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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

Appeal from the Land Use Board of Appeals Case No. 2010-011
Final Opinion and Order Dated June 30, 2010
The Honorables Tod A. Bassham, Board Member; Melissa M. Ryan, Board Member, Participating; and Michael A. Holstun, Board Chair, Concurring

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September, 2010

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INTRODUCTION

Property owners have a constitutionally protected right to enjoy their land free from unreasonable interference caused by airplane overflights. *See, e.g.*, *Griggs v. Allegheny County*, 369 U.S. 84, 89-90 (1962). The City of Hillsboro, however, adopted avigation easement regulations requiring that property owners in the proximity of the airport give up this right in order to secure any land use approval. Respondent Michelle Barnes successfully challenged the constitutionality of the City's avigation easement before the Land Use Board of Appeals (LUBA). The City and Port of Portland (together, City) seek reversal of LUBA's decision, arguing that Barnes' challenge was untimely. But as demonstrated below, Barnes timely filed her challenge in accordance with LUBA's statutory provisions and constitutional ripeness principles. *Amicus Curiae* Pacific Legal Foundation (PLF) respectfully requests that this Court affirm LUBA's Final Opinion and Order invalidating the City's avigation easement requirement.

HILLSBORO'S AVIGATION EASEMENT

The City of Hillsboro developed and implemented its avigation easement condition in two separate pieces of legislation. On October 6, 2009, the City enacted Ordinance No. 5926 (the 2009 Ordinance), which amended its comprehensive plan to create the "Airport Safety and Compatibility Overlay

Zones" (ASCO). City's Excerpt of the Record (ER) 40. This ordinance also adopted new development regulations for the ASCO zone, including a requirement that any land use approval for certain unspecified properties within the ASCO "shall be conditioned to provide an avigation easement . . . to the Port of Portland[.]" ER 49-52. In relevant part, the avigation easement required that all property owners (in an area to be later specified) convey to the Port of Portland (1) a right of way for aircraft to pass over the property, and (2) the right to subject the property to noise, vibration, fumes, dust, and fuel particle emissions. ER 43.

The 2009 Ordinance, however, did not apply the ASCO zone to any properties. That was accomplished through subsequent legislation. On October 14, 2009, the City filed a rezone application "to apply the ASCO zone to properties extending approximately 6,000 feet from the Hillsboro airport runways[.]" ER 56. In the following weeks, the City provided affected property owners with notice of its intent to rezone their properties. ER 56; ER 63. On January 19, 2010, Hillsboro enacted Ordinance No. 5935 (the 2010 Ordinance), which subjected property to the ASCO avigation easement for the first time. ER 4; ER 8-9; ER 56-57.

BARNES' LUBA CHALLENGE

Barnes timely filed a notice and petition with LUBA alleging in pertinent part that the City's rezone decision violated the Takings Clauses of the Fifth Amendment of the United States Constitution and Article I, Section 18, of the Oregon Constitution. LUBA sustained her challenge, concluding that the City's application of its avigation easement requirement through the ASCO rezone violated the "essential nexus" test set out by the U.S. Supreme Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). ER 67-74. The City does not challenge LUBA's constitutional determination. Instead, the City challenges the timeliness and venue of Barnes' petition.

ARGUMENT

I

THE 2010 ORDINANCE WAS THE FIRST OPPORTUNITY FOR BARNES TO BRING A FACIAL CHALLENGE TO THE AVIGATION EASEMENT

The City argues that Barnes' facial takings challenge was untimely because Barnes should have challenged the 2009 general zoning ordinance. Pet'r Br. at 6-9. That is not so because the general ordinance did not apply its provisions to any property.

The City's argument is as follows. The statutory provisions ORS 197.825(1) (LUBA "shall have exclusive jurisdiction to review any land use decision") and ORS 197.835(1) (LUBA "shall review the land use decision") should be read together to limit LUBA's authority to consider *only* the challenged land use decision in isolation. Pet'r Br. at 6-9. The City argues that in this case, the avigation easement requirement was adopted in the 2009 Ordinance. Thus, the City asserts that LUBA should be statutorily barred from considering whether the imposition of the avigation easement (in the 2010 Ordinance) to particular properties violated the Constitution. *Id.* at 6-9. The City's argument, however, fails to acknowledge that its avigation easement regulations were not complete and did not give Barnes the opportunity to bring a meaningful challenge until the City applied its regulations to specific properties in its 2010 Ordinance. *See Port of St. Helens v. City of Scappoose*, 58 Or. LUBA 122, 130 (2009) (holding that a petitioner would have to wait until general zoning requirements were applied to specific properties though a rezone decision before challenging the substance of the associated development regulations).

Barnes' facial takings challenge was timely. A facial takings claim argues that an ordinance cannot be applied in a constitutional manner under any set of facts. *Cope v. City of Cannon Beach*, 317 Or. 339, 342, 855 P.2d 1083 (1993) (citing *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)). Because a facial

challenge does not depend on the extent to which an individual property owner is impacted by the regulation or the degree to which the party may or may not be compensated, a facial claim ripens upon adoption of the challenged ordinance. *Id.*; *see also Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n.10 (1997); *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 341 n.23 (2005). To be ripe, however, the challenged land use regulations must contain sufficient information that the Court can consider whether its "general scope and dominant features" violate the Takings Clause. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 773 (9th Cir. 2000) (citations omitted).

