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JUDICIAL REVIEW OF LAND USE DECISIONS—TWO COURTS, TWO STATES AND TWO VIEWS

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On May 13, 2011, two thoughtful judges participated in a panel discussion concerning judicial review of land use decisions as part of the American Bar Association Section of State and Local Government Spring Conference in Portland, Oregon. The panel included Judge Peter Buchsbaum of the New Jersey Superior Court, a trial judge who had practiced land use law for 28 years before ascending the bench in 2004, and Timothy J. Sercombe, a Judge of the Oregon Court of Appeals.

I. Introduction (by Edward J. Sullivan)

The title of this article derives from the fact that there are two different sets of tasks each court must undertake. New Jersey trial courts may hear matters on the record of the proceedings before the local government or may hear additional evidence. The trial court may undertake a rigorous review of the facts and law, reevaluating the evidence and determining whether the local government made the correct legal calls. Often judges must deal as best they can with the vagaries of local procedures and records and unclear

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reasons for local decisions. Trial court procedures, presumptions and burdens are familiar tools to deal with these problems.

The Oregon system does not make much use of the trial court system in cases other than enforcement. Instead, most local land use decisions may be appealed to the Oregon Land Use Board of Appeals ("LUBA") which almost always confines itself to the record made by the local government and, except for matters of state law, defers to interpretations of local plans and land use regulations made by that local government. This administrative law model focuses upon the record that was made for determinations of whether the applicable law was correctly interpreted, substantive errors of procedure were committed to the prejudice of a party, and substantial evidence underlies the local government decision. Other decisions which involve the adoption or amendment of certain plans or land use regulations may be reviewed by that state's land use agency, the Land Conservation and Development Commission ("LCDC"). The role of the appellate courts is then to review these decisions from an administrative law perspective.

Thus, not only are trial courts and appellate courts considered, but also the land use systems of two very different states. To add to this contrast is two very different legal cultures. The New Jersey view is similar to that of many eastern, southern and midwestern states, in which the judge is asked to bring her experience, knowledge of the law and expertise to bear to determine cases. The Oregon view gives little opportunity for the judge to be creative; rather, it provides the occasion for a drier dissection of local decisions, but this limited review focusing on the local decision requires more responsibility from local government decision-making.

These presentations do not seek to show one view "better" than another; indeed, given the underlying land use systems involved, the method of judicial review follows from the systems themselves. Rather, these presentations provide very different views, not only of the role of a judge in dealing with local land use decisions, but the function of judging in a democracy. The caricatures one may make of the two positions may range from a platonic knight-errant doing justice to the engineer dryly reviewing plans. Neither is accurate, but how we view the role of judges in a democracy is an enduring issue which deserves further attention.

II. JUDICIAL REVIEW OF LAND USE CASES (by Hon. Peter A. Buchsbaum, J.S.C., Superior Court of New Jersey)

The old saw counsels that there are two things whose creation people should never see, law and sausage. So it is with some trepidation that I address this morning's subject, how land use decisions are made. I am not sure you really want to know.

However, since I agreed to undertake this task, I will try to provide some insights as to how a trial judge addresses land use disputes. Hopefully, at least some of you in the audience will not throw your hands up in despair when I finish.

The first point is obvious but perhaps sometimes overlooked. Land use cases are after all lawsuits. The techniques used for deciding all cases therefore provide the first frame of reference for review of land use actions. These techniques were magnificently laid out in 1881 and 1921 by Justices Homes and Cardozo long before they ascended the Supreme bench. In The Common Law, on page 1, Holmes enunciated perhaps the most famous analysis of judicial decision making in the entire course of American jurisprudence. To paraphrase, he declared that the life of the law has not been logic, it has been experience. The felt necessities of the times and considerations of public convenience have far outweighed the syllogism in determining the course of legal doctrine. Ever the skeptic, in a later Harvard Law Review article entitled "The Path of the Law,"[1] Holmes cautioned that right-thinking lawyers tended to equate their social and economic interests with eternal legal verities and mask their policy preferences through the use of seemingly objective doctrinal propositions. In other words, something like the fellow servant doctrine, or labor injunctions, sprung from an underlying conception of the public good and not because they were they were the inevitable result of case law. Holmes' comment in his *Lochner v. New York* dissent,[2] that "the 14th Amendment does not enact Mr. Herbert Spencer's Social Statics," reflects the same view that truth in judging requires a frank acknowledgment of the policy sources underlying the doctrinal conclusions. It followed that judges did make law, albeit interstitially, being confined, as he put it, to molecular, not molar movement.[3]

Forty years later, Holmes' most famous disciple, Benjamin Cardozo, gave a typology for judicial decision making that has remained the standard ever since. In The Nature of the Judicial Process, delivered as a series of lectures at Yale, Judge Cardozo posited four types of judicial decision making. He agreed with Holmes that judges do make law, since the answers in hard cases are not pre-determined. He even remarked on his surprise and despair when he became a judge as to how much was open to discretion, that is, how much free will he and his colleagues actually exercised in deciding cases. Ultimately, he assuaged his despair by concluding that mistakes can be rectified over time.[4]

Cardozo posited four decision-making techniques which to this day actually capture the approaches used by judges where simple application of precedent will not do. First, there is the method of analogy or philosophy, that is, deduction from existing law. However, frequently analogy or the syllogism do not provide an answer because there are two lines of cases that suggest divergent outcomes.

