

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Petitioner fails to establish a basis for reversal or remand under Article I, section 20, of the Oregon Constitution where there is no evidence that other city-approved applications for a zone change to residential are factually identical to his application. *Carroll v. City of Malin*, 80 Or LUBA 298 (2019).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A city council decision approving a subdivision that was not an amendment of the city's development code, was not adopted by ordinance, and was the result of a quasi-judicial, rather than legislative process, does not violate the prohibition in Article I, section 21, of the Oregon Constitution against laws that delegate the power to amend those laws to another entity. *Harra v. City of West Linn*, 77 Or LUBA 136 (2018).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** *Brown v. City of Medford*, 251 Or App 42, 47, 283 P3d 367 (2012), sets forth the two-part test that is applied to determine the constitutionality of an “exaction” under the Fifth Amendment of the U.S. Constitution. First, under *Nollan v. California Coastal Comm'n*, 483 US 825, 831-32, 107 S Ct 3141, 97 L Ed 677 (1987), the exaction must “substantially advance the same government interest that would furnish a valid ground for denial of the development permit.” Second, under *Dolan v. City of Tigard*, 512 US 374, 384, 114 S Ct 2309, 129 L Ed 2d 304 (1994), “the nature and extent of the exaction must be ‘roughly proportional’ to the effect of the proposed development.” *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** To determine whether a local government's conditions of approval satisfy the *Nollan v. California Coastal Comm'n*, 483 US 825, 831-32, 107 S Ct 3141, 97 L Ed 677 (1987), “essential nexus” prong of the two-part test for assessing the constitutionality of a government exaction, the local government must show “(1) what interests would allow the [local government] to deny [the applicant's proposed land] partition, and (2) how the exaction would serve those interests.” *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Where a city has two separate criteria—a transportation impacts criterion, and a services and utilities criterion—both of which are generally concerned with achieving and maintaining an adequate and safe transportation system, and both criteria must be satisfied, a finding that one of those criteria is satisfied does not necessarily mean the other criterion is satisfied. In such a situation, simply because the city found no “traffic impacts” requiring mitigation under the traffic impacts criterion does not mean the city imposed an unconstitutional exaction when it required right-of-way dedication and street improvements as conditions of approval to satisfy the services and utilities criterion. It simply means the city applies the rights-of-way requirements through the services and utilities criterion, rather than the transportation impacts criterion. *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** To determine whether “the nature and extent of the exaction is ‘roughly proportional’ to the effect of the proposed development” under *Dolan v. City of Tigard*, 512 US 374, 384, 391, 114 S Ct 2309, 129 L Ed 2d 304 (1994), “[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and

extent to the impact of the proposed development.” *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** As part of the “rough[] proportional[ity]” test under *Dolan v. City of Tigard*, 512 US 374, 384, 114 S Ct 2309, 129 L Ed 2d 304 (1994), a hearings officer commits no error when he or she identifies and relies upon potential “sub-impacts” of a proposed development, including street infrastructure wear and tear, pollution and safety, which may not be readily quantifiable, in conjunction with a quantifiable motor vehicle trip generation analysis to determine whether the impacts of the proposed development are “roughly proportional” to the required right-of-way dedication. *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** As part of the “rough[] proportional[ity]” test under *Dolan v. City of Tigard*, 512 US 374, 384, 114 S Ct 2309, 129 L Ed 2d 304 (1994), although a local government’s decision to compare the percentage of total trips in the area that can be attributed to the development proposal and the exaction’s percentage of the total area of the subject property can be accused of comparing apples and oranges, that argument does not provide a basis for remand or reversal, because that criticism is possible in most cases where a *Dolan* “rough[] proportional[ity]” analysis is required. *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A waiver of remonstrance to the formation of a local improvement district (LID) is not subject to the constitutional exaction analysis because it, by itself, does not result in a loss of petitioner’s property. Conditions of approval, such as a waiver of remonstrance, may be applied by a local government to ensure that a development proposal conforms to the applicable approval criteria or to ensure the enforcement of other local government regulations. *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A code provision that requires the applicant for a wind energy facility to obtain the signature of residential landowners consenting to reducing a two-mile setback between the facility and residences violates the Delegation Clause, Article I, section 21, of the Oregon Constitution, because the signature requirement effectively allows neighbors to “veto” the application, for any or no reason, and without appeal or review. *Iberdrola Renewables v. Umatilla County*, 67 Or LUBA 149 (2013).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** State constitutional provisions may be more protective than similarly worded federal constitutional provisions, and therefore that federal courts have interpreted the analogous federal constitutional provision more narrowly than state courts have interpreted the state constitutional provision has no bearing on the meaning of the state constitutional provision. *Iberdrola Renewables v. Umatilla County*, 67 Or LUBA 149 (2013).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Where a state constitutional provision resolves the controversy and provides the petitioner with a complete

remedy, LUBA should decline to reach issues under an analogous federal constitutional provision. *Iberdrola Renewables v. Umatilla County*, 67 Or LUBA 149 (2013).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A county ordinance that allows a private residential landowner or a city council to unilaterally “waive” a two-mile setback from wind towers to a lesser distance, potentially to a zero setback, violates the Article I, section 21, delegation clause of the Oregon Constitution, because it authorizes an entity other than the county to determine whether there is a setback at all and if so the extent of that setback. *Cosner v. Umatilla County*, 65 Or LUBA 9 (2012).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** In determining whether and how to sever a sign regulation that includes an unconstitutional content-based exemption, it is the court’s understanding of legislative intent that guides that severance decision. Legislative intent may or may not have anything to do with the impact that severance might have or how many signs would be affected by competing severance options. *Onsite Advertising Services LLC v. Washington County*, 63 Or LUBA 414 (2011).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A court may consider post-enactment actions by the enacting body to try to determine how that enacting body would go about severing an unconstitutional sign regulation. *Onsite Advertising Services LLC v. Washington County*, 63 Or LUBA 414 (2011).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Where a board of county commissioners adopted an ordinance repealing a content-based exemption to its sign regulations, rather than repealing the sign regulation altogether, a hearings officer considering local appeals of sign permit decisions governed by the old, unconstitutional version of the sign regulations properly considered the ordinance that amended the sign regulations in determining how to go about severing the unconstitutional sign regulations and applying them to the permit applications. *Onsite Advertising Services LLC v. Washington County*, 63 Or LUBA 414 (2011).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Where free-standing signs are expressly prohibited by the applicable underlying zoning district, an unconstitutional content-based exemption in the sign regulations that would otherwise apply to allow free-standing signs in that zoning district provides no basis for allowing free-standing signs in that zoning district. *Onsite Advertising Services LLC v. Washington County*, 63 Or LUBA 414 (2011).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Where sign regulations partially exempt regulated signs from underlying zoning requirements, including setback requirements, but the sign regulations are unconstitutional in their entirety due to a separate content-based exemption in the sign regulations, proposed signs must be denied if they violate setback requirements in the underlying zone because the exemption from those setback requirements is ineffective if the sign regulations are unconstitutional in their entirety. *Onsite Advertising Services LLC v. Washington County*, 63 Or LUBA 414 (2011).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Without a protected property interest to continued use of a particular access to an arterial, a property owner has no

