PLANNING FOR NATURAL HAZARDS:
Legal Issues Guide

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CAUTION:

ANY LEGAL QUESTIONS REGARDING SPECIFIC SITUATIONS SHOULD BE REFERRED TO LEGAL COUNSEL.THIS GUIDE MAY NOT BE RELIED UPON, CITED, OR OTHERWISE REFERENCED AS LEGAL ADVICE OR AS A LEGAL OPINION OF THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT OR OF THE STATE OF OREGON.

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Toledo Landslide

Photo: *Department of Land Conservation and Development*

Section 1: Introduction

The need for responsible planning to direct the orderly growth of our communities is not a new concept. "Local municipal governments since the 1920s have been the front line of public response to private land use initiatives."[1] As a result, local governments have frequently had their power to regulate such growth challenged in, and largely upheld by, the courts. However, as Oregon's population - and the pressure to develop in hazardous areas - continues to grow, planners and local officials will be expected to enact land use programs that are technically and legally sound. This guide describes current state requirements for natural hazards planning in Oregon. This guide also discusses several issues that local governments may face when adopting and enforcing natural hazards regulations.

1.1 How to Use this Guide

The information in this guide is presented primarily in a question and answer format. The questions have been reviewed by local planning officials, land use attorneys, and natural hazards experts from several state agencies. This document is designed to provide general guidance for addressing natural hazards policies, rather than resolving site specific issues.

Tip Box

Local Government's Power to Zone Land

The authority of local governments to regulate development through zoning was first upheld by the United States Supreme Court and the Oregon Supreme Court, nearly 75 years ago.[1] Prior and subsequent decisions by the Court have affirmed the authority of local governments to declare, regulate, and restrict nuisances,[2] and this authority has been expanded by the Oregon Legislature over time. The foundation of the current statewide land-use planning system in Oregon was established in 1973 with the enactment of Senate Bill 100.

1. Euclid v. Ambler Realty Company, 272 U.S. 365, 385 (1926); Kroner v. City of Portland, 116 Or 141 (1925).

2. Hadacheck v. Sebastian, 239 U.S. 394 (1915); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

Tip Box

Legal Authorities on the Web

Oregon Land Use Statutes:
http://www.lcd.state.or.us/backinfo/statutes.htm

Statewide Planning Goals:
http:/ww.lcd.state.or.us/backinfo/goals.htm

DLCD Administrative Rules:
http://www.lcd.state.or.us/backinfo/oars.htm

Land Use Board of Appeals (LUBA) Decisions:
http:// luba.state.or.us

Federal Statutes:
http://memory.loc.gov/glin/uscode.html

Federal Regulations:
http://lcweb2.loc.gov/glin/usexec.html

U.S. Supreme Court Opinions:
http://memory.loc.gov/glin/uscourt.html

Section 2:
Legal Issues and Requirements for Comprehensive Planning

Tip Box

Oregon Legal Authorities

ORS (Oregon Revised Statutes) refers to state laws enacted by either the legislature or the voters (through ballot measures). These laws are binding on citizens, local governments and state agencies in Oregon.

OAR (Oregon Administrative Rules) refers to regulations adopted by state agencies following a process set forth by the Oregon Administrative Procedures Act. These regulations must be authorized by and consistent with state law, and are binding on citizens, local governments and state agencies in Oregon.

2.1 What are the Basic Legal Requirements in Oregon for Addressing Natural Hazards through Comprehensive Land Use Plans?

Oregon Revised Statutes (ORS) Chapters 197, 215 and 227, and the Statewide Planning Goals require counties and cities to develop, and administer and (most) to periodically update:

(1) Comprehensive Plans and
(2) Land Use Regulations.[2]

Local comprehensive plans must comply with the statewide planning goals.[3] Likewise, land use regulations (e.g., zoning and subdivision ordinances) must comply with the statewide goals and be consistent with and adequate to carryout the local comprehensive plan. Therefore, when adopting comprehensive plans and land use regulations, local governments are required to:

(1) Address each applicable statewide planning goal;
(2) Adopt a comprehensive plan which:
  (a) Operates within the authority delegated to local government by state law;
  (b) Meets specific statutory requirements; and
  (c) Contains plan policies that satisfy the statewide planning goals and act as the basis for implementing local ordinances; and
(3) Adopt land use regulations to implement the comprehensive plan.

A local government may request that the LCDC review and acknowledge that its comprehensive plan and land use regulations comply with the goals.[4] When a local government has its comprehensive plan and land use regulations acknowledged by the LCDC, its land use decisions are generally governed only by that plan and those regulations.[5]

2.1.1 Statewide Planning Goals:

There are 19 statewide planning goals which have been adopted by the LCDC pursuant to ORS Chapters 195, 196 and 197. Each goal is comprised of two sections:

(1) "Goals" which refers to "mandatory statewide planning standards,"[6] and
(2) "Guidelines" which are "suggested approaches designed to aid cities and counties in preparation, adoption and implementation of comprehensive plans in compliance with the goals...."[7]

While the "goals" section is mandatory and must be followed when adopting or amending local comprehensive plans, the "guidelines" section is advisory only.[8]

In the context of natural hazards, Statewide Planning Goals 2 and 7 impose several broad requirements on local governments. These statewide planning goals establish an obligation for all local governments to:

(1) Develop inventories of hazardous areas for inclusion in the comprehensive plan;
(2) Adopt policies which prohibit development "in known areas of natural disasters and hazards without appropriate safeguards;"[9]
(3) Enact land use regulations based on those inventories and comprehensive plan policies to protect life and property from losses associated with development in hazard areas; and,
(4) Update inventories, policies, and land use regulations on a periodic basis to reflect new information, new laws and goal requirements, and changing circumstances in the community.

In addition, Goals 17 and 18 establish additional authority and requirements for coastal communities.

