

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** LUBA will deny a motion to take evidence of a city’s post-adoption actions to enforce a sign ordinance on appeal, where the petitioner’s challenge to the sign ordinance is necessarily a facial challenge, and the petitioner fails to demonstrate that evidence of the city’s post-adoption enforcement actions would be relevant or determinative of any facial challenge. *Claus v. City of Sherwood*, 66 Or LUBA 460 (2012).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** LUBA will deny a motion to take evidence that a city has applied its sign ordinance by its terms to require that temporary signs be constructed in a “colonial post style,” where the petitioner advances a facial challenge to the ordinance itself, and evidence that the city has applied the ordinance by its terms could add nothing to any facial constitutional challenge to the ordinance. *Claus v. City of Sherwood*, 66 Or LUBA 460 (2012).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** LUBA will deny a motion to take evidence that a city has applied its sign ordinance in an unequal or discriminatory fashion, where the petitioner fails to demonstrate that the city’s actual post-hoc pattern of enforcement is probative to a facial challenge to the sign ordinance itself. *Claus v. City of Sherwood*, 66 Or LUBA 460 (2012).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A county ordinance that allows a private residential landowner or a city council to “waive” a two-mile setback from wind towers and substitute a lesser or no setback violates the Due Process Clause of the U.S. Constitution, because it grants wind tower project neighbors the arbitrary and standardless power to determine whether and to what extent there is a setback for wind tower development. *Cosner v. Umatilla County*, 65 Or LUBA 9 (2012).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Where the conservation easement required as a condition of permit approval would essentially make the burdened property part of a public surface water management system and transfer several important sticks in the bundle of property rights formerly held by the fee owner, the easement is correctly viewed as an “exaction,” subject to the rough proportionality

requirement under *Dolan v. City of Tigard*, 512 US 374, 391, 114 S Ct 2309, 129 L Ed 2d 304 (1994). *Tonquin Holdings LLC v. Clackamas County*, 64 Or LUBA 68 (2011).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** To raise an issue of constitutional violation with sufficient specificity for purposes of ORS 197.763(1), at a minimum the constitutional provision at issue must be cited or the substance of the constitutional provision argued to the decision maker. A claim for relief from setbacks required under a wetland protection zone is not sufficient to put the decision maker on notice that the petitioner believes that denial of relief would violate the federal Takings Clause. *Bundy v. City of West Linn*, 63 Or LUBA 113 (2011).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A petitioner’s allegations that the city mayor cut off his oral testimony to censor the content of petitioner’s testimony is not supported by the record, where the mayor gave the petitioner the same amount of time to speak as other participants and there is no indication in the record that the mayor’s attempt to hold petitioner to the announced three-minute time limit was based on the content of petitioner’s testimony. *Claus v. City of Sherwood*, 62 Or LUBA 67 (2010).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** An ordinance requiring that developers of residential property near an airport grant the airport an uncompensated “avigation 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).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A city ordinance that explicitly and unequivocally requires that land use applicants comply with all environmental laws “as they may be amended from time to time” is inconsistent with the Oregon Constitution Article I, section 21 prohibition on delegation of the power to amend legislation. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A city ordinance requiring that land use applicants comply with “currently applicable” standards

