

# Administrative Law

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NEWSLETTER

Volume 10 | Number 2

Spring 2009

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## FROM THE CHAIR

By *Chris Cauble*



*Chris Cauble*

This legislative session has been a very active one in the area of administrative law, even though the legislature has been faced with pressing financial matters. Several weeks before writing this, I visited with several of our legislative members to talk to them about what their constituents felt about administrative law issues. After several seconds of staring while they thought about whether they ever got those questions other than from me or other lawyers, I received a plethora of responses from “make rules simpler” to “make the process fairer to average Oregonians”. Of course, how many of our citizens really speak to our legislators about administrative law. We attorneys are the only ones. Yet, administrative law is so important to so many citizens. It controls how unemployment benefits are administered, how contractors are licensed and bonded, how professionals are disciplined and given due process, and how land use laws are enforced. Yet, legislators are given so little input from the public.

The Oregon State Bar, by and through the Administrative Law Executive committee, takes a large role in educating the legislature on bills effecting administra-

tive law. Our executive section monitors hundreds of bills that are introduced each year which impact different segments of administrative law, from those bills effecting professional discipline, bills effecting judicial review and contested case procedures, and even bills relating to natural resources. Many of our members testify as to their specific knowledge and expertise on certain subjects in front of legislative committees. When appropriate, our Committee will take a position on certain legislation. In all cases, our committee, which is made up of private practice as well as government attorneys, strives to gain a consensus on legislation before we take a position on it.

This year, there is legislation that, if passed, will make profound changes on the landscape of administrative law. Since the advent of the independent hearings panel, much debate has been made concerning the power of the agencies to substitute the hearings officer’s findings in “whole cloth”. Many practitioners have become impressed with the professionalism and independence of the ALJs as the system has developed. Oregon has come a long way in developing a professional and well trained group of ALJs who make independent decisions, well thought out findings and clearly defined rulings. However many of these decisions are not favorable to the agencies. In many cases, agencies

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will substitute historical findings of fact made by the hearings officer with its own factual findings. Given current law, with the deferential standard of review in the Court of Appeals, agencies can nullify the role of the ALJ. This has caused many people ask whether ALJ's should be given final order authority. SB 274, discussed further in this publication, gets us to the middle ground. It requires agencies to have Clear and Convincing evidence in order to overturn historical findings of fact. Furthermore, it allows "de novo" review in the Court of Appeals for an overturned ALJ ruling. The Section has taken a large role in testifying before the Senate Judiciary Committee

and the members of that committee have shown great wisdom in their positive consideration of this legislation. I personally enjoy my continued work as chair of this committee and welcome any input you are willing to give. Email me at [clcauble@qwestoffice.com](mailto:clcauble@qwestoffice.com)

## BILL WATCH 2009

The editors wish to thank Karen Berkowitz, Chris Cauble, Phil Johnson, Dennis Koho, Janet Krem, and Frank Mussell for their contributions to this summary of the bills we are following this session. Some of these bills are going nowhere, others may become law. The Executive Committee felt our readers should be aware of what your Section is following this session. Please go to <http://www.leg.state.or.us/index.html> for the most current information on a particular bill. This information is provided as a courtesy for you, our membership.

SB 138 – Increases civil penalties for violations of nursing statutes and requires health care facilities to report official actions taken against nursing licensees within 10 days of action.

SB 174 – Raises the maximum civil penalty from \$1,000 to \$10,000 that the State Board of Psychologist Examiners may impose for disciplinary actions commenced after January 1, 2010.

SB 163 - This bill provides the right to a contested case hearing to dispute a finding by Department of Human Services that a nursing assistant is responsible for abuse of a resident in long term care. Under current law, the nursing assistant only has the right to an administrative review by the Department. The bill also moves the federally required registry of nurse aides from the Oregon State Board of Nursing to the Department of Human Services. The registry will include reports of abuse that have been substantiated after affording the individual due process. The bill prohibits long term care facilities from employing a nurse, LPN or nursing assistant if a court has made a finding of abuse or if a nursing assistant has a finding of abuse in the registry. An Adult Foster Home cannot be licensed if the applicant or a nursing assistant employed by the applicant has a finding of abuse in the registry.

