IN THE COURT OF APPEALS OF THE STATE OF OREGON

MICHELLE BARNES, Respondent, v. CITY OF HILLSBORO and PORT OF PORTLAND, Petitioners.	Land Use Board of Appeals Case No. 2010-011 CA Case No. A146145 EXPEDITED PROCEEDING UNDER ORS 197.850, 197.855

RESPONDENT'S ANSWERING BRIEF

Appeal from the Final Opinion and Order Dated June 30, 2010
of the Land Use Board of Appeals Case No. 2010-011.

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STATEMENT OF THE CASE

Respondent Michelle Barnes (referred to hereinafter as "Respondent" or "Barnes") accepts Petitioners', Respondents below, City of Hillsboro and Port of Portland (collectively referred to hereinafter as "Petitioners" or "City") Statement of the Case, except as detailed below.

I. Nature of the Action and the Relief Sought.

Petitioners correctly characterize the proceedings; however, Respondent disagrees that the relief sought is appropriate. Instead, this court should affirm LUBA's decision.

II. Statutory Basis of Appellate Jurisdiction.

Respondent agrees that this Court has jurisdiction under ORS 197.850(1).

III. Effective Date of for Appeal.

Respondent agrees with Petitioners' statement regarding the effective date of the order.

IV. Jurisdictional Basis for Agency Decision

Respondent agrees with Petitioners' statement regarding LUBA's jurisdiction over this matter.

V. Question Presented on Appeal.

Respondent believes Petitioners misstate the question presented on appeal. Instead, the question for this court to answer is as follows:

1. Did LUBA correctly exercise its jurisdiction to review the City's adoption of Ordinance 5935?

VI. Summary of Arguments.

1. Response to First Assignment of Error.

The only land use decision challenged by Barnes before LUBA was the City's approval of Ordinance 5935. The only land use decision that LUBA reversed was the City's approval of Ordinance 5935. LUBA understood that the arguments made by the Petitioner below was addressed to the newly imposed requirement to grant the avigation easement, the direct product of the adoption of Ordinance 5935. LUBA correctly exercised its jurisdiction because the Challenged Decision amended the City's land use regulations and is, by definition, a land use decision subject to LUBA's jurisdiction. ORS 197.015(10)(a)(A)(iii).

2. Response to Second Assignment of Error.

LUBA concluded that the City did not establish any reason why a constitutional challenge could not be advanced when a zone is applied to particular properties. On appeal, Petitioners have provided no reason why Respondent should be precluded from challenging the constitutionality of the newly applied provisions at this time. The problem for Barnes is that the avigation easement is a *fait accompli* if a property owner within the ASCO zone seeks a building permit. The easement does not depend on a later discretionary action that could be challenged at LUBA. As a direct result of this appeal, LUBA reversed a land use decision that was itself unconstitutional.

VII. Statement of Material Facts.

Respondent accepts Petitioners' statement of material facts. In addition, Respondent provides a brief description of the Airport Safety and Compatibility Overlay Zone ("ASCO"). The ASCO Zone is an overlay zone that includes six Airport Compatibility Zones of varying requirements to properties depending

on proximity and relationship to the Airport. Each of the Airport Compatibility Zones (numbered 1 – 6) limits the uses permitted on properties surrounding the Hillsboro Airport and, in addition, imposes requirements when new development is undertaken. ER pp 39 and 59. These requirements include the obligation to dedicate an "Avigation Easement" to the Port of Portland upon "development".

INTRODUCTION

Before turning to the errors that Petitioners ascribe to LUBA's decision, it is worth pausing to consider the portions of LUBA's decision that are not at issue in this appeal. LUBA sustained all three of Barnes' assignments of error below. In response to the Third Assignment of Error below, LUBA concluded that the City had not properly addressed the Transportation Planning Rule ("TPR"). Petitioners do not challenge that conclusion any further in this appeal and it is not at issue on this appeal.

LUBA also sustained the first two assignments of error. In response to the First Assignment of Error, LUBA concluded that the challenged ordinance imposed an unconstitutional burden on property owners in ASCO subzones by requiring them to provide an avigation easement to their neighbor without regard to the development permit granted. Petitioners do not challenge LUBA's conclusion that the portion of the ordinance imposing an avigation easement was facially unconstitutional and violated the takings clause of both the federal and Oregon constitutions.[1] In response to the Second Assignment of

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[1] The Amicus Brief does appear to challenge LUBA's decision on the constitutionality of the avigation easement in its discussion of ripeness on page 15-16 of the Amicus Brief. However, this court should not consider an issue raised solely by an amicus when the parties do not raise the issue. *Cf. Finney v. Bransom*, 326 Or. 472, 481 n. 8, 953 P.2d 377 (1998) (declining to consider argument advanced by an amicus) and *Beall Transport Equipment Co. v.*

Error, LUBA concluded that the challenged ordinance improperly delegated the City's legislative authority to the Port of Portland contrary to Article I, section 21 of the Oregon Constitution. Again, Petitioners do not challenge LUBA's conclusion that the provisions at issue violated the Oregon Constitution.

What Petitioners do challenge is whether LUBA had "jurisdiction" to consider the constitutional issues raised by the Petitioner below in her first two assignments of error:

> "Neither LUBA nor this court has previously addressed whether the appeal of a rezoning gives LUBA jurisdiction to review previously adopted, acknowledged provisions of the underlying zones for constitutional infirmity if those provisions were not interpreted, amended or applied in the appealed land use decision." Joint Opening Brief p 6-7.

Although Petitioners characterize their argument in terms of "jurisdiction," they do not argue that LUBA had no jurisdiction over the land use decision at issue. In fact, on page two of their Opening Brief in this court, Petitioners explicitly accept LUBA's jurisdiction over the appeal:[2]

> "The City of Hillsboro's decision to amend its Zoning Map through Ordinance 5935 is a land use decision subject to LUBA's jurisdiction."