of a port district does not violate the Oregon Constitution Article I, section 21 prohibition on delegation of the power to amend legislation, because it can be construed to refer to port standards as they exist on the date the ordinance was adopted. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A city airport zone that authorizes air passenger and freight services at a regional airport consistent with the levels identified in the airport’s master plan, which does not currently authorize such services, violates the Oregon Constitution Article I, section 21 delegation clause, because it effectively delegates to the airport the authority to determine what uses are allowed in the airport zone. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** For purposes of the equal terms provision of the Religious Land Use And Institutionalized Persons Act, an “assembly” is a place where groups or individuals dedicated to similar social, educational or recreational purposes meet to pursue those interests, and includes golf courses, and private or public parks. *Young v. Jackson County*, 58 Or LUBA 64 (2008).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** The legal question under the equal terms provision of the Religious Land Use And Institutionalized Persons Act (RLUIPA) is whether the applicable zoning scheme allows religious assemblies on less equal terms than non-religious assemblies, with respect to the regulatory objective. That question is primarily resolved by examining the text of the applicable zoning scheme, and a claimant under RLUIPA is not generally required to produce traffic studies or other evidence comparing the adverse impacts of religious and non-religious assemblies. *Young v. Jackson County*, 58 Or LUBA 64 (2008).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** While the state may have a compelling interest in preserving agricultural land and the integrity of urban growth boundaries, that interest does not justify an administrative rule that prohibits churches on agricultural land within three miles of an urban growth boundary while allowing golf courses and similar non-religious assemblies that appear to impact the state interest to the same degree. Therefore, the rule prohibition on churches on agricultural land within three miles of an urban growth boundary is inconsistent with the equal terms provision of the Religious Land Use And Institutionalized Persons Act. *Young v. Jackson County*, 58 Or LUBA 64 (2008).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Where the “rough proportionality” test in *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d (1994) applies, it can function as a kind of variance, providing a basis under which a local government may choose not to exact property as a condition of development approval that it would otherwise be entitled to exact under its land use regulations, as an alternative to compensating the landowner for the taking. *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 235 (2009).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Even if the *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d (1994), “rough proportionality” test does not apply to exactions not requiring the dedication of a property interest, where a county road standard includes a provision prohibiting the county from requiring road improvements that are not “roughly proportional” to the impact of the proposed development on public facilities and services, the county may apply its local rough proportionality test in determining whether to grant requested variances from county road standards. *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 235 (2009).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A county does not err in concluding that requiring a development applicant to improve a substandard local street to full collector street standards is not roughly proportional to the impacts of a proposed Liquefied Natural Gas terminal and therefore granting variances to some collector street standards, where in operation the terminal would produce only 150 daily trips, which combined with the existing 50 daily trips would fall below the threshold traffic range for a collector street. *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 235 (2009).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Under *Nelson v. Emerald People’s Utility Dist.*, 318 Or 99, 862 P2d 1293 (1993), a prior decision involving an issue may preclude relitigation of the issue if, among other things, the issue was actually litigated and essential to a final decision on the merits. Where in a prior land use decision the hearings officer concluded that a city code provision is facially unconstitutional, but the hearings officer denied the petitioner’s application on different grounds, the hearings officer’s view regarding facial unconstitutionality is *dicta* and not “essential” to a final decision on the merits, and therefore does not preclude the hearings officer from reconsidering that view in a decision on petitioner’s subsequent land use application. *Kingsley v. City of Portland*, 55 Or LUBA 256 (2007).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A code provision requiring dedication of a greenway is not facially unconstitutional simply because it does not explicitly require the city to conduct the proportionality analysis required by *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). The city must conduct that analysis, where required by the United States Constitution, even if the local code does not require it. *Kingsley v. City of Portland*, 55 Or LUBA 256 (2007).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Even if an overbreadth challenge can be advanced under the Takings Clause or under *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994), a code provision requiring dedication of a greenway is not unconstitutionally overbroad where the provision does not prohibit the city from conducting a *Dolan* analysis prior to imposing the dedication. *Kingsley v. City of Portland*, 55 Or LUBA 256 (2007).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Even if a decision can be understood to grant an adjoining landowner the exclusive right to use a portion of a public right-of-way that the petitioner’s predecessor-in-interest had dedicated to the city for public use, petitioner no longer has any property interest in the right-of-way and therefore the decision cannot possibly take petitioner’s property. *Brodersen v. City of Ashland*, 55 Or LUBA 350 (2007).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Federal law preempts a local determination that a proposed cellular communications facility is unsafe where the Federal Aviation Administration (FAA) has issued a “Determination of No Hazard” under FAA rules. *U.S. Cellular v. Klamath County*, 53 Or LUBA 442 (2007).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Evidence of the availability of alternative properties zoned to allow a proposed religious use may be critical to any demonstration that denial of a proposed religious use substantially burdens religious exercise under the federal Religious Land Use and Institutionalized Persons Act (RLUIPA). Such evidence may not be necessary or relevant where the record establishes that the subject property has a particular religious significance. *Timberline Baptist Church v. Washington County*, 52 Or LUBA 374 (2006).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Where a zone prohibits a particular use, the “substantial burden” under RLUIPA is the burden of acquiring suitable property located within zones where the proposed use is allowed. *Timberline Baptist Church v. Washington County*, 52 Or LUBA 374 (2006).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Denial of a proposed religious school is not a substantial burden under RLUIPA, where the record indicates that the petitioner could acquire property zoned to allow the proposed school, and thus denial of the school on property owned by petitioner does not pressure or force the petitioner to choose between following a religious precept and forfeiting approval of the school, or force petitioner to abandon a religious precept in order to obtain approval. *Timberline Baptist Church v. Washington County*, 52 Or LUBA 374 (2006).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** To demonstrate that denial of a proposed religious school substantially burdens religious exercise, it is insufficient to show that no alternative properties zoned to allow a school are currently for sale. The burden of seeking out suitable properties and contacting owners of land not for sale, as other land developers frequently must do, is not a substantial burden. *Timberline Baptist Church v. Washington County*, 52 Or LUBA 374 (2006).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A church’s particular financial circumstances and its ability or inability to afford land that is otherwise suitable and available on which to construct a religious school is not a basis to conclude that denial of the proposed school on property not zoned for that use substantially burdens the church’s free exercise rights. *Timberline Baptist Church v. Washington County*, 52 Or LUBA 374 (2006).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Given specific testimony that a church’s religious mission requires operating a religious school on the same site as the church, the fact that the church currently operates a school on a separate site may not be a sufficient basis to reject the church’s claim that denial of the school on the same site as the church is a substantial burden under RLUIPA. *Timberline Baptist Church v. Washington County*, 52 Or LUBA 374 (2006).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A county does not violate the Religious Land Use and Institutionalized Persons Act (RLUIPA) by requiring that an applicant for a church on exclusive farm use land within three miles of an urban growth boundary apply for a statewide planning goal exception as required by OAR 660-033-0130. The exceptions process does not in itself impose a substantial burden on a person’s religious exercise and does not constitute unfair delay. *Young v. Jackson County*, 49 Or LUBA 327 (2005).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** The term “existing facilities” in OAR 660-033-0130 is limited to a facility that will continue in the same use. The rule does not allow an existing residence to be converted to a church merely because it is an existing facility. *Young v. Jackson County*, 49 Or LUBA 327 (2005).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Where a city does not seek appellate court review of LUBA’s initial decision that the city’s actions to secure consents to annexation are subject to heightened scrutiny, it may not argue in a subsequent appeal of its decision on remand that its actions to secure consents to annexation are subject only to a requirement that there be a rational basis for the city’s actions. *Morsman v. City of Madras*, 47 Or LUBA 80 (2004).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A poorly defined code prohibition on “billboards” is not unconstitutionally vague where, as interpreted and read in context, the sign code provides definite and objective standards governing all signs, including billboards, and does not grant the city “unbridled discretion” to approve or deny proposed signs. *Media Art v. City of Tigard*, 46 Or LUBA 61 (2003).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Even assuming that an administrative rule prohibition on churches on high-value farmland violates the federal Religious Land Use and Institutionalized Persons Act (RLUIPA), nothing in