SB 302 - This bill provides that if state agency contracts with another public body for performance of functions that would otherwise be performed by state agency, the other public body is an agent of the state agency for purposes of the Oregon Tort Claims Act. The contract may provide that other public body waives the right to indemnification under the Oregon Tort Claims Act if the contract also requires that the public body have insurance coverage equal to the Oregon Tort Claims Act limitations.

SB 305 - This bill allows a public body to enter into an agreement with an agent that provides that the agent waives the right to indemnification under the Oregon Tort Claims Act if the agreement also requires that the agent have insurance coverage equal to the limitations imposed on recoveries under Oregon Tort Claims Act. If the public body has entered into such agreement, the liability of public body for a claim arising out of the agent's tort is reduced to extent that claim is payable from insurance available to the agent.

HB 2127 - This bill, and the proposed amendments to the bill, permit the Department of Human Services to serve contested case notices by regular mail instead of by personal service or certified mail as required by ORS 183.415. The bill provides additional protections for individuals who do not receive the notice, since service by regular mail does not allow for verification of receipt. The bill directs the Department of Human Services to promulgate rules to extend the time limit for filing a late hearing request beyond the 60 days currently allowed under by the model rules. It requires DHS to inform a client of the right to request a hearing if the individual indicates non-receipt of the contested case notice. If an individual files a late hearing request and alleges non-receipt

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## **BILL WATCH 2009** – *Continued from page 2*

of the contested case notice, the presumption of receipt of a document sent by regular mail does not apply. DHS may allow the late hearing request or refer the case to the Office of Administrative Hearings for a hearing to determine whether the individual had notice. DHS must show that the notice was sent to the correct address. The bill allows a contested case notice served by DHS to become a final order if the individual doesn't request or hearing, withdraws a hearing request, or fails to appear at a scheduled hearing.

HB 2147 - This bill creates a set-off program in Department of Revenue under which state agencies making payments to a person may set off a debt that a person owes to the Department of Revenue or to any state agency that has referred the debt to the DOR for collection. It directs the Lottery Commission and the Department of State Lands to set up a data match program with DOR. The Lottery Commission must also create a data match program with the Division of Child Support. If the bill proceeds, DOR will work on amendments to create exemptions similar to existing garnishment exemptions and provide for due process protections.

HB 2346 - This bill limits authority of health professional regulatory boards to conduct mental, physical or competency examinations unless the board determines there is objectively reasonable basis for believing the licensee or applicant poses danger to patient health or safety. It permits licensee or applicant to request contested case hearing to contest the need for the examination, assessment or evaluation. The bill provides exceptions in case of emergency.

HB 2347 – This bill prohibits health professional regulatory boards; the Department of Human Services, and the Oregon Health Licensing Agency or its advisory council from assessing costs or attorney fees for disciplinary proceedings.

HB 2345 - This bill directs DHS to establish an impaired health professional program. It directs DAS to establish a monitoring entity for impaired professionals. The bill authorizes health profession licensing boards to participate in the impaired health professional program. It specifies the procedures and prohibits them from establishing something else.

HB 2118 - This bill requires the Oregon Health Licensing Agency to investigate complaints alleging that a licensee or applicant is practicing in violation of the law. It requires that the public members of these boards review the investigatory materials and reports concerning any complaints. It allows fingerprints for purpose of conducting criminal background checks on licensees seeking license renewal, applicants for license, board employees, volunteers or applicants for employment. It allows the board to withhold personal electronic information for individuals licensed, registered or certified by

that particular board. It requires release of the information if the request for information is made for public health or state health planning purposes.

HB 2056 – This bill increases number of members on health regulatory boards and modifies and creates other provisions related to board membership.

HB 2057 - This bill terminates the semi-independent state agency status of Oregon Board of Optometry, State Board of Massage Therapists and the Physical Therapist Licensing Board. It establishes accounts for these boards and continuously appropriates money to them. The bill requires the boards to comply with State Personnel Relations Law.

HB 2058 – This bill removes the Occupational Therapy Licensing Board from the Department of Human Services.

HB 2059 - This bill requires health professional licensees to report prohibited or unprofessional conduct of another licensee to the board and requires that board to report the prohibited conduct to law enforcement. The bill punishes failure to report by a maximum \$720 fine. It requires licensees arrested for felony or convicted of misdemeanor or felony to report their conviction or arrest to the board.