Statewide Planning Goals with Requirements Relating to Natural Hazards

Goal 2: *For All Cities and Counties*	• City and county land use plans shall include "inventories and other factual information for each applicable statewide planning goal ... " • "All land-use plans and implementation ordinances ... shall be reviewed and, as needed, revised on a periodic cycle to take into account changing public policies and circumstances, in accord with a schedule set forth in the plan."
Goal 7: *For All Cities and Counties*	• "Developments subject to damage or that could result in loss of life shall not be planned nor located in known areas of natural disasters and hazards without appropriate safeguards." • "Plans shall be based on an inventory of known areas of natural disaster and hazards ... " • Areas of natural disasters and hazards are those areas that are subject to natural events known to result in death or endanger the works of man, such as flooding, landslides, earthquakes, and other hazards unique to local or regional areas.
Goal 17: *For Coastal Cities and Counties Only*	• Requires local governments to develop programs to "reduce the hazard to human life and property ... resulting from the use and enjoyment of Oregon's coastal shorelands." • Requires that "[l]and use plans, implementing actions and permit reviews shall include consideration of ... the geologic and hydrologic hazards associated with coastal shorelands." • Requires that "[i]nventories shall be conducted to provide information necessary for ... designating uses and policies. These inventories shall provide information on the nature, location, and extent of geologic and hydrologic hazards ... in sufficient detail to establish a sound basis for land and water use management."
Goal 18: *For Coastal Cities and Counties Only*	• Requires local governments to "reduce the hazard to human life and property from natural or man-induced actions associated with [coastal beach and dune areas]." • Requires inventories to be conducted which "shall describe the stability, movement, [and] hazards ... of the beach and dune areas in sufficient detail to establish a sound basis for planning and management." • "Local governments ... shall base decisions on plans, ordinances and land use actions in beach and dune areas, other than older stabilized dunes, on specific findings that shall include at least: ... Hazards to life, public and private property ... which may be caused by the proposed use."

2.2 What Elements must be Addressed in the Comprehensive Plan?

In Oregon, a local government's comprehensive plan consists of three main elements:

(1) Inventories and Other Factual Information;
(2) Comprehensive Plan Policy and Use Designations; and
(3) Implementing Measures.

The statewide planning goals require local governments to address natural hazards for each of these elements. First, the goals require local governments to inventory hazard areas as a part of the factual base of their comprehensive plans. Second, local governments must develop policies and use designations consistent with the language of Goal 7 (and Goals 17 and 18 for coastal communities). Third, local governments must adopt land use regulations and/or other measures consistent with and adequate to carry out the plan policies and use designations.

For example, a local government may conduct an inventory of steep slope areas within its jurisdiction, where there are potential landslide hazard areas. Next, the local government may develop a policy which states that development on areas identified as posing a high risk for landslides shall be prohibited unless a geologic assessment of the site reveals that no hazardous condition exists or appropriate safeguards are identified to reduce the risk posed by the hazard. Finally, the local government must adopt land use regulations (e.g., zoning or subdivision regulations) or other measures to implement the policy to prohibit development in high hazard areas.

2.2.1 Inventories

Generally, state law does not restrict the sources of information a local government may rely upon when developing their comprehensive plan inventories. State agencies such as the Department of Geology and Mineral Industries (DOGAMI) and the Oregon Department of Forestry (ODF), as well as federal agencies such as the Federal Emergency Management Agency (FEMA), collect and map information on natural hazards. A local government may rely upon this information, locate other sources of information, or develop inventories based upon their own studies. However, when developing the comprehensive plan inventory, it is important that the local government have some rational basis for adopting and relying upon the information. The local government will also need to have a basis for selecting one type of information over another in situations of conflicting information.

It is important that the local government be as thorough as possible when developing a natural hazards inventory. The inventory serves as the supporting basis for the comprehensive plan policies and subsequent land use ordinances designed to evaluate development requests in hazardous areas. Inventories often provide the factual basis to support written findings for land use decisions.

TRG Key

The Three Levels of Hazard Assessment

Refer to the three Levels of Hazard Analysis in Chapter 2: Elements of a Comprehensive Plan. The three levels of hazard assessment are:

(1) Community Wide Hazard Identification
(2) Community Wide Vulnerability Assessment
(3) Risk Analysis

2.2.2 Plan Policies and Plan Designations

Goal 7 requires a plan's policies to declare that development will neither be planned nor located in known areas of natural disasters and hazards without appropriate safeguards. Beyond this minimum requirement, however, local governments should develop specific policies for each type of natural hazard identified in their inventories.

For example, the local government's policies on development in floodplains, landslide hazard zones, wildfire hazard zones, or other hazard areas should be distinguishable from each other, in order to reflect the unique risks associated with development in each area. The policies should also distinguish between the levels of risk associated with certain kinds of development (e.g., nursing home, low density housing, high density commercial, etc.), as well as the degrees of risk associated with each hazard type (e.g., slow moving landslide, rapidly moving landslide, 100-year flood, etc.). Well-drafted policies will avoid ambiguity and confusion, and serve as the basis for consistent application and enforcement of the local government's natural hazards implementing regulations.

The purpose of "use" or "plan" designations is to identify broad areas subject to the natural hazards and express the local government's long-term vision of development within those areas. The level of detail required for plan designations depends largely on whether the local government has a separate zoning map. If the local government uses one map as both its comprehensive plan map and zoning map, refer to the subsection on Implementing Measures. Where the local government has a separate and more detailed zoning map, the comprehensive plan map may broadly define the boundaries of hazardous areas, and need not identify the specific boundaries or parcels to be included in a zone.

Tip Box

Suggestions for Good Plan Policies

(1) Write short, declarative sentences.
(2) Use mandatory language (e.g., "will", "must", or "shall").
(3) Reflect state law and community values.
(4) Provide a clear basis for implementing measures.

2.2.3 Implementing Measures

A local government's natural hazards policies are usually implemented through its zoning ordinance and / or separate hazards ordinances. Either method is acceptable, so long as the ordinance properly identifies the property subject to the ordinance, and sets forth the appropriate standards and criteria for processing and reviewing development requests subject to the ordinance. Implementing measures for natural hazards should:

(1) Identify hazard areas subject to the natural hazard ordinance(s) on the zoning map;
(2) Contain a process for determining the degree of risk created by a specific development request on a specific parcel;
(3) Include a process for identifying the necessary appropriate safeguards (mitigation measures) prior to approving the development request; and
(4) Establish a process for making a final decision on the development request.

2.2.4 Zoning Map

Local governments' zoning maps often identify hazardous areas as overlay zones, subject to specific hazard ordinances. Overlay zones should be developed based on the inventory and comprehensive plan map sections of the local government's comprehensive plan. Identifying hazard areas through overlay zoning helps to:

(1) Eliminate any confusion created by the broadly defined boundaries on the comprehensive plan map;
(2) Ensure consistent administration of all hazards ordinances;
(3) Avoid the time and expense of re-interpreting the comprehensive plan map for each development request; and
(4) Provide clear information, to all current and prospective landowners, of the regulations which affect the use of the zoned parcel.