An example from my own experience demonstrates the point. Several years ago, I had to decide whether or not to enforce a forum selection clause which required that complaints about a recreational vehicle be litigated in the state of manufacture, which was Indiana. One line of New Jersey cases enforced such clauses as to consumer fraud claims against Microsoft. Another refused to enforce them where the state had a special interest, such as protecting New Jersey franchisees under our Franchise Act, or where the subject was regulation of insurance. As a trial judge, I had to decide: Did the Lemon Law represent a powerful enough specific interest of the state in auto purchasers, or should the Lemon Law be analogized to consumer protection, a more general interest which an earlier court had subordinated to the forum selection clause? Clearly, a decision based on logic or syllogism would have been deceptive. It would have masked the true considerations at stake, which required an evaluation of the strength of the public polices at stake, those being uniformity of commerce and protection of car purchasers. I also had to look at the precise status of the litigation in order to make a pragmatic determination of the gains or losses in efficiency from dismissal. Neither of these considerations had anything to due with logic. Rather than deduction, they involved induction, that is, inferences from the policies involved and the status of the litigation.

Land use cases tend to follow a similar pattern. In defending a decision on an application for site plan or subdivision approval, the government will

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cite cases which emphatically tell judges they are not board members and should defer to local decision making. Landowners or objectors will cite equally valid cases holding that a board cannot act arbitrarily or capriciously, and that its decisions on development applications must be based on substantial evidence in the record. Logic does not reconcile these competing lines of cases; only a review of the record will suffice.

It might be objected that the law provides the ground rules for regulation of the dispute. That is true. But the stuff of the decision comes from the working out of these principles in the particular setting, and that is not a task for a philosophy major.

Cardozo's second method is history. For example, much of real property law derives from medieval formulas. We still have fee simple, uses, limits on restraints on alienation, etc. Fee tail may be gone, but many of its brethren remain. These formulations derive from history, and would not exist if one were constructing real property law today based on philosophical principles or modern conceptions of public policy.

As Cardozo might have predicted, the origins of our methods of land use decision making lie in history. Land use reviews in most states are actions at law tried without a jury. Isn't that odd? Logically, they should be equitable actions since they do require some specific relief, such as the redoing of a resolution or approval or denial, or a mandate for a public official to take some action. Alternatively, they should have juries. Thomas Jefferson wrote that the jury system is "the only anchor yet imagined by man by which a government can be held to the principles of its constitution." If that be true, shouldn't there be juries in land use matters where the only issue is whether a government has acted unlawfully? Yet history dictates otherwise. The prerogative writs—certiorari, mandamus, prohibition—originated from the English king's desire to ensure that his subordinate officials obeyed the law. Being intergovernmental in nature—that is, they were orders from the King to his subordinate officials—proceedings on these writs never utilized juries.[5] As a result, today we do not have juries in our proceedings to review of land use decisions since they are descended from these King's Writs.

So history is important. It dictates that I cannot hand off a land use case to a chancery judge or a jury. I must decide. But does history tell me what to decide? It may provide insights. For example, the history of the development of regional land use planning in Oregon should be an abiding presence in any difficult case in this state. Likewise, New Jersey's experience with decentralized growth patterns and the more recent efforts to channel and/or restrict growth cannot be ignored in cases involving large lot zoning and variances to facilitate cluster development. But these considerations provide a context, not an answer. History may provide procedural and even substantive guidelines, just as do the formal rules regarding deference to local decisions. But history will rarely divulge the answer to a particular lawsuit.

Cardozo's third method is custom. I must admit I had trouble understanding how this differed from history until enlightened by a combination of reading legal history and a remark by a guest teacher at a seminar on judging that I teach at Rutgers-Camden Law School. In A Concise History of the Common Law, T.F.T. Plucknett describes how Lord Mansfield, in the second half of the eighteenth century, essentially created English commercial law by conferring with London merchants and financiers about their business customs, and even putting them on juries, before rendering decisions on commercial transactions.[6] Our current Uniform Commercial Code thus derives from merchants' customs of the eighteenth century. Then, when I went over this account in class, my colleague Paul Armstrong, who had litigated the Karen Anne Quinlan end-of-life case in the 1970s,[7] remarked how similarly the New Jersey Supreme Court acted in establishing a rule for brain-dead patients. The Court essentially decided to rely on the existing practices of hospital ethics committees.

If custom represents what contemporaries actually do, it clearly has some rule in land use decisions. For example, in deciding how detailed a notice of hearing must be, a court will likely rely on experience in drafting or reviewing such notices when it considers whether the notice adequately informed potential objectors of the subject matter of the hearing. The honest efforts of other legal craftspersons will likely furnish a standard which will inform the court's decision. Similarly, in a case involving whether a particular home occupation is a customary—there is the word—accessory use, actual practice will be significant. Custom may even vary within a state. For example, pigeon raising was determined to be customary in semi-rural, horsy Colts Neck, N.J., but not on a 50 by 140 foot lot in urbanized Union Township near Newark.[8] In any event, in a few cases we may all be Lord Mansfields, seeking guidance from

the actual scene in a community. However, this approach will frequently be totally irrelevant and will rarely suffice as a ground of decision in a land use case.

