve the issue of whether the county was required to evaluate whether the modification would impair the Tribe's treaty protected fishing rights. The Tribe did not preserve its allegations of procedural error, including an alleged due process violation under the U.S. Constitution. The assertion that the resort Conceptual Master Plan is void provides no basis for a remedy. The county plausibly interpreted the no net loss standard, including that (1) the resort's impact on fish habitat may be analyzed based on a typical water year; (2) the resort may provide fish habitat mitigation water by voluntary cancellation of water rights; and (3) the standard does not require that the Oregon Department of Fish and Wildlife or the Tribe concur with the resort's fish habitat mitigation plan. A reasonable person could conclude, as the county did, that the resort's proposed water rights transactions will result in no net loss to fish habitat based on quantities and quality of water modeled on the listed water rights certificates. Petitioners did not demonstrate that the modification would materially affect the original findings concerning the following: (1) open space; (2) water supply; and (3) water conservation and wastewater disposal. DCC 18.113.080. The resort's abandonment of golf course facilities as part of the amended fish habitat mitigation plan is a substantial change that materially affects the county's findings for the required economic benefit analysis under DCC 18.133.070(C). The county's findings that the no net loss standard is satisfied by a compliance provision that requires the resort to merely submit an application to the Oregon Water Resource Department are inadequate and not supported by substantial evidence. Remanded.

- ***DLCD v. Josephine County*** (LUBA No 2023-071, Jan 18, 2024)
(Opinion by Zamudio, Board Member)

Petitioner appealed a county board of commissioners order that suspended the application of a local code provision that requires proof of fire protection service or fire protection measures as a condition of development for properties located outside a fire protection district. The county filed a notice of withdrawal of the challenged decision for reconsideration, which stated that the county had rescinded the challenged decision. LUBA issued an order giving petitioner the opportunity to establish that the matter is not moot. Petitioner did not respond to that order or otherwise attempt to establish that this appeal is not moot. Held: Dismissed.

- ***Freel & Associates, LLC v. Jackson County*** (LUBA No 2023-054, Jan 18, 2024)
(Opinion by Zamudio, Board Member)

Petitioner appealed a hearings officer's decision approving with conditions a lot partition and private road improvement. The county withdrew the challenged decision pursuant to ORS 197.830(13)(b) and OAR 661-010-0021. The county filed a copy of its decision on reconsideration. Held: Petitioner did not refile its original notice of intent to appeal or file an

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amended notice of intent to appeal as provided in OAR 661-010-0021(5)(a). In that circumstance, OAR 661-010-0021(5)(e) requires that the appeal be dismissed. Dismissed.

- ***Burton v. City of Cannon Beach* (LUBA No 2023-060, Jan 22, 2024)**
(Opinion by Ryan, Board Chair)

Petitioner appealed a city council decision denying an application for a setback reduction for a single-family residence in the Residential Lower Density zone. Held: Petitioner did not meet their OAR 661-010-0030(4)(d) burden to demonstrate that the issues raised in their assignments of error were preserved during the proceeding below and, therefore, failed to establish a basis for relief from LUBA. Affirmed.

- ***Even Better Homes, Inc. v. City of Sandy* (LUBA No 2022-098, Jan 25, 2024)**
(Opinion by Zamudio, Board Member)

Petitioner appealed a city council adoption of a moratorium on development pursuant to ORS 197.505 to 197.540. Thereafter, the parties agreed to suspend the appeal and the appeal was suspended. The parties did not respond to LUBA's order directing the parties to advise LUBA of the status of the appeal. Held: Dismissed.

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