Nor can Petitioners really challenge LUBA's jurisdiction to consider the appeal of the petitioner below; the challenged decision amended the City's land use regulations and is, by definition, a land use decision subject to LUBA's jurisdiction. ORS 197.015(10)(a)(A)(iii).

Southern Pacific, 186 Or App 696, 701 n2, 64 P3d 1993, *adhered to on recons*, 187 Or App 472, 68 P3d 259 (2003) (it is not the court's function to make arguments for a party when the party has not done so).

[2] Petitioners also explicitly accepted LUBA's jurisdiction over this matter in their briefing at LUBA. *See* LUBA Rec p 96 (p 1 of Joint Respondents' Brief).

In addition to not explicitly challenging LUBA's jurisdiction, Petitioners cite almost no law to support the arguments that they do make before this court. Petitioners cite no statutes that limit LUBA's jurisdictions in the manner they suggest and they cite only one judicial decision – a 1934 US Supreme Court case - for the proposition that an alternative forum may be available. Petitioners' inability to cite any authority for their position may relate to the fact that they are not making a jurisdictional argument.

In reality, what Petitioners assert is that, because there was some earlier opportunity to litigate the constitutionality of these provisions when the policy was formulated (but not applied), Respondent should not have been permitted to challenge the constitutionality of these provisions when they were actually applied. In other words, the constitutional issues are precluded by operation of some statute, law or judicial doctrine, but Petitioners in this appeal never cite what that statute, law or judicial doctrine might be, other than repeating that it could have been challenged at some other time. However, the fact that another opportunity to mount a challenge existed does not preclude a later challenge absent some principle of law that says so.

Before responding to the specifics of Petitioners' argument, it may be worth considering a variety of potential principles that could preclude the constitutional challenges; however, as explained below, none of these principles actually apply to this situation.

One potential principle that could preclude LUBA from considering the constitutional arguments involves claim preclusion. *See Drews v. EBI Companies*, 310 Or 134, 139, 795 P2d 531 (1990) (claim preclusion can apply in administrative proceedings).[3] However, this is not an appropriate case to

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[3] *Drews* addressed issue preclusion as well as claim preclusion, but issue preclusion requires that an issue actually be litigated for a later challenge to be

apply claim preclusion. Claim preclusion can have the salutary effect of facilitating prompt, orderly and fair problem resolution, avoiding the splitting of claims and ensuring final decisions are not re-litigated. *Drews* at 142. However, that doctrine has specific requirements that have to be met before the doctrine can be invoked. *State ex rel English v. Multnomah County*, 348 Or 417, ___ P3d ___ (2010).

Claim preclusion may operate to bar issues that were not, but could have been, raised in a prior proceeding, as Petitioners allege the constitutional issues could have been here. However, the prerequisites for the application of claim preclusion have not been met here. One of the prerequisites for claim preclusion to apply is that the party sought to be precluded must have litigated the issue or be in privity with one who did. *Bloomfield v. Weakland*, 339 Or 504, 123 P3d 275 (2005). The decision in *Bloomfield* articulates one of the reasons for this limitation:

> "[Privity is required out of] a concern about the fairness of binding a person to a judgment rendered in an earlier case in which he or she was not a party." *Id.* at 511.

The same concern is present here. Neither Ms. Barnes, nor anyone else, actually litigated the issue sought to be raised in this case. Moreover, if the policy advocated by Petitioners were adopted, the result would present a significant problem. In this case, the gap between the creation of the zone and its application was only three months. However, in most cases, zones may be created many years before they are actually applied to a particular property, which may not even have been part of the city at the time of adoption, or in a different zone, if in the city. Often, the current property owner may not even

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precluded. As Petitioners acknowledge, there was no challenge to the 2009 amendments and, therefore, no prior proceeding to give preclusive effect.

have lived in the City when the zone was adopted. Yet, under Petitioners' theory, the current property owner would have no ability to challenge the provisions of the zone that could significantly affect their rights and obligations, even if that zone had been adopted some time ago. If the court accepts Petitioners' argument, a city would be able to apply a clearly unconstitutional zone that was adopted decades ago and nobody would be able to challenge it. *See also Friends of Yamhill County v. Board of Commn'rs*, __ Or App __, __ P3d (opinion issued on 9/1/10).

There are other legal principles that may prevent the litigation of a particular issue. For example, the doctrine of the "law of the case" can be used to prevent the litigation of issues that were raised, as well as issues that could have been raised, in a previous proceeding.[4] However, for the law of the case to be applicable, LUBA must have "conclusively decided" an issue. Because there was no appeal of the 2009 amendments, there has been no conclusive resolution of any of these issues. More importantly, the *Beck* case demonstrates how an attempt to limit issues to be raised should be handled. In *Beck*, the court examined the statutory framework and identified four statutes that served as the framework for LUBA's review and provided limitations on LUBA's review, including ORS 197.835(9), which is applicable in this case. *Beck* at 151. Petitioners here fail to cite any statute that limits LUBA's review. Instead, ORS 197.835(9)(a)(E) specifically allows LUBA to reverse unconstitutional decisions.

Similarly, as LUBA recognized below, other statutes may serve to limit LUBA's jurisdiction. As LUBA stated,

> "If petitioner attempted in this appeal to argue that the ASCO zone is inconsistent with one or more

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[4] See *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), and its progeny for a discussion of the "law of the case" doctrine.

> statewide planning goals, such a challenge would be precluded by acknowledgement. However, acknowledgement of the ASCO does nothing to insulate that zone from challenge on statutory or constitutional challenges." ER p 8.

Acknowledgement serves to insulate plans and regulations from attack as not complying with the Goals, *see* ORS 197.175(2)(d) and *State ex rel Butler v. City of Bandon*, 204 Or App 690, 698-9, 131 P3d 855 (2006), but it does nothing to prevent a later statutory or rule-based challenge or constitutional challenge.