We finally come to Cardozo's last great ground of decision, his method of sociology or social utility. This approach corresponds to Holmes' reference to the felt needs of the times, and considerations of public advantage. Cardozo describes this approach, typified by his decision in *MacPherson v. Buick Motors*,[9] as becoming dominant, even in the 1920s. Its effect over the past century has been remarkable. Even a cursory reading of state cases demonstrates innovations in the law of governmental immunities, consumer warranties, and products liability. Such growth of common law has even occurred, limiting property rights in cases establishing public trust and other limitations on private land ownership that stem from considerations of public advantage. Accordingly, in holding that the law of trespass could not prevent a Legal Services attorney and medical aide from interviewing a migrant worker on private property owned by the farmer who housed the migrant worker, the New Jersey Supreme Court said, in a clear affirmation of the method of social utility:

> Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law.[10]

Events have thus proved Cardozo's thesis. The change from *a priori* categories to functional, policy-based decisions does not even offend originalists, like Justice Scalia, who in A Matter of Interpretation appears to have little conceptual difficulty with this path of growth of the common law, although opposing it as a technique for interpreting statutes or the Constitution.[11]

This approach may not work for some areas of the law, like real property titles, where actually there is a deep public interest in stability. In such an area the syllogism might continue to play a dominant role. However, social utility is highly relevant to land use law. As the then Chief Justice of the New Jersey Supreme Court said in the 1950s, in sustaining an ordinance setting minimum square foot requirements for houses, a "zoning ordinance is not like the law of the Medes and the Persians ... and if the ordinance proves unreasonable in operation it may be set aside at any time."[12] The then advanced and controversial notion that a town could dictate minimum house sizes not just for health reasons, but to serve the public welfare in esthetically pleasing communities, was itself based on considerations of public advantage to the newly developing post-war suburbs. The countervailing thought, that the courts could change when times change, equally responded to the idea that the basic ground of decision was the public interest.

Considerations of public advantage have actually revolutionized land use law. Courts no longer strike down exercises of local authority as *ultra vires* unless there is a rather clear conflict with a statute. Essentially, the Quiet Revolution in Land Use derives its existence from the broadened definition of the public interest that has occurred since the 1970s. Just as in tort cases formal definitions, like trespasser or invitee, are likely to be supplemented or even supplanted by an analysis of the functional relationship between the plaintiff and the landowner, so today courts are much more open to permitting local action as long as it functionally addresses some colorable conception of the public good. For example, it is the rare state that would now find an ordinance imposing off-tract improvement costs, or limiting development in stream corridors, to exceed municipal authority. The breadth of the police power as now recognized does not square with the older thought that local authority should be channeled into well-worn grooves. Courts rarely have the easy out of finding a municipal land use action beyond local authority. They must decide, not only whether the original exercise of local rulemaking was reasonable, but far more frequently, whether a specific application of the rules in a given case, or the grant of a variance from them, should be sustained.

This shift underlies the change from one judge-made concept, Dillon's Rule, to another judicial rule of thumb, deference to local decision making. It is a critical shift for judges today. Dillon's Rule, like the fellow servant rule, was not immaculately conceived. Dillon worried that poor immigrant voters in cities would not respect property rights. His doctrine of strict construction of municipal authority thus had a specific substantive end in mind. Thomas Cooley, his opponent, advocated an inherent right of local self-government in order to prevent corrupt state governments from taking over city functions for pa-

tronage purposes. Both of these doctrines have little relevance now.

They were replaced, during the middle of the twentieth century, by the presumption of validity, of deference to local choices. Like Dillon's Rule, and Cooley's counter, this doctrine of deference is grounded on considerations of public advantage. Having lost their suspicion of local governments, courts now agree that the public interest is generally served by letting local authorities decide what is best for the community. The value of local self-government is now prized. The doctrine recognizes that courts are not the fount of all wisdom, that people sitting around a council or board table know what works in their community, and that too much judicial intervention can destroy our country's unique reliance on local participation in public affairs.

Most judges, this one not excepted, are quite comfortable with this state of affairs. Most of us have at some point or other had experience with local government, as counsel, or as elected or appointed local officials. We know that local processes are sloppy, and sometimes ugly, but so is democracy. We recognize, moreover, that the right to make bad decisions is critical to autonomy. We recognize our own fallibility and generally are content to leave the decisions to others.