2.2.5 Site-Specific Risk Analysis

For projects located in identified hazard areas, local governments are encouraged to perform or require a risk analysis to address the Goal 7 prohibition against planning or locating a development in hazardous areas without appropriate safeguards. Risk analysis is used to determine:

(1) The nature and degree of hazard present; and
(2) The degree of risk to life and property posed by the development, if allowed in the hazard area.

In order to fully evaluate risk on a given site, a local ordinance should be designed to require that:

(1) An initial review of site conditions be conducted; and, if necessary,
(2) A comprehensive study of risks posed by development at the site be prepared.

The initial review step should determine if the proposed use for the site presents sufficient risks to warrant further study. To accomplish this, the local government may establish a risk threshold and a rating system based on site conditions, hazard maps, the type of proposed use, or other factors. Any rating system should contain clear and objective standards so that both the applicant(s) and the reviewing body know what information is required and what criteria will be used in reviewing the request. If the proposal exceeds the risk threshold, further review could be required. However, if the threshold is not reached, no further analysis would be necessary. If the threshold is exceeded, then the ordinance should establish the procedure for conducting a more detailed review of the site.

For landslides and other geologic hazards, the best method of determining the actual risks posed by development on a specific site is to conduct a geologic and/or geotechnical study of the conditions present at the site. A local government may require

the applicant to perform the study and submit findings as a part of the application. The ordinance should set forth the specific information which must be contained in the report. In addition, the ordinance should establish quality-control standards, such as a requirement that the study be conducted and the report prepared by a certified Engineering Geologist or Geotechnical Engineer. The ordinance may also establish a procedure for peer review of the report to ensure that all requirements are met, that procedures used and assumptions made are generally accepted, and that conclusions or recommendations are adequately supported and reasonable.

2.2.5 Identifying Appropriate Safeguards Under Goal 7

Appropriate safeguards are mitigation measures that reduce the level of risk associated with a proposed development in a hazard area. One or more safeguards may — and often should — be combined in order to reduce the level of risk to an acceptable level.

While some safeguards may apply in all situations (e.g., building codes), most safeguards will need to be specifically tailored to meet the unique conditions and hazards posed by each development request. For landslides and other geologic hazards, one of the best methods for determining appropriate safeguards is to base them on the results of a site-specific geologic or geotechnical study of the site. Therefore, a local government should require that any report based upon a study of the site contain a section identifying not only risks, but also recommended safeguards to reduce or eliminate those risks.

2.2.6 Clear and Objective Criteria

A local government's hazard ordinance should set forth the clear and objective criteria that will be used in approving or denying a development request.

Oregon Statutes

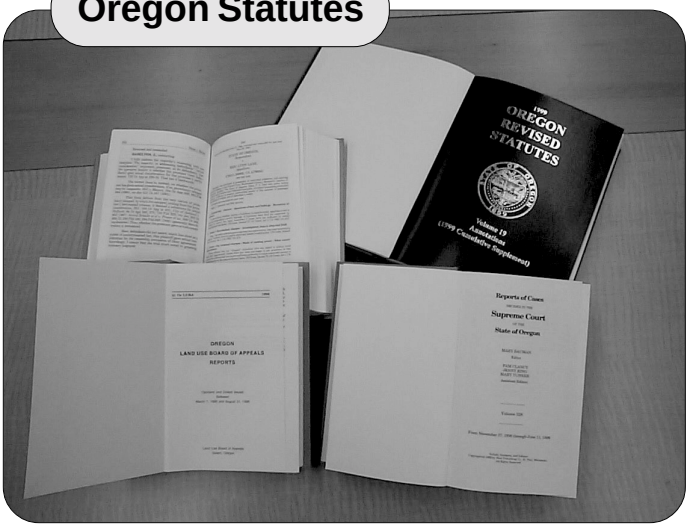


Photo: *André LeDuc*

2.3 When should a Local Government Amend its Comprehensive Plan?

Comprehensive plans must be "regularly reviewed, and, if necessary, amended to keep them consistent with the changing needs and desires of the public they are designed to serve."[10] New information that identifies "areas of natural disasters and hazards" should be incorporated into plans by amendment. If a local government fails to include new inventory data as a part of its acknowledged comprehensive plan, a court may find that this information is not usable during subsequent reviews.[11]

A local government may choose to amend its comprehensive plan for the purposes of incorporating new information in three ways:

(1) Periodic Review: A local government subject to periodic review may wait until it receives a Periodic Review notice from DLCD, whereupon the plan will be reviewed to determine its compliance with all of the statewide planning goals.[12]

(2) Internal Review Timeline: A local government may establish its own process to determine if the inventory information in its plan is the most current or reliable information available. Amendments would only occur if necessary to update old or unreliable information in the plan.

(3) As Needed: Unless precluded by local law, a local government may take the initiative at any time to seek information relating to hazards either by relying on standard sources or conducting its own survey of hazardous areas. This may be the preferred approach if the current comprehensive plan contains little or no inventory information on known hazard areas. Moreover, as state and federal agencies produce new information on hazards, local governments should review this information to determine the appropriateness of including it in the jurisdiction's comprehensive plan.

2.4 When does Ballot Measure 56 Require Notice to Property Owners of Land Use Changes?

In adopting natural hazards regulations, local governments should be aware that 1998's Ballot Measure 56 amended ORS Chapters 215 and 227 to require "written individual notice of land use change to be mailed to each owner whose property would have to be rezoned in order to comply with [an] amended or new comprehensive plan ... "[13] Property is considered "rezoned when the governing body ... : (a) changes the base zoning classification of the property; or (b) adopts or amends an ordinance in a manner that limits or prohibits land uses previously allowed in the affected zone."[14] Under limited circumstances, a local government may apply to DLCD for reimbursement of its costs of providing notice. Reimbursement of reasonable costs may be sought where the local government's rezoning effort is either: (1) initiated by a requirement of periodic review; or (2) by a new, or amendment to an existing, LCDC administrative rule or statute.