takings claim under the Article I, section 18, of the Oregon Constitution or the Fifth Amendment to the United States Constitution when the Oregon Department of Transportation adopts a plan to close that access and require the property owner to use an alternative route to access to that arterial. *Parker Johnstone Wilsonville Honda v. ODOT*, 62 Or LUBA 116 (2010).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Where the Goal 4 rule incorporates a definition in the Oregon Structural Specialty Code, the version of the Code in effect when the Goal 4 rule was adopted controls, not the Code as subsequently amended, to avoid running afoul of constitutional prohibitions on delegating legislative authority. *Central Oregon Landwatch v. Jefferson County*, 62 Or LUBA 443 (2011).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** To advance a facial challenge under the Takings Clause of the Oregon Constitution to an ordinance that allegedly requires an uncompensated physical invasion of private property and acquisition of a property easement, a petitioner need not demonstrate that the mere enactment of the ordinance effects a physical invasion or acquisition of property. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** An ordinance requiring that developers of residential property near an airport grant the airport an uncompensated “aviation easement” that allows the airport to subject the property to noise, vibrations, fumes, dust and fuel particle emissions is facially inconsistent with the federal and state Takings Clauses, because the easement does not advance the governmental interest in reducing land use conflicts between the airport and surrounding residential uses. Under the easement, the conflicts will exist to the same degree; the only arguable effect is to make it more difficult for the property owner to advance a successful inverse condemnation or other legal action against the airport. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** LUBA will not consider a petitioner’s assignment of error that the county’s more favorable treatment of other applicants for partition approval violates his right to equal privileges and immunities under Article I, section 20, of the Oregon Constitution, where LUBA is sustaining another assignment of error that does not raise a constitutional issue and would require remand for approval without the disputed conditions of approval in any event. *Sperber v. Coos County*, 60 Or LUBA 44 (2009).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** The single-subject requirement of Article IV, section 20, of the Oregon Constitution limits every legislative act to one subject and renders the act void with respect to any subject embraced in the legislation that is not expressed in the title. ORS 197.522, which was adopted as part of an act the subject of which is “moratorium on land development,” runs afoul of the single-subject requirement to the extent it is interpreted to apply to development permits outside the context of a declared or de facto moratorium. *Reeder v. Multnomah County*, 59 Or LUBA 240 (2009).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** That ORS 197.522 was not intended to apply to development permits outside the context of a declared or de facto moratorium is supported by the legislative history of the bill that enacted it, which indicates that the legislative discussion was focused exclusively on amending the moratoria statutes and included

no suggestion that the legislature contemplated that the section codified at ORS 197.522 should be applied outside the context of a moratorium. *Reeder v. Multnomah County*, 59 Or LUBA 240 (2009).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** The arbitrary application of facially neutral laws could constitute a violation of Article I, section 20, of the Oregon Constitution, but showing that a local government has treated different applications differently falls far short of demonstrating such a violation, particularly when there are factual differences in the applications that could easily explain the different treatment. *Sperber v. Coos County*, 58 Or LUBA 570 (2009).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Where a local ordinance that restricts the size of all electronic signs except those operated by government agencies as public signs is not concerned with the content of the messages being displayed on the electronic signs, under Article I, section 8, of the Oregon Constitution, the ordinance is a content neutral restriction on speech that is a reasonable time, place and manner restriction. *Lamar Advertising Company v. City of Eugene*, 54 Or LUBA 295 (2007).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** In the absence of evidence in the record indicating that a local government is allowing certain private parties to use government signs to display private commercial messages and that use results in discrimination against particular speakers, no violation of Article I, section 20, of the Oregon Constitution has occurred. *Lamar Advertising Company v. City of Eugene*, 54 Or LUBA 295 (2007).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Where a local government's only claimed basis for imposing an exaction that requires off-site road improvements is that a subdivision would otherwise violate a code standard regarding street system impacts, and LUBA finds that the local government has not established that the subdivision would violate the code standard, there is also no basis to impose the exaction. *PacWest II, Inc. v. City of Madras*, 53 Or LUBA 241 (2007).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Where statutes grant a triple majority of property owners in an area to be annexed the unilateral right to consent to the proposed annexation, and thereby make an election in the area to be annexed unnecessary, but do not grant a similar unilateral right to resident electors who do not own property, the resident electors constitute a true class for purposes of considering whether those statutes violate Article I, section 20. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** For purposes of an Article I, section 20, challenge to statutes that grant privileges to some classes and not to others, suspect classifications are not necessarily limited to classifications based on immutable characteristics, but the class of voters who do not own property is not a suspect classification. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Because the triple majority method of annexation does not discriminate based on a suspect classification, it need only