Yet, the development of legal doctrine along the lines suggested in 1952 by Chief Justice Vanderbilt of New Jersey in *Lionshead Lake* make judging more difficult. The courts have recognized that local decisions can be parochial or biased. Thus, considerations of public advantage now have to account for local acts of selfishness or randomness. There are no easy answers, if the ultimate test in every case does not rely on bright-line rules as to what towns can and cannot do, but instead depends on defining the outer limits of reason. Thus courts do have an obligation to weed out decisions that are not merely poor, but go beyond what is rational. Yet the differences between stupidity or sheer cussedness and arbitrariness do not appear like a bright line on a spectrograph. They have to be defined in each case. No algorithm works. And this is a task courts cannot shirk.

Self-government does not simply imply autonomy. It also requires actors to govern themselves, that is, to act within the bounds of reason. As Cardozo pointed out, it is a matter of degree, not of clear rules.

Moreover, decisions in most cases depend on the review of a factual record. Where an administrative body has held a hearing, the Court will have to sift through the evidence at the hearing for indicia of unreasonableness. If a plaintiff challenges a rule or regulation, the Court will have to preside over the creation of the factual record, since questions of reasonableness, in both negligence and land use cases, cannot be resolved as a matter of law. Instead, the Court will have to listen to competing experts extol the virtues or excoriate the vices of the ordinance or rule under attack.[13] This circumstance underscores the entirely non-mechanical task undertaken by land use judges.

Further, courts cannot avoid decisions out of fear of error. Judge Cardozo expressed this clearly. "A judge," he wrote, "must balance all his ingredients, his philosophy, his logic, his history, his customs, his sense of right and all the rest, and adding a little here and taking out a little there, must determine, as wisely as he can, which weight shall tip the scales."[14] She or he must also confront unconscious prejudices, surfacing them and discounting them if possible.[15] And, in the final analysis, a judge has to take comfort in the fact that hopefully she or he is not wrong too often, and that errors can be corrected in the future, if a court's view of social advantage turns out to be wrong. That may be the final comfort a judge has; although his or her decision may work an injustice to a particular litigant, "the eccentricities of judges [do] balance one another," over time at least in state courts.[16]

I would close with a few examples that typify at least my approach. About five years ago, I had to decide whether a Muslim organization could locate a fairly substantial congregation in a small lot residential area. The congregation had already outgrown the house it was using and wanted to expand the building which was located on an oversized lot. The Zoning Board rejected the application on the ground that the proposed use was out of place in this area, and that the congregation was too large even for its proposed expanded facility, which would serve an entire county. Suit was then filed under state law. RLUIPA claims were raised but later dropped. The Court had to determine whether the evidence supported the denial. The record did contain a number of remarks that could be considered intolerant. What to do?

Enter the judicial hunch, or more properly, intuition, praised by Richard Posner, in How Judges Think,[17] and by other distinguished commentators, such as Walter Schaefer, former Chief Justice of Il-

linois.[18] At some point I visited the site, and the abstract evidence about the size of the lots in the area became a reality. There was reason to decide that the decision was not so out of bounds as to be arbitrary. It might have been wrong or inhospitable, but it passed muster consistent with the ideas of the presumption of validity. However, in writing the opinion, I was able to observe that a small congregation, such as that which already gathered on weekdays at the site, would involve different considerations. I believe that there one or two dozen people still in fact continue to use the site for prayer.

More recently, in reading the plaintiff's brief in another case, it became obvious that the challenges to the approval advanced by the plaintiff, an objector, related to a record plaintiff wished he had made, not the one which really before the board. I did not even need to read the defense brief in order to decide the case in my mind. At oral argument, I was able to read a decision from the bench based on my notes. But again, the decision, while relatively easy, did depend on a view of the public interest as channeled through the presumption of validity.

Finally, I have just completed an opinion in a case concerning a home occupation. The issues are whether the welding business being conducted on site is even a home occupation under the particular local ordinance. If so, did the Board act arbitrarily in granting specific variances to allow an extra employee on site beyond the two allowed, or permitting outside storage on 200 square feet of the 6.44-acre lot? The answer did not come immediately. Or even soon. Then one day, as I was driving to teach my class in Camden, the issue somehow resolved itself, the sun came out, and at least a tentative decision emerged. This was a kind of delayed judicial hunch. It came from a jelling of a balance between the interests of the neighbors in peace and quiet, the desire of the largely rural town to allow some local businesses, the fact that I had plenary authority to construe the ordinance, and my emerging view of the appropriate exercise of discretion to review the Board's determinations of the credibility of the witnesses whose testimony about the impact of the use on neighbors had sharply conflicted.[19]

So what is the lesson from these examples? First, we have to decide. Second, the grounds of decision in a land use case depend on policy considerations that do not lend themselves to precise definition. Third, my friend Ed Sullivan to the contrary notwithstanding, a judge must ultimately rely on a trained hunch or intuition about the line to be drawn between what is arbitrary and what is merely wrong. Decisions, as Posner and others have said before me, do not result from neatly ordered intra-cranial syllogisms. Self-evident truths are confined to the Declaration of Independence. The actual process of decision making is messy. But it should be. Our current land use jurisprudence with its emphasis on reasonable conduct in the public interest means that we judges will not soon be replaced by computers and logic machines. As Cardozo also said, the best judge is not the one with "the best card index of the cases."[20] Judging, particularly land use judging, is too human and interesting an endeavor in an ever-changing world of policy and public debate about the future of our communities.