Section 3:
Permit Application, Review, and Related Decisions-Making Issues

Procedures for submitting, reviewing and approving permit applications are established by state law and a local government's zoning and planning ordinances.[15]

Oregon law requires that local government's land use decisions be supported by a written statement of findings.[16] These findings must contain:

(1) Criteria and standards used for the decision;
(2) Facts relied upon in reaching the decision; and
(3) Explanation of how the facts relate to the criteria and standards.[17]

Findings are required to:

(1) Ensure that decisions are reached in a fair, impartial, and proper manner;
(2) Provide all parties with notice of the basis for a decision; and
(3) Provide the Land Use Board of Appeals (LUBA) and appellate courts with an adequate basis for review.

By writing clear and complete findings, a local government will reduce the likelihood of having a decision overturned or remanded for additional hearings. Clear findings reduce the number of appeals taken from land use decisions by reducing misunderstandings regarding the reason and meaning of a local government's decision.

3.1 How does a Local Government Identify Standards and Criteria?

The first step in reviewing a permit application is to review the zoning map to determine the allowable uses for the area. If the zoning map contains overlay zones for hazard areas, this review will reveal whether or not special procedures must be followed for processing the permit. If the zoning ordinance is unclear or ambiguous, the comprehensive plan policies should be reviewed to ensure that the ordinance is interpreted in a manner consistent with the local government's comprehensive plan.

The standards and criteria for land use decisions related to natural hazards typically come from zoning or hazard ordinances. The criteria and standards set forth the requirements which must be met prior to permit approval. When writing the findings, each criterion should be stated and addressed individually in the findings.

For example, if a local government has established an overlay zone identifying an area as prone to landslides, the hazard ordinance may set forth a requirement that applicants provide the local government with a geologic or geotechnical report from a certified geologist or geotechnical engineer. The hazard ordinance may further require that this report clearly identify the presence or absence of a hazardous condition on the property and contain recommended methods for mitigating this hazardous condition. In the findings, each of these requirements should be clearly and separately addressed.

Sidebar

What is a LUBA?

The Land Use Board of Appeals (LUBA) was created by legislation in 1979 and has exclusive jurisdiction to review all governmental land use decisions, whether legislative or quasi-judicial in nature.[1] The Legislature stated: " ... it is the policy of the Legislative Assembly that time is of the essence in reaching final decisions in matters involving land use, and that those decisions be made consistently with sound principles governing judicial review."[1] LUBA was created to simplify the appeal process, speed resolution of land use disputes and provide consistent interpretation of state and local land use laws. The tribunal is the first of its kind in the United States. The Governor appoints the three-member board to serve four-year terms. The appointments are confirmed by the Oregon Senate. The members serving on the Board must be members of the Oregon State Bar.

1. ORS 197.810.

3.2 How should a Local Government Present its Findings of Fact?

For each relevant standard and criterion, the findings should contain specific findings of fact which state whether or not the requirements have been met.[18] Written findings of fact require more than a recitation of the evidence or reference to the record of a hearing or documents offered as evidence.[19] Findings of fact require that the decision maker identify the specific evidence used in making the decision. Each finding of fact must be supported by substantial evidence. Findings of fact must weigh the credibility of people giving testimony and any documents or other evidence received. Where there is conflicting evidence between documents, studies, or witnesses (lay or expert), the findings must explain the reason for the decision maker's acceptance of some evidence over other evidence.[20]

For example, a local government may receive testimony from a developer's expert who states that a parcel located in a landslide area will not be at risk from the effects of a landslide. The local government may also receive testimony from another witness which challenges the assertions made by the developer's expert, and offers contradicting evidence. The local government's findings of fact must state which of these witnesses the decision maker will rely upon, and why. In making this decision, the local government may rely upon facts such as the experience of the witnesses, whether the methods used complied with standards set forth by a state licensing board or professional association, or any other relevant facts.

3.3 What Form of Explanation is Required in the Findings?

The findings must clearly state the decision reached by the local government as well as an explanation for how the decision was reached. The explanation must be specific in describing how the facts support the final decision regarding whether or not the standards and criteria are met.[21] General statements of conclusion — such as: "The development plan meets our requirements for appropriate safeguards." — are not sufficient.[22]

Definition Box

What Qualifies as Substantial Evidence?

Substantial evidence is evidence a reasonable person would rely upon in the ordinary course of their serious affairs. In other words, the evidence must be credible. When evaluating the credibility of people testifying in person, a local government should first determine if the witness is an expert. When choosing among the conflicting testimony of more than one expert, a local government should look at the specific training or experience of each expert as well as the facts relied upon or methods used by the experts. When evaluating the credibility of documents, a local government should consider the source, the data relied upon or cited, the date (i.e., Is it current?), and whether the document is in its draft or final form.

Yeunger v. City of Portland, 305 Or 346 (1988); ORS 197.828; 197.835.

3.3.1 Multi-Stage Approval Processes

A local government may find that a multi-stage review process is appropriate for reviewing development permits in potential hazard areas. Such a process generally involves two stages:

(1) Stage One: Initial determination of whether the proposed project can meet all approval standards and criteria.
(2) Stage Two: The identification of precise means of meeting the standards and criteria.

LUBA has observed that this type of multi-stage review process addresses the following public policies:

(1) Avoidance of inordinate expenses at the preliminary plan stage, and
(2) Avoidance of the inordinate expenses "that would result where preliminary approval for a project is granted, but the project is later found to be unfeasible."[23]

During the stage one review, a local government must follow all statutory and local notice and hearing requirements for discretionary permits. If the local government finds that the project can meet all approval criteria (e.g., a requirement that development is feasible given the potential hazard conditions at the site), it may then "impose conditions of approval to assure those criteria are met and defer responsibility for assuring compliance with those conditions to planning and engineering staff as part of a second stage."[24]

If a local government defers its finding of compliance to a later proceeding, or leaves policy discretion regarding how conditions will be satisfied, notice and comment requirements must be followed at the second stage of review.[25] "[T]he issue to be decided to determine whether the compliance with relevant standards has been established or whether compliance with those standards has been deferred to a later stage is whether: '…substantial evidence supports findings that solutions to certain problems (for example landslide potential) posed by a project are possible, likely and reasonably certain to succeed."[26] This is a complex area of the law and persons should consult with counsel regarding any particular factual situation.

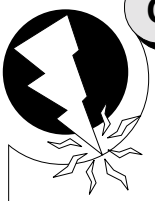
Definition Box

What is a Tort?