In short, Petitioners cite to no statute or judicial doctrine that prevents the testing of the constitutionality of provisions when those provisions are imposed on specific property for the very first time and serve to change the rights and duties of the land owners. To assert, as Petitioners do, that the ordinance can be challenged on a wide variety of ground, but not constitutionality, makes no sense – every action by a government must remain within its constitutional bounds. Moreover, common sense, as well as the language of ORS 197.615(2)(b)(D) and ORS 197.835(9)(a)(E), indicates that parties to the local land use process are allowed to challenge the constitutionality of zoning provisions that, for the very first time, impose substantial obligations on properties (e.g., the requirement to provide an avigation easement with any future land development) or that grant substantial rights to certain properties (e.g., the right to determine future intensity of use). The Oregon Supreme Court has already concluded that the time of re-zoning is an appropriate time to consider questions of constitutionality. *Dunn v. City of Redmond*, 303 Or 201, 735 P2d 609 (1987).

Ultimately, this case is about Hillsboro Ordinance 5935, the ordinance that changed the zoning of over 7,000 properties. That new zoning significantly changed the rights and obligations for the owners of those properties and, as

apparently conceded by Petitioners, did it in a way that violates several provisions of the U.S. and Oregon constitutions. Nonetheless, Petitioners would have this court determine that those provisions are beyond constitutional challenge because they could have been challenged earlier and might be challenged later. [5] Regardless of whether such challenges could be made at some other time, Petitioners never explain why a challenge is barred at this time and such a result is not supported in law and is contrary to common sense – the most appropriate time to allow judicial review of such a challenge is when the rights and obligations are actually changed.

RESPONSE TO FIRST ASSIGNMENT OF ERROR

Standard of Review

Barnes agrees that the City identified the correct standard of review under ORS 197.850(9)(a). However, LUBA's order was neither unlawful in substance or procedure because LUBA correctly exercised its judgment over the City's land use decision to adopt Ordinance 5935.

1. Ordinance 5935 was the Only Subject of Appeal Before LUBA

At all times in its review of the case, LUBA understood that Barnes was challenging the constitutionality of Ordinance 5935 adopted on January 19, 2010. In its opinion, LUBA described Barnes' challenge as follows:

> "[P]etitioner argues that Ordinance 5935, *the decision challenged in this appeal, rezones over 7,000 properties to make new development on those properties subject to HZO 135B and, in particular, subject to the obligation for the landowner to provide the Port of Portland with an avigation easement* as a condition of development. According to petitioner, the

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[5] There is no principled reason why, if constitutional challenges are precluded after regulations are formulated and then applied to property, those challenges are not also precluded when an individual application is considered.

> HZO 135B easement requirement is facially inconsistent with the Fifth Amendment to the United States Constitution, which prohibits taking private property for public use, without just compensation, and with the similar provisions of Article I, section 18 of the Oregon Constitution. Petitioner contends that in all circumstances in which the avigation easement is applied the city will violate the Takings Clauses.
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> "In advancing a facial constitutional claim to an ordinance, petitioner must demonstrate that the ordinance is incapable of any constitutionally permissible application. *Lincoln City Chamber of Comm. v. City of Lincoln City*, 164 Or App 272, 276, 991 P2d 1080 (1999). If the disputed ordinance provision is capable of being applied in a constitutionally permissible manner, then that provision can be challenged only on an "as-applied" basis, and the ordinance cannot be declared invalid on its face. Id. (citing *Cope v. City of Cannon Beach*, 317 Or 339, 855 P2d 1083 (1993))." ER pp. 6 - 7 (footnotes omitted and emphasis added).

Particularly in the initial portion of its summary of Barnes' argument, LUBA recognized that her argument focused solely on the application of the ASCO zone under Ordinance 5935 to 7,000 properties. The newly applied zone affected the legal rights and obligations of those property owners by imposing on them a new obligation – the requirement to provide an avigation easement to the Port of Portland and by granting the Port of Portland the right to determine the type and intensity of uses on its property. Prior to January 19, 2010, those obligations and rights did not exist for anyone in the City. In other words, LUBA understood that Barnes' unconstitutional takings argument made by the Petitioner below was the requirement to grant the avigation easement, the direct product of the adoption of Ordinance 5935.

Petitioners are factually incorrect in their argument that LUBA was making a decision about the effect of the adoption of the 2009 amendments to the Hillsboro Zoning Ordinance. LUBA is clear that its decision is only about Ordinance 5935. In denying the City's argument that Barnes made a collateral

attack on the creation of the zoning in HZO 135B, LUBA recognized that the application of the ASCO zone to particular properties necessarily involved a constitutional question as to those properties being newly subject to the zone. As LUBA concluded:

> "We disagree with respondents that petitioner is precluded from advancing a facial constitutional challenge to the HZO 135B avigation easement requirement in the present appeal, as an impermissible 'collateral attack' on Ordinance 5926. The only support that respondents cite for that proposition is *Butte Conservancy v. City of Gresham*, 47 Or LUBA 282, aff'd 195 Or App 763, 100 P3d 218 (2004), in which we held that in an appeal of a final subdivision plat decision the petitioner could not challenge the correctness of an earlier, final decision that modified the tentative subdivision plat approval. However, *Butte Conservancy* did not involve separate legislative decisions that adopt and then apply zoning regulations, nor constitutional challenges to such regulations. Respondents are correct that, because the ASCO zone is deemed acknowledged to comply with the statewide planning goals, if petitioner attempted in this appeal to argue that the ASCO zone is inconsistent with one or more statewide planning goals, such a challenge would be precluded by acknowledgment. However, acknowledgment of the ASCO zone does nothing to insulate that zone from challenge on statutory or constitutional grounds. We see no principled reason why such statutory or constitutional challenges cannot be advanced in an appeal of a subsequent legislative ordinance that, for the first time, applies the ASCO zone to specific properties in the city." ER p. 8.

Although Petitioners' Opening Brief in this court does not use the phrase "collateral attack" and abandons the argument based on *Butte Conservancy*, Petitioners' challenge that LUBA exceeded its jurisdiction is merely a rehash of the same argument with no citation to legal authority. LUBA ruled against Petitioners' collateral attack argument below and Petitioners' arguments on appeal provide no further basis for reversing that decision.