Here, the City adopted its avigation easement requirement in two separate pieces of legislation. The 2009 Ordinance is a general zoning ordinance that created the ASCO zone and adopted associated development regulations. But the 2009 Ordinance did not apply the new zone and its regulations to any properties. Thus, standing alone, the avigation easement *as adopted in the 2009 Ordinance* had no connection to any property and could not provide LUBA with sufficient information to determine whether the easement violated *Nollan* and *Dolan*. *See Tahoe-Sierra Pres. Council*, 216 F.3d at 773.

It was the 2010 Ordinance that first imposed the City's ASCO development regulations, including the avigation easement, to identified properties near the Hillsboro airport. The City's rezone decision purported to "mitigate conflicts between future development and airport operations[.]" ER 58. But the ordinance did not provide any process for determining whether the subject properties will have any impact on airport operations. ER 56-57. Nor did the 2010 Ordinance provide compensation to property owners required to dedicate an easement. ER 56-57. Until the general zoning law was amended to apply the regulations to specific properties, thereby defining how the avigation easement would be implemented, it could not be determined whether there would or would not be a constitutional violation.

LUBA noted that the first time that the City subjected specific properties to its avigation easement requirement was in the 2010 Ordinance. ER 8. And LUBA concluded that "an appeal of the ordinance that applies the new zone to specific properties is the first reasonable opportunity many affected or concerned persons affected would have to raise a facial constitutional challenge to the zone." ER 9.

II

LUBA CORRECTLY DETERMINED THAT THE AVIGATION EASEMENT VIOLATED THE "ESSENTIAL NEXUS" TEST

The City's avigation easement requirement is particularly susceptible to a facial challenge under *Nollan*.[1] A facial challenge brought under *Nollan* alleges that a government-imposed development condition (*vis.* the avigation easement) cannot satisfy the "essential nexus" standard in any possible application. *Nollan*, 483 U.S. at 836-37. The nexus test requires the City to demonstrate that any development within the ASCO zone will create conflicts with airport operations, and that the avigation easement is necessary to mitigate for those conflicts. *Id.* In other words, the nexus test requires the government to show that the development condition "is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391 (discussing *Nollan*'s nexus test). A condition will be deemed unconstitutional if it does not meet the nexus requirement of *Nollan* and *Dolan*.

The reasoning of *Nollan* is applicable to this case. The Nollans sought a permit from the California Coastal Commission to replace a dilapidated beachfront bungalow with a three-bedroom home. *Nollan*, 483 U.S. at 828. The Commission

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[1] Oregon's Supreme Court has applied *Nollan*'s "essential nexus" test in facial constitutional challenges. *See Cope*, 317 Or. at 345-46.

told the Nollans that it would grant the permit only if they dedicated an easement to allow the public to walk along the beach in front of their property. *Id.* The Commission explained that the easement was necessary because the Nollans' project would block the view of the ocean from the road and create a psychological barrier to accessing the beach. *Id.* at 828-29. The U.S. Supreme Court rejected the Commission's findings and concluded that the Commission's requirement for an easement was not a legitimate exercise of land-use power. *Id.* at 837-42. "It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house," the Court explained. *Id.* at 838. "It is also impossible to understand how it lowers any 'psychological barrier' to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house." *Id.* at 838-39. The Court found no essential nexus between the Nollans' proposed development and the public harm the Commission cited in support of its permit condition. *Id.*

Under *Nollan*'s essential nexus test, the government must establish a direct causal relationship between the impact of new development and an identified public harm so that the permit condition does not "'forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the

public as a whole.'" *Nollan*, 483 U.S. at 836 n.4 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). In *Nollan*, this meant that the Commission could not obtain an interest in private property through the permitting process that it could not otherwise obtain without paying just compensation. *Id.* If the power to regulate land use went that far, local governments could engage in "'out-and-out plan[s] of extortion'" by withholding permission to develop unless the property owner gave up their property, without considering the relationship between the property owner's development plan and the government's regulatory preferences. *Id.* at 837 (quoting *J.E.D. Associates, Inc. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981)).

Hillsboro's avigation easement is not qualitatively different from the development condition invalidated in *Nollan*. The City requires that all ASCO-zoned property owners who seek permits to build convey a property interest to the Port of Portland allowing the Port "free and unobstructed passage of aircraft through the airspace over the property" and the "right to subject the property to noise, vibrations, fumes, dust and fuel particle emissions." ER 14-15; ER 43. As LUBA determined, the avigation easement is not intended to mitigate the impacts of new development on airport operations. ER 14-15. Instead, the City claims to need the easements to reduce the potential for conflicts between the airport and

private property owners. ER 15. The conditions are not related to the impact of any potential "[l]and use or limited land use approvals." ER 49.