bear a rational relationship to a legitimate state purpose. The classification involved in the triple majority method of annexation is rationally related to a legitimate state purpose. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** There is no right under either the federal or Oregon constitution to vote on questions of incorporation or annexation. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Where a right to vote in a general election is extended by statute, any classification restricting that franchise on grounds other than residence, age, and citizenship must be shown to serve a compelling state interest. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** In analyzing annexation statutes, if those statutes are viewed as restricting a statutory right to vote, strict scrutiny is generally applied under the Equal Protection Clause; but if those statutes are viewed as merely presenting alternative annexation methods, where some provide for elections and some do not, rational basis scrutiny is generally applied under the Equal Protection Clause. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** The more clearly and cleanly statutes that authorize different annexation methods segregate the annexation methods that do not require elections from those that do, the more likely the statutes will not be subject to strict scrutiny as statutes that restrict voting rights. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** When statutes do not make it clear at the time an annexation is initiated whether the annexation will ultimately be subject to an election before the annexation can take effect, or the statutes appear to grant a right to vote on an annexation but also allow the election to be foreclosed at some later point in the annexation process, those statutes are likely to be subject to strict scrutiny under the Equal Protection Clause as statutes that restrict voting rights. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** The right to an election that ORS 222.111(5) grants is not an absolute right. There is no right to vote in health hazard, double majority, island or triple majority annexations. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Unlike annexation statutes that have been subject to strict scrutiny and found to violate the Equal Protection Clause as an improper restriction on voting rights, the triple majority method of annexation authorized by ORS 222.170(1) does not have the legal effect of “nullifying a vote,” “preventing an election” or “halting an election.” ORS 222.170(1) simply makes an election unnecessary; it does not foreclose an election or prohibit the city from submitting the proposed annexation to the voters in the territory to be annexed, notwithstanding that a triple majority of the property owners in the

territory to be annexed consent to the annexation. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** ORS 222.750, which allows a city to annex an “island” of territory without consent or a vote of the residents or landowners within the island, does not distinguish between classes of persons based on a “suspect” classification, for purposes of Article I, section 20 (Privileges and Immunities), of the Oregon Constitution. Therefore, the statute must be upheld if the differential treatment between persons residing or owning property within such islands and those residing or owning property in other types of unincorporated territory has a “rational basis,” *i.e.*, bears some relationship to a legitimate end. *Kane v. City of Beaverton*, 49 Or LUBA 512 (2005).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Reducing jurisdictional confusion and administrative and service inefficiencies created by “islands” of unincorporated territory surrounded by a city are legitimate legislative ends. A statute that makes it easier to incorporate such islands by eliminating the requirement to obtain the consent or electoral majority of residents or landowners within such islands furthers those legislative ends, and therefore the statute survives rational basis scrutiny under Article I, section 20 (Privileges and Immunities), of the Oregon Constitution. *Kane v. City of Beaverton*, 49 Or LUBA 512 (2005).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** The initiative powers reserved to the people under Oregon Constitution Article IV, section 1(5), are limited to “legislative” matters, and do not include “administrative” matters. An initiative that is directed at or has the effect of overturning a previous administrative or adjudicative decision is itself administrative in nature and thus beyond the electorate’s Article IV, section 1(5), powers. *Port of Hood River v. City of Hood River*, 47 Or LUBA 62 (2004).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** An initiative that effectively rezones a single property in unified ownership involves an “administrative” matter rather than “municipal legislation” and is therefore beyond the electorate’s Article IV, section 1(5), powers. *Port of Hood River v. City of Hood River*, 47 Or LUBA 62 (2004).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A broad and poorly defined sign code prohibition on “billboards” does not necessarily require inquiry into the content of signs or allow content-based distinctions where, as interpreted by the city, the code allows or prohibits all signs, including “billboards,” based on specific standards that do not require inquiry into the content of proposed signs. *Media Art v. City of Tigard*, 46 Or LUBA 61 (2003).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A poorly defined code prohibition on “billboards” is not unconstitutionally overbroad when, read in context, it is subject to a narrowing construction that clarifies the meaning of “billboard” and the precise scope of the prohibition. *Media Art v. City of Tigard*, 46 Or LUBA 61 (2003).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** An argument that a sign code definition of “image” impermissibly distinguishes between content because it regulates representational images but not abstract images does not provide a basis for reversal or remand,

where nothing in the sign code narrows the scope of the term “image” to exclude abstract or non-representational images. *Cotter v. City of Portland*, 46 Or LUBA 612 (2004).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** In the absence of a content-neutral way of distinguishing wall murals from other types of signs, a city’s regulatory choice lies between deregulating signs altogether or regulating murals along with signs. A city’s choice to regulate murals along with signs does not violate Article I, section 8, of the Oregon Constitution, where graphic expression by muralists is burdened only to the same extent as other types of constitutionally protected expression. *Cotter v. City of Portland*, 46 Or LUBA 612 (2004).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A city’s failure to address subjective language in a sign code criterion does not provide a basis for reversal or remand, where the petitioner also argues that applying that code language to approve or deny a sign application would be inconsistent with Article I, section 8, of the Oregon Constitution. *Cotter v. City of Portland*, 46 Or LUBA 612 (2004).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** That the record does not contain evidence of the specific content of proposed billboards does not indicate that a city’s denial of the billboards was not content-based, where the city’s sign ordinance defines permitted signs by content, the city denied the proposed signs because they were not among the types of signs allowed by the ordinance, and the city’s denial reflects a belief or assumption about the types of speech the proposed billboards would not include. *West Coast Media v. City of Gladstone*, 44 Or LUBA 503 (2003).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A sign ordinance that defines and regulates six permitted types of signs, and implicitly prohibits all others, necessarily requires inquiry into the content of the proposed sign in order to determine which if any of the six permitted categories and six different sets of standards apply. *West Coast Media v. City of Gladstone*, 44 Or LUBA 503 (2003).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** While distinction between “off-premises” and “on-premises” signs is not necessarily a content-based distinction in violation of Article I, section 8, of the Oregon Constitution, a sign ordinance that allows some types of off-premises speech and prohibits others necessarily distinguishes between speech based on content, and is therefore inconsistent with Article I, section 8. *West Coast Media v. City of Gladstone*, 44 Or LUBA 503 (2003).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A sign ordinance that impermissibly allows certain types of speech while prohibiting other types of speech based on content in violation of Article I, section 8, of the Oregon Constitution may also, for the same reason, violate the equal privileges and immunities clause under Article I, section 20. *West Coast Media v. City of Gladstone*, 44 Or LUBA 503 (2003).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** An evidentiary proceeding before LUBA is not warranted to consider evidence that the petitioner has installed “light emitting diodes” on an existing sign in order to engage in constitutionally protected speech,