RLUIPA requires that the local government must go further and relieve the applicant from the obligation to comply with other land use standards that apply to uses allowed in the zone and that do not impose a “substantial burden” on religious exercise. *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Because Congress intended the Religious Land Use and Institutionalized Persons Act (RLUIPA) to subject land use regulations to at least the same level of scrutiny as would apply under the Free Exercise Clause of the U.S. Constitution, analysis of whether an administrative rule prohibition on churches on high-value farmland violates RLUIPA is also dispositive of the same claim under the Free Exercise Clause. *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Prohibiting uses that are inconsistent with agriculture on high-value farmland, such as churches, while allowing agricultural-supportive structures and uses on high-value farmland, such as barns, wineries and farm stands, is rationally related to the policy of preserving high-value farmland for agricultural use, and neither treats religious assemblies on unequal terms with nonreligious assemblies nor discriminates against assemblies on the basis of religion in violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Prohibiting establishment of new uses on high-value farmland, such as churches or golf courses, while allowing expansion of existing churches or golf courses on high-value farmland does not treat religious assemblies on unequal terms with nonreligious assemblies or discriminate against assemblies on the basis of religion in violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** An administrative rule that prohibits new churches and schools on land within three miles of an urban growth boundary (UGB), while allowing community centers “operated primarily by and for residents of the local rural community” within three miles of a UGB, does not violate the “equal terms” and nondiscrimination clauses of the Religious Land Use and Institutionalized Persons Act (RLUIPA), where the membership of the proposed church is primarily composed of people who reside within the UGB. *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** The Religious Land Use and Institutionalized Persons Act (RLUIPA) does not require local governments to provide for churches in all zones within its jurisdiction, or prohibit local governments from excluding churches from some zoning districts. *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Whether a zoning prohibition on churches imposes a “substantial burden” on religious exercise under the Religious Land Use and Institutionalized Persons Act (RLUIPA) depends on whether the jurisdiction’s zoning scheme as a whole fails to provide adequate opportunity to site a church within the jurisdiction. *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** The actual financial circumstances of a religious assembly, its financial ability to acquire land zoned for a church, and the existence of market-based constraints that apply equally to religious and non-religious land users, have no bearing on whether exclusion of churches in some zones within a jurisdiction imposes a “substantial burden” on religious exercise under the Religious Land Use and Institutionalized Persons Act (RLUIPA). *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Evidence that a church is unable to acquire land with desired characteristics at a desirable price within an urban growth boundary is insufficient as a matter of law to demonstrate that an administrative rule prohibiting churches on high-value farmland owned by the church imposes a “substantial burden” on the church’s free exercise rights, under the Religious Land Use and Institutionalized Persons Act (RLUIPA). *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Subjective, discretionary conditional use and design review criteria are precisely the type of land use regulations that Congress intended to regulate, as applied to religious practices and institutions, in enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA). Although such standards may be “generally applicable” in the sense that they apply broadly to a number of secular and non-secular uses, their application to approve or deny a proposed church requires an “individualized assessment” and thus is subject to RLUIPA. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Application of discretionary design review criteria to proposed religious buildings involves the “proposed use” of land within the meaning of, and is thus subject to, the Religious Land Use and Institutionalized Persons Act (RLUIPA), where the local government may deny a proposed church if the applicant fails to demonstrate compliance with such design review criteria. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A city’s denial of a proposed church based on highly discretionary conditional use and design review standards constitutes imposition of a “substantial burden” on religious exercise within the meaning of the Religious Land Use and Institutionalized Persons Act (RLUIPA), at least where the city’s land use scheme does not include zones where a