Legal liability in a civil case (as opposed to a criminal or regulatory case) generally arises from two broad areas of law. The first is contract liability which, as the name suggests, deals with the legal liabilities of parties (e.g., individuals, corporations, cities, counties, etc.) created by their own legally binding agreements (contracts). The second is tort liability, defined as "any breach of a legal duty resulting in damages, other than those duties created by contract ... whether that duty is imposed by the common law or by statute."[1] Generally speaking, tort law "imposes duties on persons to act in a manner that will not injure other persons."[2] In general, when we discuss the legal liability of cities and counties in the realm of land use planning, we are discussing tort liability generally, and negligence (unreasonable conduct) in particular.

1. Urban Renewal Agency of the City of Coos Bay v. Lackey, 275 Or. 35, 38 (1976).

2. Prosser, Wade and Schwartz's Torts: Cases and Materials. p.1.



CAUTION:

This section on legal liability makes the following assumptions:

(1) All references to local government refer to cities and counties as well as to the officers, employees and agents of cities and counties, unless otherwise stated. This assumption is made because local governmental liability is typically based on the tortious conduct of their employees when acting as governmental agents within the scope of their employment.[27]

(2) Any local government actions are constitutional, and do not otherwise directly violate any state or federal law. The scope of this section is limited to discussing financial liability under the Oregon Tort Claims Act. Any local government actions which are unconstitutional or violate state or federal law may be subject to separate legal action, such as a claim for just compensation for a takings, or an injunction against enforcement of an ordinance.

Section 4:
Legal and Financial Liability Issues

4.1 Local Government Actions: Discretionary or Ministerial?

The potential legal liability of a local government for a decision to enact an ordinance, or an action to enforce an ordinance, depends on whether the local government (through its officers, employees, or agents) is performing a discretionary or ministerial act. The words "discretionary" and "ministerial" have legal meanings quite distinct and different from their ordinary, everyday meanings. A government employee almost always exercises some discretion when acting or not taking action, but only those actions viewed as creating policy, rather than enforcing existing policy, are likely to be viewed as discretionary and therefore immune from liability.

The issue of whether a local government is performing a discretionary, and therefore an immune, act can be answered by asking two questions:

(1) Is the local government creating policy (immune) or merely enforcing policy (not immune)?
(2) Is the local government addressing the policy matter based on its own initiative (generally immune) or is it required by law to consider and / or address the policy matter (generally not immune)?

Generally speaking, if a local government is performing a discretionary act, any decision made or action taken is granted immunity from financial liability by the Oregon Tort Claims Act (OTCA).[28] If, instead, the local government is performing a ministerial act, it will not be immune from legal liability and may be held financially liable if it

does not act reasonably "so as to avoid creating a foreseeable risk of harm to others."[29] Simply because a local government's action is ministerial, and not immune from liability, does not mean that the local government will automatically be held liable. In order to be liable, a tort must be proven against the local government.

The following sub-sections address these issues and further delineate the line between discretionary and ministerial actions.

4.2 Is the Local Government Creating Policy or Enforcing Policy?

If a local government is acting to create a new policy, or amend an existing policy, its actions are presumed to be discretionary and immune from liability. In contrast, where the local government is taking action to enforce a standard or criterion, its actions are presumed to be ministerial, and thus not immune from potential liability.[30]

A hypothetical jurisdiction's flood hazard ordinance provides an example:

(1) If the local government is debating whether or not to require elevation higher than 1 foot above the 100-year flood plain, it has discretion to choose among several different policy options (e.g., 2 feet, 3 feet, 10 feet, etc.) which may include the choice to not take any action at all. This kind of decision-making process involves discretion, and the local government will be granted immunity if it chooses to require elevation to 3 feet.
(2) On the other hand, if the local government is enforcing an existing 3-foot standard, it will be acting pursuant to an already established set of rules, which must be enforced. This kind of action involves no discretion, and is viewed as ministerial. The issuance of a development permit with elevation only up to 2 feet, may be subject to legal liability.
(3) However, sometimes a regulation or ordinance allows for judgement, and, depending on the context, conduct under such a policy could be viewed as either discretionary, and therefore immune, or

Definition Box

What is Immunity?

Traditionally, all state and local governments have been protected from tort claims by the doctrine of sovereign immunity, which generally prevented private parties from raising claims against them in court. With the passage of the Oregon Tort Claims Act (OTCA) in 1967, Oregon law was modified to grant private parties the right to sue the state or a local government for torts, but only if the claim arises under the limited circumstances set forth by the law. If a private party sues the state or a local government on a matter that is not authorized by the OTCA, the governmental body will be immune from the claim, and the courts will dismiss the case.

Definition Box

What are the Requirements for a Negligence Claim?

In order to succeed on a negligence claim, the person suing (plaintiff) the city or county (defendant) must generally prove four things.

(1) DUTY: The plaintiff must prove that the defendant owed them a duty either under common law principles or by statute. When the defendant is a public body, the Oregon Tort Claims Act (ORS §§ 30.260 - 30.300) further requires the duty to be ministerial and not discretionary.
(2) BREACH: The plaintiff must prove that the defendant breached their duty either by unreasonably failing to perform some act, or by unreasonably performing the act in a way that causes a foreseeable injury to the plaintiff.
(3) CAUSATION: The plaintiff must prove that the breach of the defendant's duty caused (was a substanial factor in causing) their injury.
(4) DAMAGES: The plaintiff must prove that they suffered damages (typically to a person or property) from that injury.

ministerial and subject to a potential claim for negligence.

It is important to note that there is a wide middle ground between the first two positions. Certainly, policies and rules may be developed in a manner which grants discretion to the local government at the time of enforcement, such as selecting the proper location on a parcel for the siting of a structure where more than one suitable location may exist. Where such discretion exists, immunity may also exist.

If a local government is performing a ministerial action based on rules which it adopted through a discretionary act, it may not be held liable if the rules are properly followed.[31] For example, in our hypothetical situation:

(1) Immunity would attach to a ministerial action which properly imposed a 3-foot elevation requirement pursuant to the local flood ordinance, because any challenge would not be against the application of this requirement, but against the original policy decision establishing the requirement. Since the original policy decision was discretionary, immunity attaches to all future applications of that policy.
(2) On the other hand, since the enforcement of the 3-foot policy is ministerial, no immunity attaches if the local government fails to reasonably enforce the ordinance.

Tip Box

Local Government's Liability Limits

Under ORS §30.270, liability for any public body is generally limited to:

(1) $50,000 for each claim of property damage or destruction;
(2) $100,000 for each claim of general or special damages; and
(3) $500,000 for all claims arising from the same incident.