The Amicus brief from League of Oregon Cities also fails to provide any basis to overturn LUBA's decision. Amicus does discuss the *Butte*

Conservancy case that Petitioners had abandoned, but only for the point that an assignment of error cannot "collaterally attack a decision other than the decision on appeal." Amicus Brief, p 8. As LUBA recognized, the *Butte Conservancy* case involved two quasi-judicial decisions at different stages of the same subdivision plat and has no bearing on whether a petitioner can facially attack the constitutionality of a decision that imposes new standards and criteria on over 7,000 properties. Amicus' arguments regarding a "collateral attack" of a previous decision are without merit.

The Amicus brief continues by acknowledging LUBA's decision in *Port of St. Helens v. City of Scappoose*, 58 Or LUBA 122 (2009). That case involved a similar situation, except that, in *Port of St. Helens*, the appeal was the first legislative decision adopting a new zone without applying it to any property. LUBA explicitly stated that, when the newly created zone is applied to particular property, that separate decision will also be subject to review:

> "As we have noted, the decision that is before us in this appeal adopts the AR zone, but does not apply the AR zone to any property. Although it seems likely that Intervenor will seek to have property near the Scappoose Airport rezoned to AR in the future, it is also possible that no property will ever be zoned AR. *If property is zoned AR in the future, that action would constitute a post-acknowledgment amendment of a land use regulation which would be reviewable at that time for compliance with applicable law.*" *Id.* at 130 (emphasis added).

In *Port of St. Helens*, LUBA explicitly held that the later application of the zoning to particular properties would present another opportunity to challenge the zone. However, Amicus asks this court to conclude that the

> "'Applicable law' at the map amendment stage (e.g. the 2010 Rezoning Respondent appealed to LUBA) is the local code criteria applicable to zone changes and any relevant state statutes or administrative rules." Amicus Brief p 11.

Apparently, Amicus would exclude the application of constitutional restrictions or other limitations on city actions. Such a position would present significant concerns regarding a variety of constitutional principles including the Equal Protection clause, *see Village of Willowbrook v. Olech*, 528 US 562 (2000), and Substantive Due Process, *see Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457, 228 P3d 650 (2010). Such a position would also present practical concerns if local legislation were passed that evaded LCDC review under the post acknowledgement plan amendment statutes (ORS 197.610-625). A variety of the concerns would not even be present or articulable when the zone was adopted, but could be assessed only when the zone was applied to particular properties. Amicus is correct that a facial challenge to the amendment likely could have been made in 2009;[6] but that

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[6] Later in the Amicus Brief, Amicus seems to hedge on whether a Takings Clause challenge could be brought at any time other than when a permit application is filed:

> "At this juncture in the land use process, the dispute about the ability to test the constitutionality of the 2009 amendments is more than a question of standing. Whether or not LUBA is obliged to '. . . apply justiciability doctrines applicable to courts," (Rec. 15) the dispute is not ripe for determination at this time. Not only is there no affected property before LUBA to which the avigation easement may be applied, but the record is devoid of any evidence that an unlawful taking will occur." Amicus Brief p 15.

Again, Petitioners do not challenge LUBA's conclusion that the challenged provisions were unconstitutional, thus, this argument has no bearing on this case. However, if Amicus is serious about this argument, it directly undercuts Amicus' assertion that the proper time to challenge the unconstitutional provisions was at the time of adoption in 2009, because, at the time of adoption, there also would have been "no affected property before LUBA."

Amicus seems to advocate a position whereby a constitutional challenge can always be evaded because the issue is the interpretation of a regulation that has not yet been applied - and therefore the challenge is too early and not ripe –

does not explain why a facial challenge to the 2010 zone change, imposing the rights and obligations of HZO 135B for the first time, is improper.

2. LUBA Correctly Exercised Its Jurisdiction to Review Adoption of Ordinance 5935

The application of the ASCO zone through the City's adoption of Ordinance 5935 is a post acknowledgement plan amendment ("PAPA") that amended the City's Zoning Ordinance. LUBA has jurisdiction over land use decisions like this PAPA. A "land use decision" is defined under ORS 197.015(10) to include a local government's amendment of its land use regulations. ORS 197.015(10)(a)(A)(iii). A land use regulation is defined in ORS 197.015(11) to mean any local government zoning ordinance establishing standards for implementing a comprehensive plan. Once the City decided to apply the ASCO and AV zones in Ordinance 5935, it applied those land use regulations to over 7,000 properties to implement the comprehensive plan as amended by the adoption of the zone itself in 2009. The application of a new zone to existing properties is a land use decision and subject to appeal to LUBA.

The process for a PAPA is governed under ORS 197.610 - 197.651. A proposal to amend a local government's acknowledged comprehensive plan or land use regulation can be appealed to LUBA under ORS 197.610(2)(a). Under ORS 197.620, anyone who participated in the local proceedings, such as Respondent here, has an opportunity to appeal the land use decision at issue; in this case, Ordinance 5935. Most importantly, the legislature granted LUBA the statutory authority to determine whether a local government, such as the City here, has made an unconstitutional decision. ORS 197.835(9)(a)(E).

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or the actual application of the zone to the property - in which case, the challenge is too late and precluded.

The City contends that Ordinance 5935 did not interpret, amend, or apply any of the specific provisions of the 2009 adoption of the HZO 135B zone. However, Ordinance 5935 amended "the official zoning map, a portion of Hillsboro Zoning Ordinance No. 1945, as amended, changing the zoning of affected properties." ER 56 (emphasis added). Because Ordinance 5935 amended a land use regulation, applying a new zone that changed the rights and obligations of over 7,000 property owners, that decision is a land use decision subject to appeal to LUBA. LUBA correctly exercised it jurisdiction over this appeal because Barnes appealed a land use decision subject to LUBA review.