where the question of whether petitioner's installation is constitutionally protected speech is a legal conclusion, not an assertion of fact. *Meredith v. Lincoln County*, 44 Or LUBA 821 (2003).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A petitioner's claim that a variance applicant received favorable treatment by the city provides no basis for concluding that the local government thereby improperly extended a "privilege or immunity" to the applicant under Article I, section 20, of the Oregon Constitution, where petitioner does not allege that she or any other variance applicant were denied similarly favorable treatment. *Lord v. City of Oregon City*, 43 Or LUBA 361 (2002).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** The fact that a city approved billboards 20 years ago under a very different regulatory scheme than the current one has little bearing on whether the city violated petitioner's state and federal constitutional rights in denying its application for a billboard under current regulations. Absent a showing of similarity between the old and new regulatory schemes, evidence of prior approvals does not demonstrate that a city acted arbitrarily or extended privileges to others that were denied to petitioners, and consideration of extra-record evidence under OAR 661-010-0045 is not warranted. *West Coast Media v. City of Gladstone*, 43 Or LUBA 659 (2003).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A city decision concluding that applying local sign ordinance criteria to deny a sign permit would violate Article I, section 8, of the Oregon Constitution is inadequate, where the findings do not identify what aspects of the local sign ordinance the city believes would be found to be unconstitutional or explain why the city believes it would be unconstitutional to apply the sign ordinance. *Haug v. City of Newberg*, 42 Or LUBA 411 (2002).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Where an application for city approval of a sign that is larger than allowed by city sign standards does not meet the city's criteria for approval of such larger signs, a city may not cite constitutional concerns and approve the request for a larger sign without (1) adopting a reviewable decision that explains what constitutional provisions the city believes would be violated and why, and (2) explaining why the appropriate remedy in that circumstance would not be to deny the request until constitutional provisions for allowing such larger signs are adopted. *Haug v. City of Newberg*, 42 Or LUBA 411 (2002).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Although the basic thrust of Article I, section 18, of the Oregon Constitution is the same as the federal Takings Clause, the two provisions are not necessarily identical. Absent particular arguments based on Article I, section 18, LUBA will not consider claims under the state constitution that are based solely on federal takings jurisprudence. *Carver v. City of Salem*, 42 Or LUBA 305 (2002).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Eliminating a quasi-judicial UGB amendment process for housing, while providing such a process for nonhousing needs, does not violate petitioner's rights under either the Equal Protection Clause of the US Constitution or the Privileges and Immunities clause of the Oregon Constitution, where petitioner's housing developer members are not a suspect class, and the local government's distinction between

housing and nonhousing UGB amendments is rationally related to a legitimate government purpose. *Homebuilders Assoc. v. Metro*, 42 Or LUBA 176 (2002).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Comments by one local government decision maker expressing frustration at the perceived burdens created by a statute promoted by petitioner is insufficient to establish that the local government, in adopting a legislative amendment to the local government's plan and code that is adverse to petitioner's interests, impermissibly retaliated against petitioner for exercising its free speech and other constitutional rights. *Homebuilders Assoc. v. Metro*, 42 Or LUBA 176 (2002).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Determining whether a statute violates the Contracts Clause, Article I, section 21, of the Oregon Constitution, requires two steps: (1) determining whether a contract exists to which the party asserting impairment is a party; and (2) determining whether the statute impairs the obligations under that contract. In making the required determinations under the Contracts Clause, LUBA applies standard principles of contract law. *City of Sherwood v. Washington County*, 38 Or LUBA 656 (2000).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Because a letter from city planning director and county memorandum setting out circumstances surrounding a compromise is not sufficient to establish an agreement between the parties establishing rights and obligations, the Contracts Clause, Article I, section 21, of the Oregon Constitution, is not applicable. *City of Sherwood v. Washington County*, 38 Or LUBA 656 (2000).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** The remedies clause, Article I, section 10, of the Oregon Constitution, allows the state to alter or abolish a cause of action, so long as an injured party is not left entirely without a remedy. The remedy need not be of precisely the same type, as long as the remedy is a substantial one. *Hale v. Port of Portland*, 308 Or 508, 523, 783 P2d 506 (1989). *City of Sherwood v. Washington County*, 38 Or LUBA 656 (2000).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Even if immunity provisions of ORS 467.131 and 467.133 violate the remedies clause, Article I, section 10, of the Oregon Constitution, that infirmity does not implicate the limited preemption provisions of ORS 467.136 or the total preemption provisions of ORS 166.170 through 166.176. *City of Sherwood v. Washington County*, 38 Or LUBA 656 (2000).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A land use regulation that makes no reference to protected speech is analyzed under the third of the categories set out in *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982), to determine whether, as applied, the regulation impermissibly burdens the applicant's right of free speech under Article I, section 8, of the Oregon Constitution. *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440 (2000).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** If the real reason a city council denied an adult video store owner's request for a conditional permit for extended