church is allowed outright without an “individualized assessment,” or where the record fails to show that there are more suitable sites in the city where the proposed church would likely be approved. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** The regulatory effect of the Religious Land Use and Institutionalized Persons Act (RLUIPA) is not limited to prohibiting discrimination against religious institutions. Rather, Congress intended RLUIPA to require local governments to treat development proposals for buildings intended for religious exercise more favorably, if necessary, than other development proposals. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Where the petitioner demonstrates that denial of a proposed church imposes a “substantial burden” on religious exercise under Religious Land Use and Institutionalized Persons Act (RLUIPA), the burden of persuasion shifts to the local government to show that denial is the least restrictive means of furthering a compelling governmental interest. That showing is not made where the record indicates that the proposed church might satisfy local regulations with imposition of reasonable conditions of approval. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** The Religious Land Use and Institutionalized Persons Act (RLUIPA) does not overrule or limit the U.S. Supreme Court’s free exercise jurisprudence, and thus does not exceed Congress’ authority under the enforcement clause of the U.S. Constitution. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** The Religious Land Use and Institutionalized Persons Act (RLUIPA) is not an impermissible advancement of religion in violation of the establishment clause of the U.S. Constitution, as long as the purpose and primary effect of RLUIPA is to alleviate significant governmental interference with religious exercise. Where RLUIPA is narrowly interpreted so that its primary effect is to constrain an area of extremely discretionary land use decision-making that historically allowed local governments to discriminate against controversial land use proposals, such as religious structures in residential settings, RLUIPA is a permissible accommodation of religion rather than an impermissible advancement of religion. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** An agreement by a property owner to establish a walkway from a vacated street west of the property to an existing street east of the property, in order to provide pedestrian access to a building on the property, does not necessarily constitute a voluntary agreement to deed a public easement for a sidewalk connecting the vacated street with the existing street. *Hallmark Inns v. City of Lake Oswego*, 43 Or LUBA 62 (2002).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Where a city requires that a property owner grant an easement across its property to provide pedestrian access between a vacated street and an existing street as a condition of development approval, and determines that the easement will satisfy city requirements for connectivity, the city has established a nexus between the exaction and the city's legitimate governmental interest in ensuring adequate transportation connectivity. *Hallmark Inns v. City of Lake Oswego*, 43 Or LUBA 62 (2002).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** In requiring an easement for a pedestrian walkway as a condition of development approval, a city may consider the impacts that reasonably flow from the approval granted, including the possible use of the walkway by employees of the development to access adjoining streets and by residents of neighboring properties to access the development on foot or by bicycle. *Hallmark Inns v. City of Lake Oswego*, 43 Or LUBA 62 (2002).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A city adequately quantifies the impact of a proposed development on the area's bicycle and pedestrian transportation system and establishes that an exaction for a pedestrian walkway across the subject property is roughly proportional to the impact of the development where the city: (1) considers the types of uses in the vicinity and concludes that the walkway is necessary to allow access to a transit stop and other neighborhood amenities; (2) explains that persons working at or patronizing the development would be impeded from accessing a neighborhood attraction to the west of the subject property without the walkway; and (3) explains that the subject property could be developed as six individual lots, with sidewalks required for each, and the decision to combine the lots into one development has impacts on the city's transportation system that the required easement ameliorates. *Hallmark Inns v. City of Lake Oswego*, 43 Or LUBA 62 (2002).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Allegations that conditions of approval are unconstitutional exactions are not sufficiently developed for review where the allegations neither explain why the conditions of approval constitute exactions nor explain why the conditions of approval, if they are exactions, violate petitioners' Fifth Amendment rights. *Botham v. Union County*, 43 Or LUBA 263 (2002).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A local ordinance that requires an applicant for a partition to improve the entire 3,500-foot length of a private road providing access to the property, including widening existing easements across private property and improving the road to full county road standards, is a possessory exaction requiring off-site improvements and is therefore subject to the “rough proportionality” requirement of *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). *Dudek v. Umatilla County*, 42 Or LUBA 427.

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Even assuming that a landowner’s actions can constitute a voluntary waiver of claims under the federal Takings Clause, the act of filing an application to develop land in an area where the city has prohibited development in the absence of essential public facilities is not, in itself, a voluntary waiver of a landowner’s rights under *Dolan v. City of Tigard*, 512 US 734, 114 S Ct 2309, 120 L Ed 2d 304 (1994). *Carver v. City of Salem*, 42 Or LUBA 305.

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A landowner’s choice to seek development in an area with inadequate public facilities, rather than wait an indefinite period of time until the city or another developer provides the missing facilities, does not constitute a voluntary waiver of the landowner’s rights under the Takings Clause, or otherwise allow the city to impose an exaction of land to provide the missing facilities, without satisfying the rough proportionality test of *Dolan v. City of Tigard*, 512 US 734, 114 S Ct 2309, 120 L Ed 2d 304 (1994). *Carver v. City of Salem*, 42 Or LUBA 305.

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** The relative importance of the public purpose underlying an exaction of land imposed as a condition of development approval does not justify an exaction that is disproportionate to the impacts of development. *Carver v. City of Salem*, 42 Or LUBA 305.

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** To the extent a city relies on a process for compensating the landowner for a required dedication of land as a means of avoiding the requirements of *Dolan v. City of Tigard*, 512 US 734, 114 S Ct 2309, 120 L Ed 2d 304 (1994), that process must ensure that the landowner receives “just compensation.” A process for reimbursing the landowner with credits against system development charges is not “just compensation,” where the amount of compensation is not related to the fair market value of land, does not include severance damages to the remainder parcel, and does not ensure that the landowner will, in fact, receive any compensation. *Carver v. City of Salem*, 42 Or LUBA 305.