3. This Appeal is not a Case of First Impression

Petitioners assert, without support, that this is a case of first impression. However, a variety of cases support the constitutional and statutory challenges made below, including several cases that applied new zoning to specific properties through a PAPA. For example, and as described above, LUBA held in *Port of St. Helens v. City of Scappoose*, 58 Or LUBA at 130 that,

> "As we have noted, the decision that is before us in this appeal adopts the AR zone, but does not apply the AR zone to any property. Although it seems likely that intervenor will seek to have property near the Scappoose Airport rezoned AR in the future, it is also possible that no property will ever be zoned AR. *If the property is zoned AR in the future, that action would constitute a post-acknowledgment amendment of a land use regulation which would be reviewable at that time for compliance with applicable law.*" (Emphasis added).

In fact, LUBA has repeatedly considered constitutional claims in challenges to post acknowledgement amendments of land use regulations. *See Homebuilders Association of Metropolitan Portland v. Metro*, 42 Or LUBA 176 (2002); *Sievers v. Hood River County*, 46 Or LUBA 635 (2004); and *Western PCS, Inc. v. City of Lake Oswego*, 33 Or LUBA 369 (1997).

In addition, the Court of Appeals analyzed a PAPA in *Northwest District Association v. City of Portland*, 198 Or App 286 (2005) ("*NWDA*"), finding LUBA jurisdiction in a case involving the application of a new zone. *NWDA* involved application of an overlay zone to allow commercial parking structures within an historic northwest neighborhood of Portland. In that case, petitioners challenged the PAPA for failure to comply with Goal 5. *Id.* at 297. Even in a non-constitutional challenge to the application of a zone, the Court of Appeals ruled that LUBA must address whether the city made adequate findings related to the Goal 5 requirements. *Id.* at 302. In fact, this court would not even consider the merits of the Goal 5 argument without first remanding to LUBA for its consideration in the first instance because the process of LUBA review would enhance the decision-making process. *Id.* Therefore, LUBA not only has jurisdiction to review PAPAs that apply particular zones to properties in a particular neighborhood, but its review in the first instance is integral to judicial efficiency and informed decision-making at the Court of Appeals.

In 1987, the Oregon Supreme Court overturned this court and specifically found that LUBA could consider constitutional issues in the circumstance of a zone change. *Dunn v. City of Redmond*, 303 Or 201, 735 P2d 609 (1987). *Dunn* is almost exactly on point in this regard. It involved the re-zoning of Mr. Dunn's property to an open space zoning (that zone had been created some time ago) and Mr. Dunn argued that the re-zoning resulted in the taking of his property. (*See Dunn v. City of Redmond*, 14 Or LUBA 650, *rev'd* 82 Or App 36, 727 P2d 145 (1986), *rev'd* 303 Or 201, 735 P2d 609, aff'd on remand, 86 Or App 267, 739 P2d 55 (1987).

The original LUBA decision explains the factual background of the case, with the City of Redmond zoning adjacent properties for open space, but Dunn's was not re-zoned because Mr. Dunn's property was outside the city at

that time. Mr. Dunn's property was re-zoned later - when Deschutes County adopted the city's zoning ordinance. 14 Or LUBA 651-2. This court concluded, among other things, that LUBA did not have jurisdiction over the constitutional issues:

> "LUBA's analytical approach to the problem reveals why LUBA erred in assuming jurisdiction over it: if no taking could arise from the ordinances independently of the historical events which preceded their adoption, the ordinances were not the real focus of LUBA's review. What LUBA was called upon to review, and did review, was a sequence of events dating from 1970. Some of the events LUBA considered were land use decisions which petitioner did not and could not challenge in this appeal; others, such as the unproductive negotiations concerning the purchase of the property, were not land use decisions at all." 82 Or App 39-40 (emphasis added).

The Supreme Court specifically disagreed with this aspect of the decision:

> "The second reason cited by the Court of Appeals for denying LUBA's jurisdiction in this case is that the landowner's claim of an unconstitutional 'taking' involved other governmental actions besides the land use decisions that he appealed to LUBA.
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> "A 'land use decision' within the exclusive jurisdiction of LUBA includes a 'final decision or determination made by a local government * * * that concerns the adoption, amendment or application' of the state's land use goals, a comprehensive plan provision, or a land use regulation. ORS 197.015(10)(a)(A). 'Land use regulation' includes planning and zoning ordinances. ORS 197.015(11). The owner's petition for review to LUBA attacked two ordinances adopted by the city, zoning ordinance 595 and planning ordinance 596, on several grounds, including an assertion that the ordinances violated Article I, section 18, of the Oregon Constitution and the Fifth and Fourteenth Amendments of the federal constitution by taking private property for public use without just compensation. On its face, therefore, the owner's petition appears correctly to invoke LUBA's jurisdiction.
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> "* * * * *

> "The [Court of Appeals] concluded:
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> > 'We hold that, although some of the events which contribute to a taking may come within the definition of a 'land use decision,' the governmental action which is really at issue when a taking claim is asserted is not that kind of component decision. It is the purported taking itself, and the courts rather than LUBA are the forum for its redress.' *Id.* at 41-42, 727 P.2d 145.
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> "In other words, the court held that LUBA loses jurisdiction whenever 'a taking claim is asserted,' even if the petition asserts that claim in an effort to invalidate a land use decision rather than to obtain compensation. That is erroneous.
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> "The petition in this case requested LUBA to review and invalidate the city's ordinances 595 and 596, which unquestionably were land use regulations and therefore land use decisions."

Although the ultimate issue in *Dunn* involved a question of whether LUBA or the circuit courts could hear the claim, the Supreme Court's decision makes it clear that LUBA has jurisdiction to hear these types of claims, even if they involve previous actions by a city (including both land use and non-land use decisions) that serve as the predicate for the challenged decisions. In this case, the challenged decision imposes constitutionally impermissible burdens and benefits on property owners and, for that reason, should be invalidated.