operating hours was the city council's opposition to the nature of the business, rather than its finding that the request did not satisfy relevant approval criteria, it would necessarily follow that the city's decision violates Article I, section 8, of the Oregon Constitution. *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440 (2000).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A city's denial of an existing adult video store's application for a conditional use permit for extended operating hours to allow 24-hour operation does not violate Article I, section 8, of the Oregon Constitution, where (1) the conditional use approval criteria are not directed at protected speech, (2) the city's decision is supported by adjudicative findings that the effects that are proscribed by the conditional use criterion would result if the permit were granted, and (3) the city's decision is supported by substantial evidence. *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440 (2000).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A city council decision that has the effect of requiring petitioner to produce a traffic study with larger geographic scope than that required by city staff does not violate the privileges and immunities clause of the Oregon Constitution, absent a further showing that the city council has in fact imposed the traffic study requirement in a manner that discriminates against petitioner and in favor of others. *Ontrack, Inc. v. City of Medford*, 37 Or LUBA 472 (2000).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** OAR 660-012-0060 does not require that a local government impose exactions to ensure that impacts from a plan amendment do not violate Transportation Planning Rule Level of Service requirements. *Dept. of Transportation v. Coos County*, 35 Or LUBA 285 (1998).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Compliance with OAR 660-012-0060 does not deprive a property of all beneficial use, where the current comprehensive plan and zoning designations allow a range of uses that may generate any amount of traffic and are not subject to the rule. *Dept. of Transportation v. Coos County*, 35 Or LUBA 285 (1998).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A zoning ordinance that lacks provisions governing signs and that is nevertheless applied to evaluate whether a proposed billboard is an accessory use to industrial and commercial uses allowed in the relevant zone is not subject to facial challenge under Article I, section 8, as an ordinance directed at the content of speech or as a content-neutral ordinance that expressly prohibits speech. *Media Art Company v. City of Gates*, 35 Or LUBA 123 (1998).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A zoning ordinance that is not directed at the content of speech and does not expressly prohibit speech may be challenged under Article I, section 8, only on an as-applied basis. To prevail, an as-applied challenge to a decision denying a proposed billboard because it is not an accessory use to uses allowed in an industrial and commercial zone must demonstrate that the decision burdens the applicant's rights of free expression without a rational basis for doing so. *Media Art Company v. City of Gates*, 35 Or LUBA 123 (1998).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A local government may constitutionally distinguish between signs related to on-premises uses, and signs related only to off-premises uses or services, and deny a proposed billboard because it is unrelated to the primary use of the property, where the city's evaluation of the relationship between the sign and the premise does not entail a content-based distinction, and the on-premises/off-premises distinction is a rational means to preserve the zone for allowed uses. *Media Art Company v. City of Gates*, 35 Or LUBA 123 (1998).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A local government does not impermissibly favor commercial speech over noncommercial speech because it allows signs related to on-premises uses in an industrial and commercial zone and prohibits all others. That signs related to on-premises commercial uses are allowed while unrelated commercial and noncommercial signs are prohibited is an incidental consequence of the permissible distinction drawn between signs related to on- and off-premises uses. *Media Art Company v. City of Gates*, 35 Or LUBA 123 (1998).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A facial "takings" challenge of a mandatory public acquisition ordinance, while not subject to the "ripeness" requirement, must nevertheless demonstrate that the ordinance would "take" petitioner's property and that the taking would be uncompensated. *Nike, Inc. v. City of Beaverton*, 35 Or LUBA 57 (1998).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** The key to determining whether an approval standard is unconstitutionally vague is whether a reasonable applicant could understand what must be done to comply with the standard. *Holland v. City of Cannon Beach*, 34 Or LUBA 1 (1998).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Where the accumulation of sand on petitioner's beachfront property is caused by time and nature, and not city's sand removal regulations, denial of petitioner's permit request to remove the sand does not fall within the "physical invasion" category of takings cases. *Beta Trust v. City of Cannon Beach*, 33 Or LUBA 576 (1997).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Article I, section 20, of the Oregon Constitution does not prohibit a county from limiting park ownership in EFU zones to fee owners because such a classification is not closed to petitioner nor is it based on antecedent personal or social status or characteristics. *R/C Pilots Association v. Marion County*, 33 Or LUBA 532 (1997).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** There is no violation of the right to equal privileges and immunities under Article I, section 20, of the Oregon Constitution or the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution in applying a code provision to deny an absentee landowner permission to remove a tree, where the code does not create a separate classification for absentee landowners and the record does not show that any of the applications previously denied by the city were submitted by absentee landowners. *Lindstedt v. City of Cannon Beach*, 33 Or LUBA 516 (1997).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** In order to claim inequality of treatment as a class, petitioner must be a member of a true class whose disparate treatment is by virtue of characteristics they have apart from the law in question. A local code provision establishing criteria that must be met in specified circumstances to approve removal of a tree does not create such a true class. *Lindstedt v. City of Cannon Beach*, 33 Or LUBA 516 (1997).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** The city's denial of a tree cutting permit does not result in an unconstitutional "taking" of the portion of petitioner's property defined by the "circumference and diameter of the foliage and surface of roots of the tree," where petitioner retains "some beneficial use" of the property and is left with "an economically viable use" of the property. The "rough proportionality" test of *Dolan v. City of Tigard*, 512 US 374 (1994), does not apply to land use decisions that merely limit the available uses of property. *Lindstedt v. City of Cannon Beach*, 33 Or LUBA 516 (1997).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** In adopting land use regulations, including emergency and temporary land use regulations, a city is bound by the substantive and procedural requirements established by ORS 197.610 and Statewide Planning Goals 1 and 2. These statutory and Goal requirements must be followed notwithstanding contrary city charter provisions. *Western PCS, Inc. v. City of Lake Oswego*, 33 Or LUBA 369 (1997).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** LUBA will reject petitioners' claims that amendments to the city zoning ordinance are "class legislation" that violates certain property owners' right to equal privileges and immunities under Article I, section 20, of the Oregon Constitution where any property owner may bring itself, on equal terms, within the "favored class." *Downtown Community Assoc. v. City of Portland*, 32 Or LUBA 1 (1996).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** To establish a privileges and immunities violation under Article I, section 20, of the Oregon Constitution, a petitioner must prove: (1) denial of a privilege granted to others; (2) membership in a true class, and (3) the legislative classification has no rational basis. *Cummings v. Tillamook County*, 30 Or LUBA 17 (1995).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A condition requiring an applicant for site plan approval for a fast food restaurant to design street improvements for hundreds of feet beyond the subject property boundaries does not meet the "rough proportionality" test established in *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed2d 304 (1994). *Clark v. City of Albany*, 29 Or LUBA 325 (1995).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Under *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed2d 304 (1994), and *J.C. Reeves Corp. v. Clackamas County*, 131 Or App 615, 887 P2d 360 (1994), findings in support of a condition requiring an applicant for site plan approval for a fast food restaurant to construct certain street and frontage improvements must compare traffic and other effects of development to required improvements. *Clark v. City of Albany*, 29 Or LUBA 325 (1995).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** That a local code's definition of the term "taking" neither accurately nor completely reflects the opinions of appellate courts and LUBA regarding what constitutes a "taking" of private property for public use under the Fifth Amendment to the U.S. Constitution or Article I, section 18, of the Oregon Constitution provides no basis for reversal or remand, where the term "taking" is not used elsewhere in the code. *DLCD v. Josephine County*, 28 Or LUBA 459 (1994).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** That a local government determined a particular development is a "motel" and, therefore, is not subject to the restrictions on transient occupancy of dwelling units otherwise applicable under local ordinance, does not confer on that development any privilege not generally available to other similarly situated establishments, in violation of Article I, section 20, of the Oregon Constitution. *Kaady v. City of Cannon Beach*, 27 Or LUBA 464 (1994).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** City and county ordinances requiring that owners of certain unincorporated property either annex or sign a consent to annexation before receiving sewer connection permits do not improperly infringe on such property owners' statutory right to vote on annexations. *Bear Creek Valley San. Auth. v. City of Medford*, 27 Or LUBA 328 (1994).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Ordinances requiring consents to annexation as a condition of receiving sewer service do not improperly coerce property owners to give up their right to vote on annexations simply because an objecting property owner may be forced to pay a LID benefit assessment for the cost of extending sewer service which the objecting property owner does not wish to receive. Any such benefit assessments may be challenged on that basis in a proper forum and will either be invalidated or sustained. *Bear Creek Valley San. Auth. v. City of Medford*, 27 Or LUBA 328 (1994).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A condition of approval requiring elimination of a one-foot "spite strip" separating a new street serving a subdivision from the adjoining property is reasonably related to the impacts of the proposed subdivision and, therefore, does not effect an unconstitutional "taking" under either the United States or Oregon Constitution. *J.C. Reeves Corp. v. Clackamas County*, 27 Or LUBA 318 (1994).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Where the local code prohibits residential, but not commercial or industrial, development in certain wetlands, and includes density transfer provisions for residential developments limited by wetlands, but not for commercial or industrial developments, there is a rational basis to justify the disparate code treatment of residential versus commercial or industrial developments. *J.C. Reeves Corp. v. Clackamas County*, 27 Or LUBA 318 (1994).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Where a proposed subdivision will add traffic to an abutting arterial street, although direct access to the subdivision will be provided by local streets, a local government approval condition requiring that the developer construct sidewalks, storm sewers and other frontage improvements along the portion