**2.2.2 Constitutional Law – U.S. 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.

**2.2.2 Constitutional Law – U.S. 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.

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A code criterion requiring that a proposal be shown to be compatible with the surrounding area and to not have more than a minimal impact on the livability and appropriate development of the surrounding area is not unconstitutionally vague and does not violate the ORS 227.173(1) requirement that permit approval criteria be included in the city's land use regulations. *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440 (2000).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Only those impacts that reasonably flow from the approval granted may be considered when imposing exactions to ameliorate those impacts. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** During its review of a proposed partition, a city may consider the impact that future dwellings may have on public infrastructure, where the partition approval is the last land use decision necessary to establish dwellings on the resulting parcels. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** It is appropriate to include some consideration of the benefits to the parcels created by a partition, as well as the impacts from the new parcels, in the rough proportionality analysis required by *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** In reviewing findings adopted to support the imposition of exactions, LUBA first determines if any identified impacts or benefits are not relevant for the purposes of the rough proportionality analysis required by *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). LUBA then looks at whether the remaining findings adequately quantify the benefits to the development or the impacts of the development on public facilities, and whether those findings suffice to demonstrate that the city's

exactions are “roughly proportional” to those benefits and impacts. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** The fact that an exaction is required by city ordinance is irrelevant to whether an exaction imposed pursuant to that ordinance is in fact roughly proportional to the impacts of development. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** The fact that a portion of the property subject to dedication for transportation improvements will be used for transportation access whether it is privately or publicly owned is not relevant under *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994), because that consideration is neither a benefit to the property owner nor an impact of development on the public infrastructure. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Benefits to the larger community resulting from the imposition of exactions, as opposed to specific benefits to the subject property, are not appropriate considerations under *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** In some cases, the impacts resulting from the development may be so great, and the exactions imposed so small, that it is readily apparent without additional explanation that the exactions are roughly proportional to the expected impact. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** The impacts resulting from the approval of two residential parcels are not so great as to make it self-evident that the imposition of a 20-foot dedication of right-of-way requirement is roughly proportional to the impacts of the proposed development. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Unless a local government makes some effort to quantify the benefits accruing to a particular development, those benefits will be of limited assistance in applying the rough proportionality analysis required by *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** If the extent of safety impacts caused by a proposed partition justify some or all of the city’s exactions, the local government may impose those additional conditions that are roughly proportional to the safety impacts caused by the approval. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A land use regulation may effect a taking under the Fifth Amendment of the United States

Constitution if it does not substantially advance a legitimate state interest. *Homebuilders Association v. City of Portland*, 37 Or LUBA 707 (2000).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Under the Fifth Amendment takings clause, zoning to achieve aesthetic concerns is within the city’s police power and is a legitimate state interest. *Homebuilders Association v. City of Portland*, 37 Or LUBA 707 (2000).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Under the Fifth Amendment takings clause, public safety and alternative transportation goals constitute legitimate state interests. *Homebuilders Association v. City of Portland*, 37 Or LUBA 707 (2000).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A city is not required, under the first prong of the two-part test in *Agins v. Tiburon*, 447 US 255, 260, 100 S Ct 2138, 65 L Ed 2d 106 (1980), to establish in advance that a land use regulation prohibiting certain housing designs will in fact result in more livable or aesthetically pleasing residential neighborhoods. Where a city regulation directly regulates the design features that the city has identified as negatively affecting aesthetic and livability concerns, the regulation “substantially advances legitimate state interests,” within the meaning of the first part of the *Agins* test. *Homebuilders Association v. City of Portland*, 37 Or LUBA 707 (2000).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Where a petitioner’s disagreement with the city over whether a land use regulation will actually further identified public safety concerns is based on the kind of arguments over which reasonable persons may disagree, LUBA will conclude that the land use regulation satisfies the requirement under *Agins v. Tiburon*, 447 US 255, 260, 100 S Ct 2138, 65 L Ed 2d 106 (1980), that the regulation substantially advances a legitimate state interest. *Homebuilders Association v. City of Portland*, 37 Or LUBA 707 (2000).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Consents to annexation obtained pursuant to ORS 222.115, where the consent is given in exchange for the city’s provision of extra-territorial services, are constitutional. *Johnson v. City of La Grande*, 37 Or LUBA 380 (1999).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** The exactions analysis set forth in *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994) is not applicable to petitioner’s claim that the city effected a regulatory taking in rezoning his property from multi-family to single-family residential uses. Even if the rezoning reduced the value of the property, that is insufficient to establish that the rezoning is a regulatory taking that deprives the property of all economically beneficial use. *Herman v. City of Lincoln City*, 36 Or LUBA 521 (1999).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** To the extent *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994) is applicable to a facial takings challenge to legislative adoption of a local ordinance,