4.3 Is the Local Government Addressing the Policy Matter Based on its Own Initiative or is it Required by Law to Consider and/or Address the Policy Matter?

Where a local government is establishing a policy on its own initiative, its actions are presumptively discretionary; however, when it addresses the matter based on a statutory mandate, its actions are presumed ministerial.[32] Continuing with our hypothetical example from the previous sub-section:

(1) If a local government takes up the matter of whether to impose a 3-foot elevation requirement for structures in the floodplain (beyond the 1-foot requirement established by the National Flood Insurance Program), it is doing so on its own initiative. Since the local government had no previous obligation to consider elevation requirements beyond 1 foot, it could not be held liable if it failed to consider the 3-foot requirement. Likewise, any decision by the local government to set an elevation higher than 1 foot would be immune from liability, as stated in the previous section.
(2) On the other hand, if the local government is required to adopt and enforce a policy by state statute, it does not have discretion to decide not to consider the matter. If a local government fails to consider, adopt, or enforce the statutorily

mandated policy, it may be subject to liability for failing to perform its ministerial duty.

Again, a middle ground exists between these two positions. It may be possible for state statute to require the local government to consider a matter, while at the same time giving the local government discretion to choose the means by which to address the matter.[33] For example, Goal 7 currently requires local governments to develop inventories of known hazard areas and prohibits development in those areas without appropriate safeguards. Local governments must develop inventories and prohibit any development that fails to have appropriate safeguards. Failure to consider these issues could result in legal liability. Local governments, however, are given discretion in selecting the means by which they will conduct inventories, and discretion in selecting when and what safeguards are appropriate and should be required prior to development. Thus, a local government ordinarily may not be held liable for its choice of how to conduct an inventory or its selection of appropriate safeguards.

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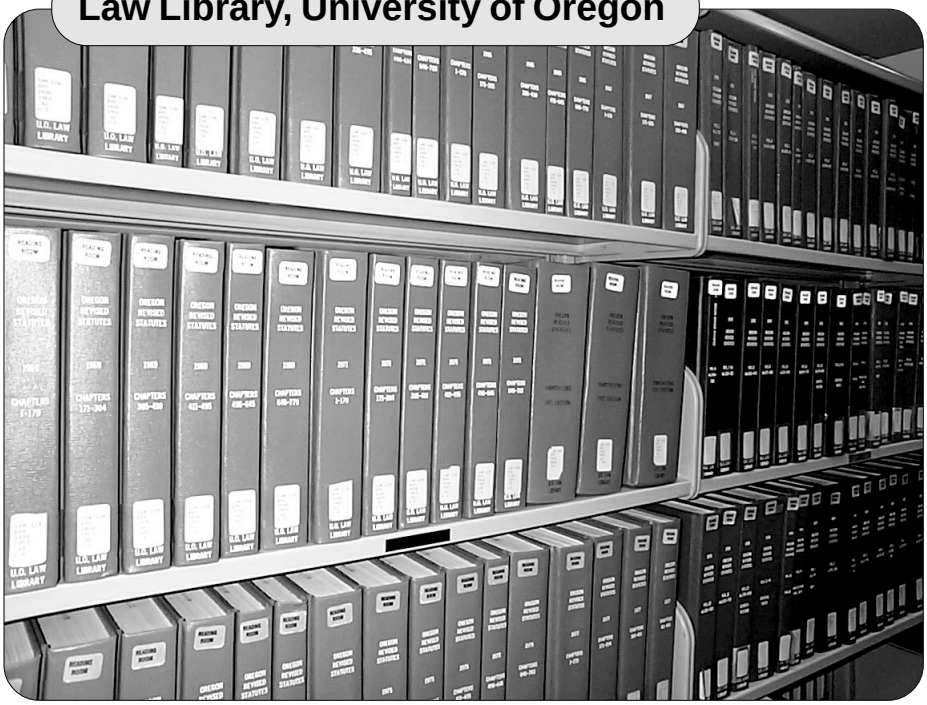

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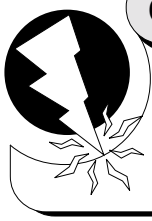

CAUTION:

This section provides a cursory review of takings law. Any questions regarding this subject should be referred to legal counsel.

Section 5: Constitutional Takings Issues

In drafting ordinances and reviewing development requests, local governments should consider whether such ordinances or decisions may trigger a requirement to pay the landowner compensation under the state and/or federal constitutions. The following section sets out the basic framework for identifying these issues.

5.1 What is a Taking?

The Fifth Amendment to the United States Constitution prohibits the taking of "private property ... for public use, without just compensation."[34] A parallel provision in the Oregon Constitution provides: "Private property shall not be taken for public use nor the particular services of any man be demanded, without just compensation ... "[35] (It is important to note that the action of taking private property for a public use is *not* a violation of the Constitution. Rather, it is the failure of government to provide *compensation* that results in a constitutional violation).

State and federal courts generally recognize three main categories of takings:

1. **Physical Taking**
   Traditionally, takings were thought of as an actual physical invasion of a landowner's property. In other words, a taking occurred if the government physically seized private property and converted it to some form of public use. Thus, a physical taking may occur when a local government initiates eminent domain proceedings to, in effect, seize private property for a public use (e.g., dams, roads, etc.).
2. **Regulatory Taking**
   The term regulatory taking is used to refer to a regulatory action "that goes too far,"[36] by restricting the use of private property. A regulatory taking is sometimes referred to as inverse condemnation. Unlike a physical taking of property through eminent domain and condemnation proceedings, regulatory takings occur as a result of the application of regulations to limit the use of property. A land use action that precludes all economically viable use of property would be considered a regulatory taking.

Definition Box

What is Eminent Domain?

Under the doctrine of eminent domain (a.k.a. condemnation), a local government may take possession of private property, either temporarily or permanently, for any legitimate public purpose. Neither the Oregon nor the U.S. Constitution prohibit the state or a local government from exercising its power of eminent domain over private property. However, both the state and federal constitution generally require that the private property owner be paid "just compensation" which is defined as the fair market value of the property at the time it was condemned.