Petitioners, as amplified by Amicus, argue that, if LUBA is upheld here, it would impose a substantial new burden on cities. The perceived new burden would be the possibility of an additional challenge to the actions of a local government, not just when a new zone is adopted, but also when it is applied. However, nothing prevents a city from both adopting and applying the zone in one ordinance, thus eliminating the perceived risk. Here, the City chose to bifurcate its proceeding and neither Petitioners nor Amicus cite to any legal authority or principle that prevents a facial constitutional challenge to the

application of an already existing zone to new property. If the City wanted to avoid the risk of challenge when it amended its comprehensive plan by imposing the zone on particular properties, it could have adopted the zone and applied it in the same decision. Under that scenario, only one challenge could be mounted.

Amicus contends that confusion will ensue around the public notice requirements regarding the criteria necessary to list on the notice itself. Amicus Brief p 4 and 12-13.[7] Amicus' "Chicken Little" argument that it would be subject to multiple unknowable appeals represents a fundamental misunderstanding of the notice and appeal requirements under state law.

ORS 197.763(3)(b) requires cities to "list the applicable criteria *from the ordinance and plan* that apply to the application" in a *quasi judicial* application.[8] (Emphasis added.) ORS 197.835(4)(a)[9] allows new issues to be

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[7] Amicus argues as follows:

> "In addition, LUBA's order further complicates an already complex land use planning program. For instance, if LUBA's order stands, it is not clear what standards and criteria (i.e., the 'applicable law') govern zone change applications. In the public notices and statements it must make prior to a hearing, is a city now required to list all of the regulations in a proposed zone as applicable criteria, in addition to those standards that specifically apply to zone changes? If so, and if a city fails to list the underlying regulations, it would be subject to appeals from persons who never appeared or participated in the local hearing on the application." Amicus Brief, p 4.

[8] It is worth noting that ORS 197.763 did not apply to Hillsboro's adoption of Ordinance No. 5935 in this case because it was not the result of a quasi-judicial "application," but a legislative re-zoning initiated by the City and, therefore, there was no notice required under ORS 197.763. *See Century Properties, LLC v. City of Corvallis*, 207 Or App 8, 15, 139 P3d 990 (2006). As explained in *Century Properties*, there is no "raise it or waive it" issue in legislative amendments, but there is a requirement for participation. Thus,

raised based on criteria not provided in the notice, but only new issues based on criteria from the ordinance or plan. All local government decisions are subject to constitutional concerns and, in quasi-judicial settings, those issues must be raised at the local level and LUBA's decision does not change that – there is no requirement to list the constitutional provisions that always apply to local government decisions.

Further, Amicus contends that Barnes is prohibited from taking a "second bite at the apple" here based on *Doney v. Clatsop County*, 142 Or App 497, 921 P2d 1346 (1996), and *Mill Creek Glen Protection Assoc. v. Umatilla County*, 88 Or App 522, 746 P2d 728 (1987). However, those cases all involve quasi-

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Amicus' concerns have no place in legislative matters and the argument in the body of this brief will address only the requirements applicable to quasi-judicial proceedings.

[9] The Amicus Brief appears to cite the wrong provision. It cites to ORS 197.830(3), which provides as follows:

> "(3) If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 227.175 (10), or the local government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:
>
> "(a) Within 21 days of actual notice where notice is required; or
>
> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

As far as Respondent can tell, this provision plays no role in the situation Amicus posits and was likely a typographical error and Amicus meant to cite ORS 197.835(4), which is discussed in the brief.

judicial decisions involving particular developments. These cases are inapposite to the situation here involving a challenge to a legislatively adopted zone change. Although Amicus consistently merges the two decision making processes, a legislative zone change is not comparable to a quasi-judicial development approval, whether with regard to notice, local procedures or judicial review standards. In any event, all local government actions must be consistent with constitutional concerns and these issues simply were not present in those cases.

While the City contends that other forums, such as the federal courts, may be available to hear this case under *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926), the availability of other forums does not detract from the availability of LUBA as a forum. As the Supreme Court indicated in its decision in *Dunn*, other forums may not even be available to decide this issue:

> "In sum, *if an owner seeks to have a land use decision set aside on constitutional grounds, the owner must take that appeal to LUBA*. An owner who maintains that the government's acts entitle him to compensation may seek compensation in circuit court. If the owner seeks invalidation of the land use decision or compensation in the alternative, or both, and the government defends the validity of its regulatory decision and denies that compensation is due, the court may have to withhold judgment until the legality of the land use decision is placed before and decided by LUBA and the government has had an opportunity to reconsider and modify its decision." 303 Or at 208 (emphasis added).

Moreover, Petitioners' argument that the federal court is a realistic alternative forum ignores the intervening years of federal court precedents. *See, e.g., Williamson County v. Hamilton Bank*, 473 U.S. 172 (1985), (limiting access to federal court for plaintiffs alleging claims under the Fifth Amendment to the US Constitution), and *Village of Belle Terre v. Boraas*, 416 US 1, 12, 94 SCt 1536, 1542, 39 L Ed 2d 797 (1974) (Marshall, J., dissenting) (A federal court, after

all, "should not ... sit as a zoning board of appeals.")

Petitioner below satisfied the jurisdictional requirements for LUBA review and her forum choice makes sense. Petitioners have not established that LUBA did not have jurisdiction to decide these issues, but only complain that they would have preferred a different outcome.

RESPONSE TO SECOND ASSIGNMENT OF ERROR

Standard of Review

Barnes agrees that Petitioners identified the correct standard of review under ORS 197.850(9)(a). However, LUBA's order was neither unlawful in substance nor procedure because LUBA correctly found constitutional defects in the City's land use decision to adopt Ordinance 5935 which applied the HZO 135B requirements.

1. LUBA Correctly Ruled that Ordinance 5935, Independent of the Adoption of the Underlying Zoning in 2009, was Unconstitutional.