III. JUDICIAL REVIEW OF LAND USE CASES—ANOTHER VIEW (by Hon. Timothy J. Sercombe, Oregon Court of Appeals)

I do not refute Judge Buchsbaum's thoughtful analysis of how a trial court reviews a local government land use decision when the standard of review is whether the decision is reasonable or not arbitrary or capricious. It may very well be the case that New Jersey courts look to custom or to considerations of "public advantage" or apply a "presumption of validity" in assessing the rationality of local zoning decisions or legislation. Given that review task, I could certainly understand Judge Buchsbaum's conclusions that "the grounds of decision in a land use case depend upon policy considerations that do not lend themselves to precise definition" and that "the actual process of decision making is messy."

Things are a bit tidier in Oregon. For the most part, our courts do not review local government land use decisions at all. Instead, those decisions—whether they involve the adoption of land use policy or the application of land use standards through a local adjudication—are reviewed by state agencies. *See*, *e.g.*, ORS 197.825 (jurisdiction of Oregon Land Use Board of Appeals (LUBA) to review local government land use decisions); ORS 197.626 (review authority of Land Conservation and Development Commission (LCDC) over certain urban growth boundary changes). Judicial review exists in my court, an intermediate appellate court, over whether the state agency properly exercised its own review functions. ORS 197.650 (judicial review of LCDC

orders); ORS 197.850 (judicial review of LUBA orders). That judicial review task is, in turn, regulated by statutes prescribing the standards of review by the court over an agency decision.

Not that land use cases do not pose peculiar issues of administrative law—more on that later—but neither the agency review of a local land use decision nor the indirect judicial review assesses whether the local decision was arbitrary or capricious. Rather, agency review is for whether the local decision maker correctly interpreted the applicable standards, made factual determinations that were supported by an adequate factual record, and followed the required procedures. *See* ORS 197.835 (scope of LUBA review over land use decisions). And, review of the agency evaluation in the Court of Appeals is largely for errors of law—whether the agency properly interpreted and applied the governing policies.

Before detailing the differences between judicial review of state agency land use decisions and review of other agency decisions under the state administrative procedures act, a brief tutorial on Oregon land use law is necessary. In 1973, legislation was adopted that imposed state controls on land use decision making. Or Laws 1973, ch 80 (Senate Bill 100). Each city and county is required to adopt a comprehensive land use plan that includes textual policies and a land use map. ORS 197.175. The local plan must implement statewide planning goals that are adopted by a state planning agency, LCDC. ORS 197.175; ORS 197.250. LCDC, in turn, approves an adopted plan if it determines that the plan sufficiently implements the statewide planning goals. ORS 197.251. There are 19 statewide planning goals that set out policies for citizen participation, protection of resource lands, public facilities and services, transportation, urban growth boundaries, and other matters. The local zoning and development code and most permitting decisions must be consistent with the approved comprehensive plan. ORS 197.175.

Most local and state land use decisions (whether legislative or adjudicative in character) can be appealed to LUBA, which almost always determines those appeals on the record. Its standards of review are for legal and prejudicial procedural error and sufficiency of the record to support factual findings by the governmental entity. ORS 197.835. A LUBA proceeding is very much like an appellate judicial proceeding. Errors are assigned and briefed. Oral argument is before a three-person panel of experienced land use referees, who are lawyers. The final LUBA order and opinion makes determinations on the assignments of error.

Some land use decisions involving amendments to land use regulations or comprehensive plans (e.g., larger urban growth boundary changes and designation of urban or rural reserve areas) are automatically reviewed by LCDC. ORS 197.626. There too, LCDC will often determine whether the local government action is sufficiently supported by findings that address the relevant standards and are supported by substantial evidence in the local government record.

Judicial review of a LUBA or LCDC order is, for the most part, for errors of law; i.e., whether the agency correctly interpreted and applied the relevant decisional standards. We give limited examination to sufficiency of record determinations. The decisional processes before each agency are well laid out and thorough, so that judicial review for procedural error is rare. Nonetheless, the extraordinary amount of land use policies in Oregon (in state statutes, LCDC goals and regulations, local comprehensive plans, and local zoning ordinances) that are construed and applied by LCDC and LUBA, particularly in review of local legislative actions, makes administrative and then judicial review complex.

In my state, local zoning decisions are not ad hoc and are justified under specific standards in the local development code, including whether the decision is consistent with the comprehensive plan policies and map. Most permitting decisions are made formally with adopted findings following a noticed public hearing. State statutes set out the land use hearing procedures for local quasi-judicial hearings. ORS 197.763. Some land use decisions (preliminary partition and subdivision approval, site review, and design review) can be made by an administrative officer following a notice and comment procedure with a right to appeal and have an evidentiary hearing before a reviewing officer or body. ORS 197.195. Even legislative decisions (e.g., adoption or amendment of zoning code, textual or major map amendments to the comprehensive plan, and urban growth boundary changes) are required to be made after a noticed public hearing, based upon an evidentiary record, and justified in writing under the relevant statutes and LCDC goals and administrative rules. *See* ORS 197.160; OAR 660-015-0000(1) (LCDC Goal 1); OAR 660-015-0000(2) (LCDC Goal 2).