of the arterial abutting the subdivision is reasonably related to the impacts of the proposed subdivision and is not an unconstitutional taking. *J.C. Reeves Corp. v. Clackamas County*, 27 Or LUBA 318 (1994).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Vague approval standards in a local code will not be found to violate the Oregon Constitution's guarantee of equal privileges and immunities unless a petitioner demonstrates that such approval standards have in fact led to a policy unlawfully discriminating in favor of some persons against others. *Towry v. City of Lincoln City*, 26 Or LUBA 554 (1994).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Where the challenged decision concerns the application of zoning regulations that limit the permissible uses of the subject property, rather than zoning decisions made in contemplation of eventual acquisition of the subject property for public use, there is no unconstitutional taking if the decision allows petitioner "some beneficial use" of the property. *Stern v. City of Portland*, 26 Or LUBA 544 (1994).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** The legal analyses applied to vagueness and overbreadth challenges under both the United States and Oregon Constitutions are essentially the same. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** That a condition of approval contains an ambiguous term does not, of itself, establish the condition is unconstitutionally vague. Rather, some ambiguity is tolerated where the ambiguous language of a condition is circumscribed by reference to specific, non-vague regulations. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** The issue in determining whether a condition of approval is unconstitutionally vague is whether a reasonable applicant could understand what must be done to comply with the condition. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Unconstitutional overbreadth refers to legislative action having a sweep so broad that it unreasonably limits constitutionally protected activity. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Where petitioners do not challenge findings that a condition of approval is reasonably related to mitigation of impacts associated with the particular development proposal, petitioners fail to establish the challenged action is overbroad. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Article I, section 8, of the Oregon Constitution forbids the passage of any law absolutely and directly restraining free expression. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A condition of permit approval that prohibits remonstrance against the formation of an LID, but does not proscribe other kinds of objections to an LID, only limits the manner in which expression may be exercised and does not directly and absolutely restrain the exercise of free expression in violation of Article I, section 8, of the Oregon Constitution. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** In Oregon, waiver of a constitutional right is uniformly held to be the voluntary relinquishment of a known right. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Petitioner's claim that his business was treated differently from another business, in violation of Article I, section 20, of the Oregon Constitution, because the other business was granted an "exemption" from a restrictive ordinance requirement, provides no basis for reversal or remand of the challenged decision where the decision does not purport to grant an "exemption" to any business. *Kaady v. City of Cannon Beach*, 26 Or LUBA 424 (1994)