Petitioners correctly describe LUBA's decision making authority under ORS 197.835(1) and OAR 661-010-0071 that the Board shall reverse a land use decision that is unconstitutional. LUBA's decision recognized that the City's ASCO zone adoption in 2009 was acknowledged to comply with the planning goals,

> "Respondents are correct that, because the ASCO zone is deemed acknowledged to comply with the statewide planning goals, if petitioner attempted in this appeal to argue that the ASCO zone is inconsistent with one or more statewide planning goals, such a challenge would be precluded by acknowledgment. However, acknowledgment of the ASCO zone does nothing to insulate that zone from challenge on statutory or constitutional grounds. We see no principled reason why such statutory or constitutional challenges cannot be advanced in an appeal of a subsequent legislative ordinance that, for the first time, applies the ASCO zone to specific properties in the city." ER p 8.

However, LUBA made the important distinction that the City did not establish any reason why a constitutional challenge could not be advanced when the zone is applied to particular properties.

Petitioners would prefer Barnes to have worded her argument in the exact phrasing it suggests,

> "It may be possible to construct an argument that the adoption of an ordinance rezoning land is *per se* unlawful, and therefore reversible error, to the extent any provision of an existing, acknowledged zone being mapped onto the land is statutorily or constitutional infirm. This case does not present that issue because Respondent never raised it and LUBA's Final Opinion and Order does not address it." Petitioners' Brief, p. 17. (emphasis in original).

However, this suggested re-write was not the argument that Barnes raised below. Rather, the issue raised by Petitioner below, and decided by LUBA, is that the standards in HZO 135B were imposed on property for the first time and that, in most circumstances, it is at the re-zoning of their property that most property owners will have the opportunity (or reason) to challenge the zone that is newly applied to their property.[10]

Petitioners have chosen not to defend the constitutionality of the provisions and have failed to even argue that the zone is constitutional when applied to these 7,000 properties. At least the City is consistent in its intent to

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[10] It appears that Petitioners are correct that the City provided Measure 56 notice of the entire proceeding to property owners in the area for the entire process before the City. However, LUBA's point regarding ORS 215.503 and ORS 227.186 (commonly known as Measure 56) remains valid. The City had no obligation to provide notice of the adoption of a new zone, but local governments are required to provide notice only when property is "re-zoned." ORS 227.186(9). Because of the process used by the City in this case, property owners might have been provided notice of the adoption of a new zone, but there was no requirement and, often, the newly applied zone will have been created some time before it is ever applied to a property. *See Dunn*, discussed above.

continue to hide the pea under different shells so that it can suggest that the constitutional questions must be decided at another time instead of accepting the consequences of the indentified concerns and fixing the problem at the outset. It was the City's decision to bifurcate the process for adoption of the zone and the application of the zone to particular properties. There was no second bite at the apple, but two different apples to bite. Petitioners have provided no reason why Respondent should be precluded from challenging the constitutionality of the newly applied provisions at this time.

2. <u>The Amicus Brief Does Not Establish LUBA Erred in Finding Ordinance 5935 Unconstitutional.</u>

On pages 15-16 of the Amicus Brief, Amicus contends that the City could simply pay for the easement later and avoid a takings altogether and, therefore, the appeal was not ripe (an argument not addressed by Petitioners at all). If this Court chooses to review this new argument, the difficulty is that Amicus conflates eminent domain with regulatory takings. If the City wanted to pay for the easements, it could bring an eminent domain action, without passing a zoning regulation, and pay just compensation. But by requiring an easement as a condition of development, the City has made this into a *Nollan/Dolan* regulatory takings case, subject to the nexus test. The City has made this into a regulatory takings case, subject to the nexus test from *Nollan v. California Coastal Com'n*, 483 US 825 (1987), and the rough proportionality test from *Dolan v. City of Tigard*, 512 US 374 (1994). LUBA agreed,

> "We generally agree with respondents that because the *Dolan* 'rough proportionality' analysis requires evaluation of the specific impacts of specific proposed development, the rough proportionality analysis will play little or no direct role in a facial takings challenge. That does not mean, however, that *Dolan* is completely inapposite to a facial takings challenge of the kind advanced here. *Dolan* is a refinement of the reasoning in *Nollan*, and is part of a closely related two-prong test for determining under what

> circumstances a local government can take private property for public use without paying the just compensation otherwise required by the federal Takings Clause. While petitioner relies on *Dolan* in part to argue that the HZO 135B avigation easement requirement facially violates the Takings Clauses, because petitioner believes that in all cases in which it is exacted the easement will have no relationship to the impacts of any proposed development, that argument is based as much on *Nollan* as *Dolan*. To the extent the reasoning in *Dolan* illuminates the requirements of *Nollan* or otherwise has some bearing on a facial takings challenge in the posture of the case before us, we see no error in considering that reasoning." ER pp. 9 - 10.

Amicus cites to *Dunn v. City of Redmond*, 303 Or 201 (1987) to suggest that, at some later date, the City could decide to pay just compensation when an avigation easement is required. However, the problem for Barnes is that the avigation easement is a *fait accompli* if a property owner within the ASCO zone seeks a building permit. The easement does not depend on a later discretionary action that could be challenged at LUBA. Moreover, even using Amicus' rationale, that later challenge may be too late in any event. The property owners within the ASCO zone are being forced to provide their neighbor with a property right that is wholly unrelated to the impacts of their development project in exchange for development approval. The suggestion that the City could pay for it does not right the wrong of this requirement.[11]

In any event, *Dunn* does not say what the Amicus purports. In that case, the Court decided that, when land use takings claims and compensation questions overlap between circuit courts and LUBA, LUBA in the first instance

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[11] This is especially true considering ORS 35.015 (also known as "Ballot Measure 39"), which prohibits a government from condemning property with the intent to turn that property over to a third party. Although there may be some question about that statute's application in this case because of the Port of Portland's status as a quasi-public agency, such transfers appear to be contrary to that measure.

rules whether a land use decision is a takings. *Id.* at 309. After LUBA issues a ruling, it is for the circuit court to decide whether to award compensation. *Id.* The current appeal does not pose this conflict because no as-applied challenge is raised, and no compensation claim has been made.

