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MEMORANDUM

LANE COUNTY
OFFICE OF LEGAL COUNSEL

SUPPLEMENTAL MATERIAL

To: Board of County Commissioners

From: Marc Kardell, Assistant County Counsel **Extension:** 3301

Date: July 26, 2005

Re: Vacation

Question presented: May the county adopt an Order which would condition a vacation of property upon receipt of the value of the benefit conferred to the vacation petitioner?

Answer: While the answer is not clear, imposing such a condition would likely be found to be a taking, for which the County would be liable in compensation or damages.

Analysis: The authority for issuing a vacation order is statutory. ORS 368.356 provides that, after consideration of certain prerequisites:

> "(1) . . . a county governing body shall determine whether vacation of the property is in the public interest and shall enter an order or resolution granting or denying the vacation of the property under ORS 368.326 to 368.366.
> (2) An order or resolution entered under this section shall:
> (a) State whether the property is vacated;
> (b) Describe the exact location of any property vacated;
> (c) Establish the amounts of any costs resulting from an approved vacation and determine persons liable for payment of the costs;
> (d) Direct any persons liable for payment of costs to pay the amounts of costs established; and
> (e) If a plat is vacated, direct the county surveyor to mark the plat . . .
>
> * * *
>
> (4) Any person who does not pay costs as directed by an order under this section is liable for those costs."

Thus, the statute sets forth that upon a finding of vacation being in the public interest, an order or resolution "shall" be entered. Further, the statute contemplates only that "costs" be paid, or that the petitioner be liable for the "costs."

There are two main Oregon cases that deal with the issue of conditions in a vacation of property. The first case deals with an earlier (1933) version of the Oregon statute. The second case assumes a monetary charge to be allowable, at least in part because the petitioner does not argue the point.

In *Portland Baseball Club v. City of Portland*, 142 Or 13 (1933), a street vacation was granted, but was to become void in the event that a stadium was not constructed within a specified time. When that condition did not occur, litigation commenced. The Oregon Supreme Court stated:

> "We think that it has generally been held that in the absence of statutory or charter authority, the city council is not authorized to impose restrictions or conditions to an ordinance vacating a

> public street. Our statute seems to confer that authority . . . (it) provides that, if there is no opposition thereto, the County court 'may vacate a highway with such restrictions as they may deem reasonable and for the public good' . . . These provisions, we think confer the authority upon the council of the city of Portland to impose reasonable restrictions and limitations upon the act of vacating a public street within the city." (Emphasis supplied).

It appears significant that the Oregon statute has since been charged to delete the statutory reference to "restrictions," but instead requires vacation when the prerequisites are complied with and when vacation is in the public interest. While the Supreme Court relied on the earlier language to allow restrictions, the later deletion of that phrase from the statute was presumably intentional. See, inter alia, *Clark v. Ranchero Acres Water Co.*, 198 Or App 73, 108 P3d 31 (2004) ("the legislature was presumably aware of the case law . . ."), *Weber and Weber*, 337 Or 55, 67, 91 P3d 706 (2004) ("as part of this court's well established statutory construction methodology, this court presumes that the legislature enacts statutes in light of existing judicial decisions that have a direct bearing upon those statutes.")

The more recent case dealing with Oregon law was *Parks v. Watson*, 716 F2d 646 (9th Cir. 1983). This case raised, among other issues, whether a Klamath Falls ordinance caused a taking under 42 U.S.C. §1983. The facts there were that a developer wished to put apartments onto a parcel of land, and utilize geothermal wells on the same property to provide heat to the apartments. A vacation of platted city streets was needed to accomplish the project. The Klamath Falls ordinance required that just compensation be paid to the city for all vacations. The developer was willing to pay the money sought by the city. However, the city also wanted not just an easement over other property of the developer, but wanted fee title to a 20-foot strip of property, which would have provided the City access to some of the geothermal wellsites. This would have allowed the city to utilize some of the geothermal wells on the parcel. The developer refused to agree to this.