All of this creates a different dynamic than the messy procedures and imprecise standards described by Judge Buchsbaum. The judicial task in the Or-

egon planning system is not one of discerning the appropriate standards by which to assess the legal sufficiency of a land use decision; rather, it is to interpret and reconcile adopted standards and determine whether those standards were properly applied. The standards by which a land use decision is reviewed by the administrative agencies and the courts do not allow assessment of whether the decision is arbitrary or unreasonable. Oregon courts give short shrift to demands for a more searching review of land use decisions than that allowed by statute, particularly under the guise of substantive due process. See, e.g., *Powell v. DLCD*, 238 Or. App. 678, 682, 243 P.3d 798 (2010) (rejecting the plaintiff's contention that retroactive application of statute violated her right to substantive due process under the Due Process Clause of the Fourteenth Amendment).

So what, then, are the challenges for judges in deciding land use cases in Oregon? First, we don't have much time to make a decision. The rules encourage citizen participation at the local hearing level, and then allow standing to any participant to obtain agency and then judicial review. In exchange for greater opportunities to contest a decision at all three levels by this rather loose-standing requirement, state law requires prompt local decision making, agency review, and judicial review. A local government land use decision must generally be made within 120 days of the completed application. ORS 215.427; ORS 227.178. A LUBA decision must issue within 77 days of the transmittal to it of the local government record. ORS 197.830(14). A Court of Appeals decision should be made within 91 days after oral argument. ORS 197.855. Those deadlines can be extended for good cause.[21]

Second, traditional rules of judicial deference are out the window. In most states, courts defer or exercise a less searching oversight to legislative decisions, as compared with adjudications, of a local government. As we know, any decisional process required by the Due Process Clause will differ, depending upon the classification of the decision as legislative or adjudicative in character—a process choice driven by the degree of the necessary justification for the decision. Compare *Londoner v. Denver*, 210 U.S. 373 (1908), *with Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915). In Oregon, *both* quasi-judicial and legislative land use decisions require an adequate supporting record, a noticed hearing with rights of participation, and a formal written justification based on standards set out in or derived from state law. Because the range of permissible legislative decisions is constrained by the requirement of evidentiary support for compliance with decision making standards, there is not as much judicial deference to land use legislative choices in Oregon as there might be in states that employ mere rationality review. Again, examples of state regulated legislative decisions include the adoption or amendment of a comprehensive plan, the setting or significant expansion of an urban growth boundary, needed housing policies, parks master plans, and transportation plans.

Courts also defer to an agency's interpretation of its delegated authority to implement general legislation. See *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (concluding that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"); *Springfield Education Assn. v. School Dist.*, 290 Or. 217, 223-30, 621 P.2d 547 (1980) (deference to agency interpretation of "delegative" statutory terms that "express non-completed legislation in which the agency is given delegated authority to complete"). Even though cities and counties are delegated statutory authority to implement statutes and LCDC goals and rules through the adoption and implementation of comprehensive plans, no judicial deference is given to a locality's exercise of that delegated authority. That is because the state delegation is quite specific as to the content and justification for the comprehensive plan.[22]

There is a second area of judicial deference that is affected by the top-down planning system in Oregon. Deference—again meaning a lesser judicial scrutiny of an agency decision—is often given to an agency's or a local government's interpretation of its own rules or ordinances. After all, the governmental entity is the one that promulgated the policy; its determination of its own legislative intent is to be preferred. But when a local ordinance implements specific state policies, the meaning of the state statutory or regulatory standard drives the manner in which the ordinance is construed. Thus, ORS 197.829 instructs LUBA to affirm a local government's interpretation of its own comprehensive plan or land use regulations so long as that interpretation is consistent with the text or purpose of the local ordinance and with the underlying state policy, statute, goal, or rule that the ordinance implements. These same principles would narrow a court's deference to a local gov-

ernment's interpretation of its own ordinance. Thus, the structure of the Oregon planning program (state regulation of the process and standards for making legislative land use decisions) affects and narrows the deference that would normally be given by courts to a local government's adoption or interpretation of its land use ordinances.[23]

To recap, judicial review in Oregon is not really direct review of a local government land use action, but instead is review of an agency decision that has assessed the factual and legal sufficiency of the local government action.[24] By and large, judicial review of the agency action is for substantive correctness—whether the agency correctly interpreted and applied the applicable law. Neither the agency nor the court necessarily defer to a local government's choice about the necessary content of its land use policies or the meaning of those policies. State statutory law—and not judge-made constitutional law—details the procedures used to make land use decisions of whatever stripe. State statutes set out the standards of review by which state agencies and the courts assess the legal sufficiency of a local land use decision.

As noted above, this is all quite tidy. One would suppose that Oregon appellate judges have it pretty easy, even if we have to hurry a decision quicker than we'd like. The interpretation of statutes and rules, after all, is what we largely do for a living. It goes without saying that having to grade the agency's paper is less time-consumptive than wallowing around in the local government record.