petitioner must establish from the face of the challenged ordinance that no set of circumstances exist under which the ordinance can be applied in a constitutional manner. *Lincoln City Ch. Of Comm. v. City of Lincoln City*, 36 Or LUBA 399 (1999).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** The requirement in *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994) that the local government establish “rough proportionality” between a proposed exaction and the impacts of development does not mean that the local government must assume the burden of producing the evidence on which the rough proportionality determination is based. *Lincoln City Ch. Of Comm. v. City of Lincoln City*, 36 Or LUBA 399 (1999).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Depending on the facts of the case, a local government’s demonstration of rough proportionality required by *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994) may require up to three distinct sets of analyses: (1) the extent to which the proposed exaction will benefit the development; (2) the extent to which the proposed exaction will mitigate the development’s impacts on the public infrastructure; and (3) whether the benefits and impacts analyzed in (1) and (2), considered together, demonstrate that the proposed exaction is roughly proportional to the impacts of development. *Lincoln City Ch. Of Comm. v. City of Lincoln City*, 36 Or LUBA 399 (1999).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Even assuming *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994) addresses whether the local government must originate the analysis used to demonstrate rough proportionality between a proposed exaction and the impacts of development, an ordinance requiring that an applicant submit a “rough proportionality report” is not facially unconstitutional, where nothing on the face of the ordinance requires the local government to adopt or use in whole or part the conclusions contained therein. *Lincoln City Ch. Of Comm. v. City of Lincoln City*, 36 Or LUBA 399 (1999).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A county provision requiring that schools outside urban growth boundaries be “scaled to serve the rural population” is not unconstitutionally vague where a reasonable applicant would understand that to comply with that provision, the applicant must submit evidence that the school is no larger than needed to serve the anticipated number of rural students. *Christian Life Center v. Washington County*, 36 Or LUBA 200 (1999).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A county provision requiring that schools outside urban growth boundaries be “scaled to serve the rural population” does not infringe directly on religious practices, and thus is not subject to strict scrutiny, absent a showing that the proposed parochial school must exist on the same rural property as its supporting church for members to exercise their rights to free exercise of religion and their right to direct their children’s education. *Christian Life Center v. Washington County*, 36 Or LUBA 200 (1999).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** The appropriate standard for reviewing challenges to zoning laws under the Free Exercise Clause involves balancing (1) the impact of the zoning law on the exercise of religious belief; (2) the existence of a compelling state interest justifying the burden on the exercise of religious belief; and (3) the extent to which an exemption from the law would impede the objectives sought to be advanced by the law. *Christian Life Center v. Washington County*, 36 Or LUBA 200 (1999).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** The Free Exercise Clause does not require an exemption from a county zoning ordinance that prohibits urban-sized schools on rural land, where the county has a strong interest in maintaining the boundaries between rural and urban uses, and the ordinance imposes only the minimal burden on religious practice of requiring the applicant to build a smaller parochial school than desired or locate the school on property within the nearby urban growth boundary. *Christian Life Center v. Washington County*, 36 Or LUBA 200 (1999).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A local government may constitutionally distinguish between signs related to on-premise uses, and signs related only to off-premise 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-premise/off-premise distinction is a rational means to preserve the zone for allowed uses. *Media Art Company v. City of Gates*, 35 Or LUBA 123 (1998).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A local government does not impermissibly favor commercial speech over noncommercial speech because it allows signs related to on-premise uses in an industrial and commercial zone and prohibits all others. That signs related to on-premise 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-premise uses. *Media Art Company v. City of Gates*, 35 Or LUBA 123 (1998).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A city's determination that a proposed billboard is not an accessory use "incidental, appropriate and subordinate" to the primary use on the property is subject to an inquiry so factually and legally circumscribed that it does not render constitutionally protected rights of free

expression contingent upon the unbridled discretion of a government official. *Media Art Company v. City of Gates*, 35 Or LUBA 123 (1998).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Where almost all loss of viable economic use of a property is the result of the landowner's choice to restrict use of the property rather than the city's action in revoking a conditional use permit, the city's action cannot be combined with the landowner's actions to constitute a complete loss of viable economic use of the property and hence a taking of property without just compensation in violation of the Fifth Amendment of the U.S. Constitution. *Cope v. City of Cannon Beach*, 34 Or LUBA 441 (1998).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues** A federal takings claim challenging city's denial of remedial sand removal is not ripe for review where petitioner has not requested a grading permit limited to the amount of grading necessary to preserve alleged protected property rights. The city is not obligated to approve something different than what was requested. *Beta Trust v. City of Cannon Beach*, 33 Or LUBA 576 (1997).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Where a county identifies a rational basis for distinguishing between leaseholders and fee owners for purposes of allowing conditional uses on EFU lands, the county does not violate the Equal Protection Clause. *R/C Pilots Association v. Marion County*, 33 Or LUBA 532 (1997).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** LUBA will not find that the application of a broad design review standard violates the Fourteenth Amendment to the U.S. Constitution unless petitioner shows that a policy unlawfully discriminating in favor of some persons against others either has been adopted or has been followed in practice. *Johns v. City of Lincoln City*, 32 Or LUBA 195 (1996).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** The difference between modes of transportation on different streets justifies separate classifications for transit mall streets and light rail transit streets. Since the different classifications bear a rational relationship to an end of government (*i.e.*, appropriate forms of development), they are not prohibited by the Fourteenth Amendment to the United States Constitution. *Downtown Community Assoc. v. City of Portland*, 32 Or LUBA 1 (1996).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Where the different modes of transportation found on light rail transit streets and transit mall streets justifies the distinctions made in permitting development on the two types of streets, there has been no violation of the right to substantive due process under the Fourteenth Amendment to the United States Constitution. *Downtown Community Assoc. v. City of Portland*, 32 Or LUBA 1 (1996).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Until LUBA can ascertain whether and to what extent proposed conditions will be imposed on petitioner's property, there is no way of determining whether the conditions bear an "essential nexus" to the impacts of the development and whether any exactions are roughly proportional to the impacts of petitioner's proposed development. *Reeves v. City of Tualatin*, 31 Or LUBA 11 (1996).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A federal taking claim challenging a condition of development approval is not ripe for review where petitioner has not pursued a variance procedure that is available under the local code. Until a variance is denied, LUBA has no way of knowing whether petitioner can be relieved of the contested conditions. *Reeves v. City of Tualatin*, 31 Or LUBA 11 (1996).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A city cannot be required to contribute to the cost of the improvements directly proportional to petitioner's proposed development simply because the city owns undeveloped property adjoining petitioner's parcel, where the city has not proposed to develop that property; *Dolan v. City of Tigard* does not require improvements or contribution from an adjacent property owner simply because that owner may develop the adjacent property in the future. *Clark v. City of Albany*, 31 Or LUBA 375 (1996).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A city satisfies the "rough proportionality" test of *Dolan v. City of Tigard* where it determines that petitioner's development will receive the sole or principal benefit of the improvements that he is required to make, and that the requirements are directly responsive to the impacts that the development will have. *Clark v. City of Albany*, 31 Or LUBA 375 (1996).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Under the rough proportionality test established in *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed2d 304 (1994), the local government must consider both the nature of the exaction, *i.e.*, whether there is an adequate nexus between the legitimate state interest and the exaction, and the extent of the impact, *i.e.*, whether there is a close enough connection or fit between the exaction and the anticipated impact of the development. *Art Piculell Group v. Clackamas County*, 30 Or LUBA 381 (1996).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** The rough proportionality analysis established by *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) requires more than a simple mathematical equation as to the number of cars generated by a subdivision development; rather, the analysis allows the county to consider the subdivision's real traffic impacts to the adjoining road. *Art Piculell Group v. Clackamas County*, 30 Or LUBA 381 (1996).