3. Exaction Taking

An exaction taking is a hybrid of both physical and regulatory takings. Like a physical taking, an exaction taking occurs when the government acquires physical title to the property. However, like a regulatory taking, an exaction taking typically occurs as the result of applying regulations to a specific parcel of property. In the context of land use decisions, an exaction may occur when a local government requires the public dedication of a portion of private property in exchange for permission to develop or re-zone the property (e.g., if parcel is developed, x feet must be dedicated to public right of way for roads, sewers, bicycle path, etc.) and there is not a "rough proportionality" between the effects of the use and the required dedication.

5.2 When does a Regulatory Taking Occur?

There are two tests for determining whether a regulatory taking has occurred:

1. Does the regulation result in a "per se" taking?
2. If not, does the regulation fail a balancing test?

5.2.1 Per Se Regulatory Taking

The United States Supreme Court has held that a "per se" regulatory taking may occur in only a few situations. The most relevant situation for natural hazards planning is where a local government's regulation denies a property owner all economically viable use of their property. In order for a regulation to deny a property owner all economically viable use, a judge or jury must find that "the government has deprived a landowner of all economically beneficial uses [of the property]."[37]

Such was the case in Lucas, where the state trial court found that the South Carolina Beachfront Management Act affected a taking of Lucas' two beachfront lots and awarded him $1.2 million as just compensation. The Beachfront Management Act had been developed in part to manage the beach and dune system of South Carolina's barrier islands as "(a) a barrier and buffer from high tides, storm surge, hurricanes, and normal erosion; (b) a public area which serves as a major source of state and local revenue; (c) habitat for indigenous flora and fauna; (d) a place which harbors natural beauty."[38] The Act sought to achieve these objectives by drawing a line in the sand, seaward of which no permanent structures could be developed. Both of Lucas' lots were located seaward of the line, and as a result the trial court found that Lucas was left with no economically viable uses for these lots. The United States Supreme Court relied on the state trial court's finding, and held that in this situation, where all economically viable use has been prohibited, a taking will be found. The Court also noted that such a finding would be rare, and several of the justices questioned the trial court's conclusion that Lucas had been denied all economically viable use. Finally, even a regulation that denies all economically viable use may not result in a taking if the use was already prohibited at the time the owner acquired the property.

CAUTION:

When in Doubt Seek Legal Counsel

Given the uncertain nature of the law in this area, and the sometimes conflicting positions of state and federal courts, local governments are advised to consult with legal counsel to resolve actual questions involving specific situations.

5.2.2 Balancing Test

Where some economic use of the property remains after application of the regulation, a court will apply a balancing test to determine whether a taking has occurred. The factors of this test are:

(a) The economic impact of the regulation on the claimant,
(b) The character of the governmental action, and
(c) The reasonable expectations of the property owner.[39]

5.3 When does an Exaction Taking Occur?

The United States Supreme Court has held that, under limited circumstances, a government requirement to dedicate property rights to the public may not result in a taking where the action is linked to the expected effects of the proposed development. Underlying the Court's holding is the philosophy that local governments have the right to limit certain uses of private property, and that certain permit conditions, may be necessary to limit or avoid specific public harms threatened by the proposed use. The Court has set forth the following three part test to determine whether an exaction results in a taking:

(a) Does the exaction substantially advance a legitimate public purpose?
(b) Is there an essential nexus between that purpose and the harm threatened by the proposed use?
(c) Is the exaction roughly proportional to the degree of threatened harm?

Nearly all proposed government purpose will be found legitimate, and the United States Supreme Court has found that "a broad range of governmental purposes and regulations satisfies [the public purpose] requirements."[40] More important under this analysis, is whether the public purpose is legitimate in the context of the local government's authority to limit the proposed land use. In other words, is there a nexus between the government's purpose in requiring the exaction (often by a condition requiring a public dedication) and the public harm threatened by the proposed development? If such a nexus exists, the next inquiry is whether the exaction is roughly proportional to the public harm threatened by the proposed development. This means that the exaction must be "related both in nature and extent to the impact of the proposed development."[41]

Definition Box

What Qualifies as a Legitimate Public Purpose?

The 10th Amendment to the United States Constitution reserves to the states the police power, which allows them to take actions for any legitimate public purpose. In the context of constitutional takings law, the term "legitimate public purpose" refers to any governmental purpose that promotes the health, safety, or welfare of the public. Local governments are given considerable discretion in defining actions as being for a legitimate public purpose. The following list provides just a few examples of local government policies that promote the public's health, safety and welfare:

(1) Restrict development in hazardous areas.
(2) Require elevation above the 100-year flood plain.
(3) Require site-specific geologic or geotechnical surveys in landslide hazard areas.
(4) Prohibit the siting of critical facilities in tsunami or earthquake liquefaction zones.

5.4 What Options does a Local Government have if a Decision will Result in a Regulatory Takings?

The United States Supreme Court has noted two circumstances where a governmental action will not result in a taking, even a "per se" taking. The first is where the proposed use of the property would result in either a private or public nuisance. The second situation is where the proposed use was never allowed on the property to begin with. However, both of these areas of law are still being debated by attorneys and worked out by the courts. Given the uncertain nature of the law, and the sometimes conflicting positions of state and federal courts, local governments are advised to consult with legal counsel to resolve questions regarding regulatory takings.

If a local government discovers that its actions may result in a regulatory taking, it has several different options depending on what stage the development request is at:

(1) If the local government has not yet made a final decision on the proposal, it may choose to grant the property owner a variance or modify the development conditions.
(2) The local government could provide the property owner with a list of suggested economically viable uses which might be pursued as alternatives to the use proposed.
(3) If a final decision has been made, and a takings is found by a court, the local government may modify its decision to allow for some economically viable use, while only providing compensation for a temporary taking based on the length of time that the use was denied.
(4) If the local government chooses to maintain the policy that denied the use, it may condemn the property and pay the property owner the fair market value of the property at the time the taking occurred.

These options are by no means the only options available to a local government in this situation, and local counsel should be consulted if any questions arise before or after a decision is made.

Section 6:
Alternative Dispute Resolution (ADR)

6.1 What is Alternative Dispute Resolution?

Local governments often face opposition from members of the public and developers when they make land use and development decisions, whether at the policy or implementation level. For example, disputes may arise when citizens take an active role in opposing new development proposals in their neighborhood. In addition, disputes may be triggered by a local government's decision to restrict development in hazardous areas. These disputes have the ability to strain local government resources and may place local government decisions under a cloud of threatened litigation. One of the best strategies for resolving disputes, as well as avoiding the costs and uncertainties of litigation, is to develop an Alternative Dispute Resolution (ADR) Program for dealing with disputes.