However, what makes the judicial review process challenging is its complexity, arising from the sheer amount of land use policies that apply to local government land use decisions, particularly legislative decisions to adopt changes to the comprehensive plan or an urban growth boundary. Those state policies—state statutes, LCDC statewide planning goals, and LCDC rules—have accumulated over the nearly 40-year life of the Oregon planning program. They have been the subject of published agency and judicial opinions over the same time period. The policies have been amended and supplemented in nearly every legislative session since 1973. And, the policies are often not internally consistent with each other or clear in their application. Thus, the exercise of statutory construction is more cumbersome because of the weight of statutory context and precedent.

Judicial review of land use decisions in Oregon, then, is not for the faint-hearted or those without an eye for detail. That review is susceptible to deductive reasoning and familiar methods of statutory construction (unlike the inductive approach described by Judge Buchsbaum). But in the end, however, I suspect that Oregon judges do hold in common with our colleagues from the east the characteristics of New Jersey judges described by Judge Buchsbaum—a commitment to deciding land use cases in a just and correct way combined with some bewilderment and trepidation about that decisional process. At least, that's my judicial hunch.

NOTES

1. 10 Harvard L. Rev. 457 (1897).
2. Lochner v. New York, 198 U.S. 45, 75, 25 S. Ct. 539, 49 L. Ed. 937 (1905).
3. Southern Pac. Co. v. Jensen, 244 U.S. 205, 221, 37 S. Ct. 524, 61 L. Ed. 1086 (1917).
4. Nature of the Judicial Process, 166-167, 178-179.
5. A whiff of this history is revealed even to this day by the captioning in some states of prerogative writ cases as *State ex rel. Jones,* where Jones is the plaintiff seeking justice from a local official in the name of the sovereign.
6. (Fifth Ed., 1956), at 250-251. The concise history is 742 pages.
7. Matter of Quinlan, 70 N.J. 10, 355 A.2d 647, 79 A.L.R.3d 205 (1976).
8. Compare DaPurificacao v. Zoning Bd. of Adjustment of Tp. of Union, 377 N.J. Super. 436, 873 A.2d 582 (App. Div. 2005) with Colts Run Civic Ass'n v. Colts Neck Tp. Zoning Bd. of Adjustment, 315 N.J. Super. 240, 717 A.2d 456 (Law Div. 1998). That the pigeon did not win an award as the A.B.A. land use animal of the year can only be ascribed to extreme anti-New Jersey prejudice.
9. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).
10. State v. Shack, 58 N.J. 297, 277 A.2d 369, 372 (1971). Also see, for example, PruneYard Shopping Center v. Robins, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980), upholding a state's right to prevent a private landowner from forbidding exercise of free speech on private property, and, more recently, Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010), upholding a state's title to sand areas it had added to a private beach.
11. Scalia, A Matter of Interpretation: Federal Courts and the Law (1997) at 12-13. However, Justice Scalia might set an outer limit to common law growth in property law cases. *Stop the Beach Renourishment,* supra n.10, 130 S.Ct. at 2601, ff. (Scalia, J., concurring).

12. Lionshead Lake, Inc. v. Wayne Tp., 10 N.J. 165, 89 A.2d 693, 697 (1952). There was a great deal of scholarly criticism of this opinion by Prof. Charles Haar and others. The opinion was curtailed by the *Mt. Laurel* cases and all but overruled in Home Builders League of South Jersey, Inc. v. Berlin Tp., 81 N.J. 127, 405 A.2d 381 (1979).
13. See, for example, Jennings v. Borough of Highlands, 418 N.J. Super. 405, 13 A.3d 911 (App. Div. 2011), holding that a claim of spot zoning presents issues of reasonableness that must be resolved by a trial.
14. Nature of the Judicial Process, at 162.
15. Judge Jerome Frank, a famous scholar, even suggested that judges submit to psychoanalysis; this suggestion has not been warmly greeted. Compare Frank, Courts on Trial: Myth and Reality in American Justice (1949) at 250, with Posner, How Judges Think (2008) at 112.
16. Nature of the Judicial Process, at 177.
17. (2008) at 113-115.
18. Schaefer, Precedent and Policy, Judicial Decisions and Decision Making, 34 U. Chi. L.Rev. 3 (1966).
19. The hectic rhetoric of one of the parties did not change the decision but did prove to be an unnecessary distraction. In general, name calling is not persuasive.
20. Nature of the Judicial Process, at 21.
21. Another tradeoff for greater citizen participation opportunities is strong preservation of error policies to make administrative and judicial review more narrow and efficient. A participant is required to raise an issue before the local government in order to preserve that issue for review by LUBA. ORS 197.763(1); ORS 197.835(3). Under our own preservation rules (Oregon Rule of Appellate Procedure 5.45), we require strict preservation of error before LUBA in order to be cognizable on judicial review.
22. Analogously, in Oregon, a reviewing court will uphold the validity of an agency rule based upon its facial legality and not the accuracy of the information or evidence relied upon by the agency in adopting the rule. ORS 183.400(4); Wolf v. Oregon Lottery Commission, 344 Or. 345, 182 P.3d 180 (2008). As noted above, this deference to agency policymaking does not extend to local government land use ordinances.
23. Conversely, when the local ordinance being construed does not implement state law, then the local government's "plausible" interpretation will be respected. Siporen v. City of Medford, 349 Or. 247, 259, 243 P.3d 776 (2010).
24. Trial courts retain jurisdiction to grant injunctive and mandamus relief with respect to the enforcement of land use regulations. ORS 197.825(3).