**2.2.2 Constitutional Law – U.S. 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), a subdivision developer's fair share of the total cost of road improvements rightfully includes traffic-related impacts by subdivision residents beyond the portion of an adjoining road which actually fronts the subdivision. Consideration of those impacts requires more than a mathematical calculation of the number of cars driving on an isolated segment of the adjoining road. *Art Piculell Group v. Clackamas County*, 30 Or LUBA 381 (1996).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Consideration of both the benefits and the burdens of an exaction is relevant and appropriate in articulating whether there is a sufficient connection between the proposed development and the required improvements to justify the exaction. *Art Piculell Group v. Clackamas County*, 30 Or LUBA 381 (1996).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** LUBA need not determine whether each one of the county's findings independently could satisfy the rough proportionality test established in *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed2d 304 (1994). Rather, LUBA need only determine whether cumulatively the county's findings establish that there is a sufficient connection between the impacts of the proposed development and the dedication and frontage road improvements the county is requiring. *Art Piculell Group v. Clackamas County*, 30 Or LUBA 381 (1996).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Under the equal protection clause of the Fourteenth Amendment to the U.S. Constitution, legislative classifications must bear a rational relationship to a legitimate state interest. *Cummings v. Tillamook County*, 30 Or LUBA 17 (1995).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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), the city must show a right-of-way dedication is roughly proportional to the impact of a proposed development. To require the dedication when the city finds there will be no impact is unconstitutional. *Gensman v. City of Tigard*, 29 Or LUBA 505 (1995).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** If a local government approves a proposed partition with conditions requiring exactions, the local government must ensure that the requirement of *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 2319-20, 129 L Ed2d 304 (1994) for "individualized determination[s] that the required dedication is related both in nature and extent to the impact of the proposed development" is satisfied. *Neuman v. Benton County*, 29 Or LUBA 172 (1995).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A local government does not violate petitioner's right to equal protection under the law by directing its enforcement order exclusively at petitioner, and excluding the property owner, where the property owner attempted to have petitioner remove the use that was

the subject of the enforcement order and ultimately advised petitioner he would have to vacate the property. *Sanchez v. Clatsop County*, 29 Or LUBA 26 (1995).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Conditions of land use approval requiring uncompensated dedication of land constitute "exactions." Where a condition of land use approval imposes an exaction, the local government must make an individualized determination that the exaction is roughly proportional in nature and extent to the impact of the proposed development. *Davis v. City of Bandon*, 28 Or LUBA 38 (1994).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Aside from the requirement under *Dolan v. City of Tigard* for an "individualized determination" justifying a condition of approval imposing an exaction, there is no generally applicable requirement that conditions of land use approval be supported by findings that justify imposing the condition. *Davis v. City of Bandon*, 28 Or LUBA 38 (1994).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Vacation renters and owners of vacation rental dwellings are not suspect or quasi-suspect classifications which require that a local government have a "compelling governmental interest" to justify regulation of vacation rental dwellings differently than other types of dwellings. A rational basis is sufficient to justify regulation of vacation rental dwellings. *Towry v. City of Lincoln City*, 26 Or LUBA 554 (1994).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A local code provision which regulates vacation rental dwellings to limit their impacts on adjoining neighborhoods and streets has a rational basis and does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Towry v. City of Lincoln City*, 26 Or LUBA 554 (1994).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A condition of approval limiting petitioners' rights to remonstrate against LIDs does not impermissibly infringe on petitioners' First Amendment rights to freedom of expression where the condition does not require the local decision maker to disregard petitioners' political views about LIDs and leaves petitioners free to object to the formation of a proposed LID