Any actual conflicts between new development and airport operations can be resolved by enforcing height limitations for buildings, other structures, and trees, and prohibiting lighting, electrical interference, glare, and anything else that would be hazardous to aircraft flight. ER 16, 43. Instead, the City has chosen more drastic measures that allow airport operations to trump property interests by compelling property owners to grant the Port "an easement to physically invade private property." ER 15. The forced dedication of an avigation easement minimizes only one perceived "harm" to the City: it will prevent private property owners from seeking compensation when the noise, fumes, and vibrations created by airport operations rise to the level of a physical taking. *See United States v. Causby*, 328 U.S. 256, 264 (1946) (Noise and glaring lights from government airplane overflights invaded private property and constituted a physical taking.); *Griggs v. Allegheny County*, 369 U.S. 84 (1962) (Landowners have property rights in the airspace above their land.); *McCarran Int'l Airport v. Sisolak*, 137 P.3d 1110, 1130 (Nev. 2006) (Holding that a local government's adoption of an ordinance imposing an avigation easement as a mandatory development condition constituted a *per se* taking by physical occupation under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).).

III

LUBA IS THE PROPER FORUM IN WHICH A PARTY MAY SEEK INVALIDATION OF AN UNCONSTITUTIONAL LAND USE DECISION

The City and Amicus League of Oregon Cities question the appropriate forum and relief for Barnes' challenge. *See* Pet'r Br. at 14; Amicus League Br. at 15-16. These arguments demonstrate the City and League's misunderstanding of takings law. In *Dunn*, Oregon's Supreme Court recognized that there are two distinct types of relief that can be sought in a takings challenge: (1) compensation for a deprivation of private property, or (2) a declaration that a future government action that will affect a taking "be abandoned or enjoined." *Dunn v. City of Redmond*, 303 Or. 201, 204, 735 P.2d 609 (1987) (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922) (declaring void as a "taking" an injunction restraining mining of coal under certain lands)).

Under Oregon law, the type of relief sought in a takings claim is determinative of the forum in which a party may bring his or her claim.[2] A party

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[2] The City's passing reference to *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), for the proposition that the federal courts have jurisdiction to hear facial constitutional challenges, is irrelevant and inadequate. For example, in *Dodd v. Hood River County*, the federal court stayed plaintiffs' inverse condemnation claim while their claims made their way through LUBA and the Oregon courts. 59 F.3d 852, 857 (9th Cir. 1995).

who "seeks to have a land use decision set aside on constitutional grounds . . . *must* take that appeal to LUBA." *Dunn*, 303 Or. at 209 (emphasis added); ORS 197.835(8). A party only seeking compensation may pursue his or her claim in a circuit or federal court. *Dunn*, 303 Or. at 209; *Dodd v. Hood River County*, 59 F.3d 852, 857 (9th Cir. 1995). But if a party seeks both invalidation and compensation, he or she must pursue claims in both forums, and the circuit or federal court will withhold judgment until LUBA determines the legality of the challenged land use decision. *Dunn*, 303 Or. at 209; *Dodd*, 59 F.3d at 857 ("LUBA has subject matter jurisdiction over federal and state constitutional claims."). There is no question that LUBA was the proper forum in which Barnes could seek invalidation of the City's avigation easement.

Amicus the League of Oregon Cities alternatively contends that Barnes is barred from bringing a facial takings claim because the determination of whether a taking occurred generally turns on an ad hoc factual inquiry. Amicus League Br. at 16. The League's argument, however, fails to understand the distinction between a facial and as-applied challenge. A facial challenge " 'presents no concrete controversy concerning . . . [the legal provision's] effect on specific parcels of land.' " *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d at 781 n.24 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295 (1981)). There is nothing in the

relevant law that prohibits Barnes from bringing a facial constitutional challenge before LUBA seeking to invalidate the City's avigation easement.

CONCLUSION

The City's adoption of the 2010 Ordinance was the first opportunity that Barnes had to bring a facial challenge to the City's avigation easement. LUBA correctly rejected the City's argument that the Board lacked authority to consider whether the rezone decision implementing the City's avigation easement violated the Takings Clause of the State and Federal Constitutions. Amicus PLF respectfully requests that this Court affirm LUBA's decision.

DATED: September 7, 2010.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief Length

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 2,701 words.

Type Size

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

DATED: September 7, 2010.

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CERTIFICATE OF FILING

I hereby certify that on September 7, 2010, I filed the original and 13 true copies of the foregoing **BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT** (Court of Appeals Case No. A146145) with the State Court Administrator, Appellate Court Records, Supreme Court Building, 1163 State Street, Salem, Oregon 97310, by Federal Express overnight mail in Sacramento, California.

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CERTIFICATE OF SERVICE BY MAIL

I, Laurie E. White, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 3900 Lennane Drive, Sacramento, California 95834.

On September 7, 2010, true and correct copies of the foregoing **BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT**(Court of Appeals Case No. A146145) were placed in envelopes addressed to:

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 7th day of September, 2010, at Sacramento, California.

LAURIE E. WHITE