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A condition of partition approval requiring that three existing driveways presently serving property to be partitioned be consolidated into a single driveway does not "take" a cognizable property interest, within the meaning of the Fifth Amendment to the U.S. Constitution or Article I, section 18, of the Oregon Constitution. Such a condition simply requires that a property owner exercise the property right of access differently. *Kostenborder v. City of Salem*, 25 Or LUBA 440 (1993).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Where there is a reasonable relationship between the development potential of a parcel to be divided and the impacts reasonably attributable to the divided parcel on the one hand, and the city's need to respond to legitimate traffic concerns on the other, and it would be more difficult to address such concerns when there are three parcels rather than a single parcel, notwithstanding the lack of current plans to develop the property further, a condition requiring consolidation of existing driveways is appropriate. *Kostenborder v. City of Salem*, 25 Or LUBA 440 (1993).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Because a constitutional taking claim is not dependent upon a local government's adoption of a particular interpretation of an ordinance, in that denial of an application for development approval is a reasonably foreseeable possibility, a petitioner is required to raise taking claims during the local proceedings or waive the right to raise those issues at LUBA. *Larson v. Multnomah County*, 25 Or LUBA 18 (1993).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** While a local government is not obliged to respond to a taking claim raised during the local proceedings, the local government should, in the first instance, have an opportunity to respond to a taking issue during the local proceedings. Where there is more than one possible interpretation of the local approval standards, the local government should have the opportunity to adopt an interpretation that is constitutional. *Larson v. Multnomah County*, 25 Or LUBA 18 (1993).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** The purpose of the requirement under applicable federal and state constitutions that a “taking” claim be ripe, is to allow the reviewing body to know the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it. *Larson v. Multnomah County*, 25 Or LUBA 18 (1993).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** That petitioners believe a local government will deny proposed development because it does not meet various approval standards, does not excuse petitioners from giving the local government the opportunity to make that decision for itself. Petitioners must make a good faith application for at least some of the conditional uses allowed in the applicable zoning district before a taking claim is ripe for review. *Larson v. Multnomah County*, 25 Or LUBA 18 (1993).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Where a petitioner has been denied permit approval, but has failed to seek approval of other allowable uses or seek a plan amendment or statewide planning goal exception, the petitioner’s regulatory taking claims under the United States and Oregon Constitutions are not ripe for review. *Lardy v. Washington County*, 24 Or LUBA 567 (1993).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Under Article I, section 18, of the Oregon Constitution, a land use regulation must allow a property owner some substantial beneficial use of his property, but there is no generally applicable right under that section to construct a dwelling on one’s property. *Lardy v. Washington County*, 24 Or LUBA 567 (1993).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Under Article I, section 18, of the Oregon Constitution and *Fifth Avenue Corp. v. Washington Co.*, 282 Or 591, 581 P2d 50 (1978), a landowner must be compensated where land use regulations which designate his property for public use or public acquisition “inflict virtually irreversible damage.” However, the “inflict virtually irreversible damage” test does not apply to other types of land use regulations which do not designate property for public use or public acquisition. *Lardy v. Washington County*, 24 Or LUBA 567 (1993).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A taking claim brought under the “inflict virtually irreversible damage” test articulated by the Oregon Supreme Court in *Fifth Avenue Corp. v. Washington Co.*, 282 Or 591, 581 P2d 50 (1978), is not excused from the ripeness requirement. *Young v. Clackamas County*, 24 Or LUBA 526 (1993).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** LUBA will not presume it would be futile for petitioners to apply for a comprehensive plan amendment and zone change to make their taking claim ripe for review. *Young v. Clackamas County*, 24 Or LUBA 526 (1993).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** In order for petitioners’ claims under Article I, section 8, of the Oregon Constitution and the Fifth Amendment to the United States Constitution, that their property was taken by a local government without just

compensation, to be ripe for review, petitioners must show that listed permitted uses cannot be established on the subject property and that they were refused a plan and zone change and approval for other listed conditional uses. *Young v. Clackamas County*, 24 Or LUBA 526 (1993).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A local government's implementation of exclusive farm use zoning is not the equivalent of imposing a statutory conservation easement. *Young v. Clackamas County*, 24 Or LUBA 526 (1993).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Both the Oregon and U.S. Constitutions require that there be a “reasonable relationship” between a challenged condition of approval and the impacts of, or needs generated by, the proposed development. *Sherwood Baptist Church v. City of Sherwood*, 24 Or LUBA 502 (1993).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Because a constitutional taking claim is not dependent upon a local government's adoption of a particular interpretation of an ordinance, in that denial of an application for development approval is a reasonably foreseeable possibility, a petitioner is required to raise taking claims during the local proceedings or waive the right to raise those issues at LUBA. *Larson v. Multnomah County*, 24 Or LUBA 629 (1993).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** While a local government is not *obliged* to respond to a taking claim raised during the local proceedings, the local government should, in the first instance, have an opportunity to respond to a taking issue during the local proceedings. Where there is more than one possible interpretation of the local approval standards, the local government should at least have the opportunity, if possible, to adopt an interpretation that is constitutional. *Larson v. Multnomah County*, 24 Or LUBA 629 (1993).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** The purpose of the requirement under applicable federal and state constitutions that a “taking” claim be ripe, is to allow the reviewing body to know the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it. *Larson v. Multnomah County*, 24 Or LUBA 629 (1993).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** That petitioners believe a local government will deny proposed development because it might not meet various approval standards, does not excuse petitioners from giving the local government the opportunity to make that decision for itself. Accordingly, petitioners must make a good faith application for at least some of the conditional uses allowed in the underlying zoning district before a taking claim is ripe for review. *Larson v. Multnomah County*, 24 Or LUBA 629 (1993).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** An evidentiary hearing at LUBA will not be allowed to show that many, but not all, conditionally permitted uses listed in the applicable zoning district are economically infeasible, where petitioners do not argue that it would have been futile to apply for approval of the other conditionally permitted uses. Under these circumstances, the evidence petitioners seek to introduce would not establish an unconstitutional “taking.” *Larson v. Multnomah County*, 24 Or LUBA 591 (1992).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Where a petitioner alleges a land use decision results in a taking under Article I, section 18, of the Oregon Constitution, but relies entirely on arguments advanced in support of allegations that the decision constitutes a taking under the Fifth Amendment of the U.S. Constitution, LUBA will limit its review to petitioner's federal taking claim. *Nelson v. Benton County*, 23 Or LUBA 392 (1992).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Where petitioner seeks to establish through an evidentiary hearing that all nonresidential uses allowed outright or conditionally under the existing zone are not economically feasible on the subject property, but has not sought approval of a plan and zone map amendment which would allow residential development of the subject property, petitioner's state constitution taking claim is not ripe for adjudication and petitioner's motion for evidentiary hearing will be denied. *Dority v. Clackamas County*, 23 Or LUBA 384 (1992).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Under both the Oregon and Federal constitutions, taking claims must be ripe for adjudication before LUBA may review their merits. Where petitioners did not seek any form of administrative relief from the applicable regulations, and did not seek either a variance or a plan and zone map change, petitioners' taking claims are not ripe. *Schoppert v. Clackamas County*, 23 Or LUBA 138 (1992).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Petitioner's unsupported assertions that the subject parcel is not suited for any use other than a nonresource dwelling are not a sufficient basis for excusing petitioner from the requirement that he seek approval for other uses potentially allowed under the applicable zone before pursuing a taking claim under the Oregon or United States Constitution. In any case, a petitioner is required to seek quasi-judicial plan and zone map amendments prior to pursuing a taking claim. *Joyce v. Multnomah County*, 23 Or LUBA 116 (1992).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A local code criterion requiring that a request for land use approval be in the "public interest" does not require that the local government determine whether denial of the request would constitute a taking of private property without just compensation in violation of Article I, section 18, of the Oregon Constitution or the Fifth Amendment to the U.S. Constitution. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Because a local government is not required to consider whether denying a request for land use approval would constitute an unconstitutional taking of private property without just compensation, a local government's findings on such constitutional issues provide no basis for reversal or remand. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Unlike a local government, LUBA is specifically required by statute to consider arguments that a local government decision is unconstitutional and to reverse or remand an unconstitutional decision. Therefore, procedural errors a local government may have committed in considering constitutional