ADR refers to the use of non-litigation strategies for resolving disputes between parties. The primary goal of ADR is to assist parties in finding mutually acceptable solutions to their disputes through collaborative decision making processes. Local governments may find many useful applications for an ADR Program, several of which may involve natural hazards planning and regulation. Common ADR strategies in the public policy arena include mediation, negotiated rulemaking, facilitation, and consensus building. The common thread between these approaches is the use of an impartial, third party who can facilitate discussions between the disputants, and help them find common ground and craft their own solution.

6.2 What ADR Resources Exist for Local Governments?

An excellent resource for ADR information and assistance is Oregon's Public Policy Dispute Resolution Program. The program can provide the following useful services for local governments:

- Assistance in identifying the most appropriate resolution process for dealing with a specific dispute;
- Critical analysis of a local government's current system for resolving disputes;
- Facilitation of a local government's efforts to retain a mediator;
- Education for local governments, developers, and citizens on ADR processes; and
- Grant assistance for local governments working "to resolve complex pubic policy disputes."

For more information on Oregon's Public Policy Dispute Resolution Program, visit their website at: **(http://www.odrc.state.or.us/ppdrp.htm)**, or contact:

Public Policy Dispute Resolution Coordinator
Department of Land Conservation and Development
635 Capitol Street NE, Suite 200
Salem, OR 97301
(503) 373-0050

Section 7:
Legal Issues Summary

In order for a local government to develop a legally sound natural hazards strategy, it must comply with Oregon's comprehensive planning requirements and statewide planning goals. Comprehensive plans must rely upon credible inventory data to perform a hazards analysis. Plan policies must be clearly defined, must promote a legitimate public purpose, and must be linked to the inventory fact base of the plan. Ordinances must contain clear and objective standards and must be consistent with the local plan policies. A review process should be in place, which allows for variances to be granted preventing an undue burden where necessary. Finally, a local government should consult its legal counsel whenever potential legal questions arise, whether they are related to planning or implementing a natural hazards strategy.

Legal Issues Endnotes:

[1] Platt, Rutherford H. Land Use and Society: Geography, Law, and Public Policy. p.215.

[2] ORS § 197.629 (1999).

[3] ORS § 197.175 (1999).

[4] ORS § 197.251 (1999).

[5] ORS § 197.251 (1999); Neuberger v. City of Portland, 288 Or 155, 170 (1979).

[6] ORS § 197.015(8) (1999).

[7] ORS § 197.015(9) (1999).

[8] Neuberger, 288 Or at 169.

[9] Statewide Land Use Planning Goal 7.

[10] ORS § 197.010(1)(e) (1999).

[11] Bridges v. City of Salem, 19 Or. LUBA 373, 379 (1990).

[12] ORS § 197.629 (1999). In 1999 the state legislature passed SB 543 which exempts smaller sized cities and counties from the periodic review process. For more information on the new periodic review requirements established by this law, refer to the DLCD document: Understanding the New Periodic Review Process" Senate Bill 543." http:// www.lcd.state.or.us/legis/934300.pdf.

[13] ORS §§ 215.503(3) and 227.185 (1999).

[14] Id.

[15] ORS §§ 197.763, 215.427, and 227.178 (1999).

[16] Fasano v. Washington Co., 264 Or 574, 507 P.2d 23 (1973); O.R.S. §§ 215.416 and 227.173; Statewide Planning Goal 2.

[17] ORS §215.416(9) (1999).

[18] Everets v. Washington Co., 15 Or. LUBA 358 (1987).

[19] DLCD v. Klamath County, 16 Or. LUBA 23 (1987).

[20] Moore v. Clackamas Co., 29 Or. LUBA 372 (1995).

[21] Ball and Associates v. Josephine Co., 25 Or. LUBA 525 (1993).

[22] Kunz v. Clackamas Co., 27 Or. LUBA 130 (1994).

[23] Bartels v. City of Portland, 20 Or LUBA 303, 310 (1990) (citing Margilus v. City of Portland, 4 Or LUBA 89, 98 (1981), Meyer v. City of Portland, 7 Or LUBA 184 (1983), *aff'd* 67 Or App 274 (1984)).

[24] Rhyne v. Multnomah County, 23 Or LUBA 442, 447 (1992).

[25] Burghardt v, City of Molalla, 39 Or LUBA 223, 236 (1995); Eppich v. Clackamas County, 26 Or LUBA 498, 507-08 n8 (1994).

[26] Corbett/Terwilliger/Lair Hill Neighborhood Association v. City of Portland, 25 Or LUBA 601, 611 (1993) (quoting Meyer v. City of Portland, 67 Or App 274, 280, *rev den* 297 Or 82 (1984)).

[27] Smith v. Cooper, 256 Or. 485 (1970).

[28] ORS §§ 30.260 - 30.300 (1999).

[29] Brennen v. City of Eugene, 285 Or. 401, 407 (1979).

[30] Tozer v. City of Eugene, 115 Or. App. 464 (1992); Baker v. Elliott, 125 Or. App. 1 (1993).

[31] Baker v. Elliott, supra.

[32] Miller v. Grants Pass Irrigation District, 297 Or. 312 (1984).

[33] Miller v. Grants Pass, *supra*; State Forester v. Umpqua River Navigation Company, 258 Or. 10 (1970).

[34] U.S. Const. Amend. V.

[35] Or. Const. Art I, Sect 18.

[36] Pennsylvania Coal Co. v. Mahon, 200 U.S. 393, 415, 43 S.Ct. 158 (1922).

[37] Lucas v. South Carolina Coastal Commission, 505 U.S. 1003, 1017, 112 S.Ct. 2886 (1992).

[38] Lucas v. South Carolina Coastal Commission, 404 S.E.2d 895, 898 (1991).

[39] Penn Cental Transportation Company v. City of New York, 438 US 104, 98 S.Ct 2646 (1978); City of Monterey v. Del Monte Dunes at Monterey, Ltd., ___ U.S. ___, 119 S.Ct. 1624 (1999).

[40] Nollan v. California Coastal Commission, 483 U.S. 825, 834-5, 107 S.Ct. 3141 (1987).

[41] Dolan v. City of Tigard, 512 U.S. 374, 391, 114 S.Ct. 2309 (1994).