in a variety of ways other than by remonstrance. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** The protections afforded by the First Amendment to the U.S. Constitution may be waived so long as the waiver is voluntary and knowing. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A requirement for an uncompensated dedication or conveyance is constitutional under the Fifth and Fourteenth Amendments to the U.S. Constitution where the required dedication or conveyance is reasonably related to the needs created by the use for which approval is sought. *Louisiana Pacific v. Umatilla County*, 26 Or LUBA 247 (1993).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A county may not condition approval of a farm dwelling on dedication of over two miles of right of way, where the required dedication has no reasonable relationship to needs or impacts associated with the farm dwelling. *Louisiana Pacific v. Umatilla County*, 26 Or LUBA 247 (1993).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Federal preemption of local authority to regulate is not presumed. Rather it is necessary to determine whether preemption was the "clear and manifest purpose of Congress." *Skydive Oregon v. Clackamas County*, 25 Or LUBA 294 (1993).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Nothing in the federal regulatory scheme relating to the regulation of parachute jumping purports to foreclose state and local land use regulation of the ground based impacts of parachuting. *Skydive Oregon v. Clackamas County*, 25 Or LUBA 294 (1993).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** In order for petitioners' claims under Article 1, 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** The U.S. Constitution imposes a requirement that there be an "essential nexus" between the legitimate public purpose for which a development application could be denied, and the condition imposed. *Sherwood Baptist Church v. City of Sherwood*, 24 Or LUBA 502 (1993).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** In the absence of some reason apart from its origin to treat out-of-state waste differently than in-state waste, local laws that discriminate against out-of-state waste violate the Commerce Clause. Further, the local government bears the burden of establishing that there are no non-discriminatory alternatives available to protect a legitimate local interest that is served by the local law. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 466 (1993).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Where no nondiscriminatory reason is offered to justify a local regulation treating out-of-state waste differently than in-state waste, and where no party argues non-discriminatory alternatives are not available to protect a legitimate local interest served by the regulation, the regulation violates the Commerce Clause. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 466 (1993).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** The rules applicable to the severability of statutes are also applicable to local enactments. Thus, an unconstitutional ordinance provision will be severed from the remainder unless it is apparent that the local legislative body would not have enacted the regulation without the disputed provision, or the remaining parts of the regulation would be incomplete and incapable of being executed in accordance with the legislative intent. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 466 (1993).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A land use restriction results in a taking under the Fifth Amendment of the U.S. Constitution if the restriction (1) does not substantially advance a legitimate state interest, or (2) denies the owner economically viable use of his land. *Nelson v. Benton County*, 23 Or LUBA 392 (1992).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Under *Rutherford v. Armstrong*, 31 Or App 1319, 572 P2d 1331 (1977), parcels that would be suitable for farm use, except for their small size, nevertheless are considered suitable for farm use unless it is shown they cannot be leased or by some other arrangement be put to farm use in conjunction with other farm parcels. The *Rutherford* requirement substantially advances the state's legitimate public interest in preserving "the maximum amount of the limited supply of agricultural land," and thus does not violate the takings clause of the Fifth Amendment, provided it does not leave the property without viable economic use. *Nelson v. Benton County*, 23 Or LUBA 392 (1992).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Where a challenged ordinance requires discontinuation of a use after expiration of a five-year

amortization period, but also allows a property owner to apply for hardship relief if such property owner can substantiate that an investment made exclusively in the nonconforming use cannot be adequately amortized within the five-year period specified by such ordinance, property owners have no basis to contend their property has been taken until they have applied for and been denied the hardship relief. *Cope v. City of Cannon Beach*, 23 Or LUBA 233 (1992).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Where the maximum penalty for each separate violation of an ordinance is 500 dollars, and there is no possibility of imprisonment for violating the ordinance, the penalties provided by the ordinance are civil, not criminal, in nature. Therefore, a vagueness challenge based solely on the constitutional vagueness analysis applied where criminal sanctions are possible, provides no basis for reversal or remand of such ordinance *Cope v. City of Cannon Beach*, 23 Or LUBA 233 (1992).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A condition requiring dedication of portions of the applicants' property is not an unconstitutional taking under the Fifth Amendment of the U.S. Constitution, if it has a "reasonable relationship" to the impacts of the proposed development. *Nollan v. California Coastal Com'n*, 483 US 825, 107 S Ct 3141, 97 L Ed2d 677 (1987), does not establish a new, stricter standard for the relationship required between the impacts of a proposed development and exactions imposed as conditions of approval. *Dolan v. City of Tigard*, 22 Or LUBA 617 (1992).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. 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).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Although a county's denial of permission to locate a dwelling on a 50 acre forest parcel may make forest operations more expensive and difficult, where the record does not show the decision denies petitioner economically viable use of the forest parcel, the county's

decision does not contravene the Fifth and Fourteenth Amendments to the United States Constitution. *Lardy v. Washington County*, 20 Or LUBA 450 (1991).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** A federal taking claim challenging a condition of development approval is not ripe for review 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).

**2.2.2 Constitutional Law – U.S. 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 1, 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).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Unequal administration of the law does not in every case constitute a violation of Equal Protection clause of the Fourteenth Amendment to the U.S. Constitution. Petitioner must show the local government's decision to deny his application was based on race, religion, the exercise of constitutional rights or some other arbitrary classification. *McCarty v. City of Portland*, 20 Or LUBA 86 (1990).

**2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues.** Where several different uses are permitted, or permitted subject to review, in the county's General Timber District zone, and petitioners have been denied one type of use, a nonforest dwelling, but have not shown that the other authorized uses could not be established on the subject property, petitioners have not established their property has been "taken" without due process, under the Fifth and Fourteenth Amendments of the United States Constitution. *Sabin v. Clackamas County*, 20 Or LUBA 23 (1990).