Moreover, Amicus' contention that it is not unlawful for a local government to impose a taking; it is unlawful to impose a taking without just compensation, was not an argument raised by the City before LUBA or on appeal. Therefore, even if Amicus could establish grounds for the claim by some creative reading of *Dunn*, the argument was waived. *Mill Creek Glen Protection Ass'n v. Umatilla County*, 88 Or App 522, 527 (1987) (a party who did not raise an issue in an earlier proceeding because he chose not to participate in it should be as precluded from later raising the issue as a party who did participate but neglected to raise the issue).

Amicus also attempts to resurrect the applicability of *Garneau v. City of Seattle*, 147 F.3d 802, 807 (9th Cir. 1998), to claim that LUBA should not have reviewed this land use decision by considering the *Dolan* nexus test, but should have waited for an as-applied challenge. However, LUBA disagreed in its opinion stating,

> "Respondents next argue that the 'rough proportionality' test in *Dolan* cannot, by its nature, be applied in a facial takings claim. *See Garneau v. City of Seattle*, 147 F3d 802, 811 (9th Cir 1998) (the *Dolan* analysis cannot be applied in facial takings claims). According to respondents, much of petitioner's facial challenge to HZO 135B rests on the premise that the avigation easement required under that provision will not be 'roughly proportional' to the impacts of proposed development of land allowed in the base zone, and thus the exaction of the easement will violate the requirements of *Dolan*.
>
> We generally agree with respondents that because the *Dolan* 'rough proportionality' analysis requires evaluation of the specific impacts of specific proposed development, the rough proportionality analysis will play little or no direct role in a facial takings

> challenge. That does not mean, however, that *Dolan* is completely inapposite to a facial takings challenge of the kind advanced here. *Dolan* is a refinement of the reasoning in *Nollan*, and is part of a closely related two-prong test for determining under what circumstances a local government can take private property for public use without paying the just compensation otherwise required by the federal Takings Clause. While petitioner relies on *Dolan* in part to argue that the HZO 135B avigation easement requirement facially violates the Takings Clauses, because petitioner believes that in all cases in which it is exacted the easement will have no relationship to the impacts of any proposed development, that argument is based as much on *Nollan* as *Dolan*. To the extent the reasoning in *Dolan* illuminates the requirements of *Nollan* or otherwise has some bearing on a facial takings challenge in the posture of the case before us, we see no error in considering that reasoning." ER pp. 9 - 10.

The Amicus brief is unconvincing on this point because, as LUBA aptly described, the *Nollan/Dolan* construct offers the best instruction for judging whether this zone amendment violates the Takings Clause. Further, in *Guggenheim v. City of Goleta*, 582 F3d 996, (9th Cir. 2009), a case decided after *Garneau v. City of Seattle*, 147 F3d 802 (1998), the Ninth Circuit explicitly concluded that a regulatory takings claim could be brought in a facial challenge.

This is further supported by Oregon case law. The effect of Hillsboro's easement requirement from property owner's in the City's newly applied zones is almost identical to the effect of the easement required by the City of Mill City in *Ferguson v. City of Mill City*, 120 Or App 210, 852 P2d 205 (1993). In that case, Mill City decided to build a new sewer and ordained that each property adjacent to the sewer would be required to provide a location to site an interceptor tank. The city adopted an ordinance that "effectively requires private property owners to grant easements" to the city to enter onto the property and operate and maintain the sewer collection system. *Id.* at 212. A

property owner filed a declaratory judgment action against Mill City seeking a declaration that the ordinance resulted in unconstitutional taking and both the trial court and this court agreed with the property owner.[12]

In *Ferguson*, as in this case, there was no indication that an easement had yet been sought or acquired; instead, the challenge was a facial attack on an ordinance that prospectively required property owners to provide an easement upon taking certain actions. This case differs from *Ferguson* in only three respects, each of which is immaterial to whether the facial challenge can be asserted here. First, in *Ferguson*, the easement was required when a property owner connected to a sewer (which was required when a sewer was put into the street abutting the owner's property), while, in this case, the action requiring the easement is when the property owner seeks further development of the property. Second, in *Ferguson*, the ordinance was reviewed by way of a declaratory judgment, here LUBA review was sought. Because the City's ordinance in this case was a land use decision, Barnes could not have brought a declaratory judgment action and LUBA review was the only way to seek a declaration similar to the declaration granted by the Court of Appeals in *Ferguson*. *See also Dunn*. Finally, in *Ferguson*, the easement ran to the city, while here, the easement runs not to the regulatory agency or the public, but to a neighboring property owner.

Both the *Guggenheim* and the *Ferguson* cases confirm that these types of takings claims can be brought in a facial challenge to an ordinance and Amicus' resurrection of the *Garneau* argument has no merit.

Ultimately, this case involves a simple question – when a property is rezoned to impose new rights, obligations and duties, can the constitutionality

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[12] *Ferguson* was at least a closer case – there the property owners were being benefitted by the sewer at issue. In this case, the avigation easement only allows the Port to trespass and disturb its neighbors.

of those new rights and obligations be challenged? The straight forward answer is that, of course, when those obligations are changed is the appropriate time to bring such a challenge. Petitioners cite to no statute, law or judicial principle that lead to any other conclusion and, accordingly, LUBA's decision should be affirmed.

CONCLUSION

For all of the above reasons, LUBA's decision should be affirmed.

DATED this 1st day of September, 2010.

Respectfully submitted,

GARVEY SCHUBERT BARER

By _____

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CERTIFICATE OF COMPLIANCE

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 8,928 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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CERTIFICATE OF FILING

I hereby certify that on September 1, 2010 I filed the original and thirteen (13) copies of the RESPONDENT'S ANSWERING BRIEF with the State Court Administrator at the following address by first-class mail:

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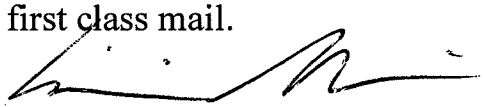

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