The *Parks* court found that "even though (the developer) was willing to pay more than a fair amount for the vacation, the city refused to vacate unless (the developer) also dedicated the well sites without just compensation," supra, at 652. The rationale for the court's finding of a taking is important. The court said "the requirement that (the developer) convey its geothermal property has no relationship to the public's interest in the vacation of streets," supra, at 651, and that "requiring an applicant for a governmental benefit to forgo a constitutional right is unlawful if the condition is not rationally related to the benefit conferred," supra, at 652. The court finally held that "(s)ince the requirement that (the developer) give its geothermal wells to the city had no rational relationship to any public purpose related to vacation of the plotted streets the . . . condition violates the Fifth Amendment," supra, at 653.

The *Parks* court's use of the term "relationship" actually looked at two different, but related concepts. First it discussed a "relationship to the public's interest in the vacation." Next was that the condition be rationally related the benefit conferred. Because the developer never contested the dollar amount sought by the city, and the court said that the developer "was willing to pay more than a fair amount," *Id.*, the issue of whether the dollar/benefit conferred charge was actually related to the public interest in the vacation was never really litigated as to the Oregon statute. It may also be worth nothing that this case predates by over ten years the seminal takings case of *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

In the *Dolan* case, a property owner's development was approved by the City, subject to certain conditions requiring the applicant to dedicate portions of the real property to public use. The

Supreme Court found that there were not sufficient findings in the record to support hose conditions, and sent the case back to Oregon. Of interest here, the *Dolan* court did state:

> "Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property. See *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.* 391 U.s. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)." *Id*, at 385.

While the direct case law dealing with the imposition of conditions on vacations in Oregon is somewhat sparse, at least two issues are clearly in play. The first is whether state law preempts a county resolution requiring payment to the county. The second issue has to do with, even if no preemption occurs, whether the county effects a taking by imposing conditions that may or may not be related to the public interest in the vacation of right-of-way.

Preemption

While "the perimeters of city and county home rule authority may defy easy delineation," *State v. Logsdon,* 165 Or App. 28, 32 P2d 1178 (2000), "[W]e begin with a presumption against preemption of local regulation." *Ashland Drilling, Inc. v. Jackson County*, 168 Or App 624, 635 4 P3d 748 (2000). In the *Ashland Drilling* case, the court was called on to decide whether ORS 537.769 preempted certain county ordinances. That statute states in part:

> "No ordinance, order or regulation shall be adopted by a local government to regulate the inspection of wells, construction of wells or water well construction subject to regulation by the Water Resources Commission or the Water Resources Department under ORS 537.747 to 537.795 and 537.992."

The court in the *Ashland Drilling* case rejected the county's argument that the statute only preempted local regulation that conflicted with the statute's text. It did find that large portions of the county ordinance, dealing with well construction, location, and flow were expressly preempted. However, water quality testing and deed recordation provisions of the ordinance were not preempted. See also *AT&T Communications v. City of Eugene*, 177 Or. App. 379, 35 P3d 1029 (2001) (statutory limit of 7% telecommunications tax for use of rights-of-way does not preempt city's business registration and licensing fee of two percent of gross revenues). What these modern cases demonstrate is that state preemption of a local regulation should only occur when the statutory language clearly requires preemption.

Given the foregoing, it is unlikely that an ordinance imposing a compensation requirement upon a vacation would be held to be preempted by the current state statute. While there is some legislative history that may lead one to conclude that the change in legislative language eliminating the express ability to impose restrictions on vacations may have been meant to limit local restriction on right-of-way vacations, courts today would be unlikely to find the specific preemption of local regulation required to invalidate such an ordinance.

Takings

Imposing such a restriction/change under § 1983 and *Dolan* is more problematic. For one, the relationship to the public benefit test used in *Parks* is still a factor used by the courts.

In *Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687 (1999), the city on several occasions added new restrictions on a proposed development, effectively blocking development. Developer then filed a § 1983 action alleging a regulatory taking, and sold the land to the state. A jury trial resulted in a verdict against the city and the city appealed. The 9th Circuit affirmed.