OF RELATED INTEREST

Discussion of matters related to the subject of the above article can be found in:

American Law of Zoning §§42:1 et seq., 43:1 et seq., 44:1 et seq., 45:1 et seq.

Rathkopf's The Law of Zoning and Planning §§55:1 et seq., 56:1 et seq., 62:1 et seq., 64:1 et seq.

Zoning and Planning Deskbook §§7:1 et seq.

RECENT CASES

U.S. Supreme Court holds that local legislator had no First Amendment right to vote on proposed development of hotel/casino project, where state ethics statute required recusal due to his relationship with developer

Michael Carrigan was an elected member of the Sparks City Council. Carrigan's friend Carlos Vasquez had served as campaign manager for each of his election campaigns. Vasquez also worked as a consultant for the Red Hawk Land Company. In that role, Vasquez advised Red Hawk on matters pertaining to the development of a hotel/casino project called the Lazy 8.

Red Hawk submitted an application to the City of Sparks regarding the Lazy 8 project. Before casting his vote on the application, Carrigan stated on the record that Vasquez was his friend and campaign manager. The Nevada Commission on Ethics subsequently censured Carrigan, stating that he violated a state ethics law by failing to abstain from voting in light of his relationship with Vasquez.

Carrigan sought judicial review in Nevada district court, which upheld the Commission's action. On appeal, however, the Nevada Supreme Court reversed, holding that Carrigan's vote on the application was protected speech under the First Amendment.

On certiorari, the U.S. Supreme Court reversed and remanded. The Court noted that early congressional enactments provide weighty evidence of the Constitution's meaning, and that federal legislative recusal rules were adopted by both the U.S. Senate and the House of Representatives within 15 years of the founding of the nation. The notion that recusal

rules violate legislators' First Amendment rights is also inconsistent with longstanding traditions in the States, which have widely adopted statutes or common-law rules regarding conflict of interests.

The Court went on to explain that a legislator's vote is the use of his share of the legislature's power. The power represented by the vote is not personal to the legislator but belongs to the people; the legislator has no personal right to it. The Court rejected the contention that a vote is First Amendment speech because it can be used to express deeply held views. The act of voting, said the Court, discloses that a legislator supports or rejects adoption of a proposal, but is not an act of communication. Even if the nonsymbolic act of voting is the product of a deeply held personal belief, and the actor would like it to convey that belief, that does not transform the action into First Amendment speech. And even if it were true that the vote itself could express the legislator's views, "the argument would still miss the mark," inasmuch as the First Amendment confers no right to use governmental mechanics to convey a message. *Nevada Com'n on Ethics v. Carrigan*, 2011 WL 2297793 (U.S. 2011).

Tenth Circuit holds that owner had no vested property right in its development proposal.

Jordan-Arapahoe, LLP and the Jacob Mazin Company, Inc. owned land in Arapahoe County, Colorado which they wanted to develop for use as a car dealership and then sell. Although the County had previously approved a preliminary development plan (PDP) under which the property had been rezoned in a way that would have allowed the dealership, the Board of County Commissioners, when it learned of the owners' development plans, again rezoned the property to make the development impossible. The owners sued under 42 U.S.C.A. § 1983, claiming that the rezoning deprived them of a protected property interest under the Fourteenth Amendment. The district court dismissed the case.

On appeal, the U.S. Court of Appeals for the Tenth Circuit affirmed. The owners argued that they had a vested property right under the state's Vested Property Rights Act, which, according to the owners, prevented the County from changing the zoning of their property once the County had approved the PDP. The court disagreed, noting that under the statute, it is only after a final development plan has been approved that a vested right exists. The court rejected the owners' contention that the County had no discretion to reject a final development plan that was consistent with a previously approved PDP; such discretion existed even if the final development plan was identical to the PDP.

The court then considered whether the owners had nonetheless acquired a vested property right under Colorado common law. The court noted that the owners had not obtained a building permit, which meant that they were "facing an uphill battle" in arguing that they had a common-law vested property right. Distinguishing the case of *Eason v. Board of County Com'rs of County of Boulder*, 70 P.3d 600 (Colo. App. 2003), the court ruled that mere reliance on a zoning classification is insufficient to confer a common-law vested property right under Colorado law; there must also be some affirmative act or representation by the government as to the permissibility of the intended use. The County's approval of the PDP could not qualify as such an affirmative act or representation, because it was insufficient to confer a vested right under the Vested Property Rights Act. *Jordan-Arapahoe, LLP v. Board of County Com'rs of County of Arapahoe, Colo.*, 633 F.3d 1022 (10th Cir. 2011).