issues during local proceedings are harmless errors. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Zoning regulations limiting the allowable forest and nonforest uses of property located within a forest zone do not constitute a nuisance or physical invasion of such private property. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Under Article I, section 18, of the Oregon Constitution, private property is not impermissibly taken for public use without just compensation, so long as the landowner is allowed “some substantial beneficial use” of the property. *Fifth Avenue Corp. v. Washington Co.*, 282 Or 591, 609, 581 P2d 50 (1978). *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** In view of the Oregon Supreme Court’s explicit reservation of judgment concerning whether it will look to U.S. Supreme Court Fifth Amendment “takings” jurisprudence to further develop the appropriate tests to be applied in considering Article I, section 18, takings claims under the Oregon Constitution, LUBA will not do so. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Where there is expert testimony in the record that the subject property can produce a net profit if properly managed for forest use, and the conclusion of the owner’s expert that there is limited existing and future value in forest use of the property is based as much on deficiencies in forest management practices as on inherent limitations of the property, the landowners have a substantial beneficial use of their property. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Where property was not legally partitioned until after the applicable zoning district was amended to limit dwellings to those necessary for and accessory to forest uses, and the property owners’ predecessors in interest received notice of the zoning ordinance amendment, the owners may not fail to consider the uncertainty of receiving approval for a dwelling in agreeing to a purchase price and thereafter use the price of the property as a basis for contending their property has been unconstitutionally taken without compensation. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Petitioners must seek relief from application of a velocity flooding overlay designation to the subject property through the variance process provided in the local government’s flood damage prevention ordinance, before they may obtain LUBA review of any constitutional “taking” claims. *Alexiou v. Curry County*, 22 Or LUBA 639 (1992).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Article I, section 18, of the Oregon Constitution requires that there be a “reasonable relationship” between a condition of approval and the impacts of or needs generated by the proposed development. *Dolan v. City of Tigard*, 22 Or LUBA 617 (1992).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Where a proposed larger building and paved parking area will increase the amount of impervious surfaces on the subject property and, therefore, runoff into an adjacent creek, there is a “reasonable relationship” between the proposed development and a condition requiring land along the creek to be dedicated for a planned greenway for management of storm water runoff. *Dolan v. City of Tigard*, 22 Or LUBA 617 (1992).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Where a significantly larger retail sales building and parking lot will accommodate larger numbers of customers and employees and their vehicles, there is a reasonable relationship between alleviating these impacts of the development and a condition requiring dedication of land for a pedestrian/bicycle pathway as an alternative means of transportation. *Dolan v. City of Tigard*, 22 Or LUBA 617 (1992).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Where the evidence cited by the parties supports only a conclusion that production of forest products, a permitted use in the subject zone, is a feasible economic use of the subject property, petitioners fail to demonstrate they are precluded from making any economic use of the subject property and their claim of violation of Article I, section 18, of the Oregon Constitution will be denied. *Wickwire v. Clackamas County*, 21 Or LUBA 278 (1991).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Legislation preempting certain city and county land use decision making and rights of appeal concerning a proposed mass transportation facility does not violate constitutional home rule provisions because such legislation is a “general law addressed primarily to substantive social, economic, or other regulatory objectives of the state,” and is not “irreconcilable with the local community’s freedom to choose its own political form.” *La Grande/Astoria v. PERB*, 281 Or 137, 156, 576 P2d 1204 (1978). *Seto v. Tri-Met*, 21 Or LUBA 185 (1991).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** A law adopted to facilitate decision making concerning a mass transit system which will be part of a regional transportation system serving a large number of cities and counties and a significant percentage of the state’s population is a “general law addressed primarily to substantive social, economic, or other regulatory objectives of the state” even though only three cities and two counties are directly affected by the law. *La Grande/Astoria v. PERB*, 281 Or 137, 156, 576 P2d 1204 (1978). *Seto v. Tri-Met*, 21 Or LUBA 185 (1991).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Constitutional home rule provisions do not prohibit the legislature from adopting substantive legislation in an area where local governments are also permitted to legislate. *Seto v. Tri-Met*, 21 Or LUBA 185 (1991).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Different treatment under the law does not necessarily amount to a violation of constitutional rights to equal protection under the Fourteenth Amendment to the U.S. Constitution or equal privileges and immunities under Article I, section 20, of the Oregon Constitution. Where petitioners fail to explain why the

different treatment amounts to a violation of those constitutional provisions, petitioners' constitutional challenges will be rejected. *Seto v. Tri-Met*, 21 Or LUBA 185 (1991).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Petitioners' challenge to a condition of development approval as a taking, contrary to the Oregon Constitution, cannot be upheld if a variance process in the local code is an available administrative means for petitioners to seek relief from the disputed condition. *Dolan v. City of Tigard*, 20 Or LUBA 411 (1991).

**2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues.** Neither the equal protection clause of the 14th Amendment to the U.S. Constitution nor the equal privileges and immunities provision of Article I, section 20, of the Oregon Constitution requires a local decision maker to adhere to a prior erroneous interpretation of a comprehensive plan policy. *Reeder v. Clackamas County*, 20 Or LUBA 238 (1990).