The Supreme Court also affirmed, agreeing with the trial court's instruction that the city could be found liable if "the city's decision to reject the plaintiff's 190 unit development proposal did not substantially advance a legitimate public purpose." *Id.* at 700. The court went on to say that

> "Although this Court has provided neither a definitive statement of the elements of a claim for a temporary regulatory taking nor a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions, c.f., e.g., *Nollan*, supra, at 834-835, n. 3, we note that the trial court's instructions are consistent with our previous general discussions of regulatory takings liability. See *Dolan,* supra, at 385; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992); *Yee v. Escondido*, 503 U.S. 519, 534 (1992); *Nollan*, supra, at 834; *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 474 U.S. 121, 126 (1985); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). The city did not challenge below the applicability or continued viability of the general test for a regulatory takings liability recited by these authorities and upon which the jury instructions appear to have been modeled. Given the posture of the case before us, we decline the suggestions of *amici* to revisit these precedents." *Id.* at 704.

From this less than definitive statements, the U.S. Supreme Court further attempted to clarify takings jurisprudence in *Lingle v. Chevron U.S.A., Inc.*, No. 04-163 (May 23, 2005). This case involved a challenge to a Hawaii statute that set a cap on what rental amounts could be charged gas station lessees. The Ninth Circuit affirmed a summary judgment in favor of Chevron, based upon a finding that the statute did not "substantially advance" the state's interest. The Supreme Court reviewed, finding that there are four different types of takes cases:

1. Where physical invasions of property occur, these cause a taking;
2. Where regulations completely deprive an owner of all economically beneficial use of property, these cause a taking;
3. Where regulations take less than all the property's value, courts must factor "the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interest," *Id*; and
4. Where *Nollan/Dolan* land use exactions occur, that analysis applies. It is not clear if this analysis applies for financial exactions.

In *Lingle*, the Supreme Court held that the Hawaii statute should not have been examined under the "substantially advances" test, and remanded the case for further examination under one of the above four categories, or potentially under a due process analysis.

The Court did say that the "substantial advances" test does survive, but only in the land use exaction cases. The Court has yet to determine if a monetary exaction would be such a case. If this test is applicable, the regulation would be required to "substantially advance the same government interest that would furnish a valid ground for denial of the permit," *Id.*

The closest the Oregon courts have come to deciding the monetary exaction issue was in *Rogers Machinery, Inc. v. Washington County,* 181 Or App 369, 45 P3d 966 (2002). That case involved a "traffic impact fee" imposed on new development. The Court of Appeals then noted that "(l)ower

court authority appears most sharply divided on the issue of *Dolan's* application to monetary exaction," at 388. The Court found that the traffic impact fee was valid, in large part because the legislatively enacted criteria left little discretion, and the resulting fees were not "ad hoc individual monetary exactions," at 398. The *Rogers Machinery* court relied in part on *Clark v. City of Albany*, 137 Or App 293, 904 P.2d 185 (1995). The *Clark* case was not a takings case, but an appeal of development conditions upheld by LUBA. The *Rogers* court noted that in *Clark*, "we also held that monetary exactions can be subject to heightened scrutiny under *Dolan*," at 394 (emphasis supplied). The *Rogers* court further said that "*Clark*, however, did not necessarily settle the question of whether a requirement to pay money in exchange for a development permit or other approval necessarily falls within the range of exactions subject to analysis under *Dolan*." *Id* at 394.

The Oregon and federal courts have clearly struggled with the monetary exactions issue, and neither has addressed a regulation where the value of the benefit conferred to the property owner is the specific exaction required. Under the *Lingle* case, two of the four types of regulatory takings cases can quickly be discarded, those causing an invasion of the property and those depriving an owner of all of the economically beneficial use of their property. The Oregon cases would appear to use the *Dolan* analysis, requiring "that the exactions would substantially advance the same government interest that would furnish a valid ground for a denial of the permit," and that the exaction be roughly proportionate "in nature and extent to the impact of the proposed development." *Lingle,* supra.

Conclusion

While the county probably has the power to require that any benefits conferred to a vacation petition be paid to the county, doing so would also probably constitute a taking. The effect of it being considered a taking is that the County would then have to pay just compensation for the value of the taking – in other words, the County would require the petitioner to pay the County and then the County would turn around and pay the petitioner.