# SB 274 - A SMALL CHANGE IN ADMINISTRATIVE LAW?

By Bill Boyd

As originally submitted, Senate Bill 274 would have given Administrative Law Judges of the Office of Administrative Hearings the authority to issue final orders in contested cases brought before them. An agency seeking to modify the order would have had to file an appeal with the Court of Appeals. This would have been a radical change to Oregon's administrative law.

The bill as of this writing is before the Senate Judiciary Committee. The last hearing was on March 24. A work session is scheduled for Friday, April 17. The committee will be considering the "-3" amendments. These amendments provide as follows:

- An agency may not modify the findings of fact in a proposed order issued by an Administrative Law Judge in a hearing before the Office of Administrative Hearings unless "there is clear and convincing evidence in the record that the finding was wrong." This would be the biggest change to current law.
- The Office of Administrative Hearings will be independent of the Employment Department. Currently the Director of the Employment Department appoints the Chief Administrative Law Judge. Under this bill, he or she will be appointed by and serves at the pleasure of the Governor.

- The Attorney General must consult with an advisory group when adopting the model rules of procedure use in contested cases before the Office of Administrative Hearings. This advisory group will have at least one representative from the private bar.
- The rules on ex parte communications will apply to any communications between an Office of Administrative Hearings Administrative Law Judge and an assistant attorney general. This leaves only Office of Administrative Hearings employees exempt from the ex parte rules.
- The Secretary of State must use the Office of Administrative Hearings to conduct its hearings.
- Declares an emergency.

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Neither the contributors nor the Administrative Law Section make express or implied warranties regarding the use of materials in the newsletter. Each lawyer must depend on his or her own research, knowledge of the law, and expertise in using or modifying these materials.

# CASE NOTES

By Phil Johnson and Irene B. Taylor



Philip A.  
Johnson II



Irene Taylor

\* These summaries are modified versions of case summaries originally published by Willamette Law Online of the Willamette University College of Law at <http://www.willamette.edu/wucl/journals/wlo/>

***\*Pendleton School District 16R, et al., v. State of Oregon, 345 Or 596, 200 P3d 133 (January 23, 2009)***

The legislature established quality goals as directed by Article VIII, section 8. However, the legislature did not appropriate sufficient funds to meet those quality goals for the 2005-2007 biennium. Plaintiffs, 18 public school districts and seven public school students, filed an action alleging that the legislature's level of funding violated Article VIII, section 8. Alternatively, plaintiffs alleged that the legislature's level of funding violated Article VIII, section 3, of

the Oregon Constitution. Plaintiffs sought declaratory and injunctive relief. The state moved for summary judgment, while plaintiffs sought partial summary judgment. The trial court granted the state's motion for summary judgment, and the Court of Appeals affirmed.

In a unanimous opinion, the Supreme Court noted that Article VIII, section 8, contained two seemingly contradictory concepts. One provision directed the legislature to fund the public school system sufficiently to meet the quality goals established by law. The other provision, however, directed the legislature to publish a report if its funding fell below the constitutionally specified level. The Court concluded that it should give due regard to both provisions by individually examining each particular form of relief requested by plaintiffs and determining whether that relief was consistent with both provisions of Article VIII, section 8. The Court held that the trial court could and should have entered a declaratory judgment that the legislature had failed to fund the public school system for the 2005-2007 biennium at the levels required by Article VIII, section 8. The Court concluded, however, that the trial court could not enter either a declaratory judgment or an injunction that the legislature must fund the public school system to the levels specified in Article VIII, section 8, because either form of relief would have been inconsistent with reporting requirement of that section. The Court also analyzed the meaning of Article VIII, section 3, and concluded that it requires the legislature to establish free public schools that will provide a

basic education, with a minimum of educational opportunities. The Court ultimately concluded the trial court correctly granted summary judgment for the state on that claim because plaintiffs had not demonstrated that the legislature has failed to provide a minimum of educational opportunities as required by Article VIII, section 3.

***\*Department of Revenue v. Oscar A. Croslin, et al., 345 Or 620, 201 P3d 900 (January 29, 2009)***

In 2002, taxpayers filed an income tax return, in which they claimed that they had received no income. The Department of Revenue disagreed and issued a notice of assessment. Taxpayers filed a *pro se* complaint in the magistrate division of the Oregon Tax Court. The department defended its assessment and requested an award of damages under ORS 305.437, claiming that taxpayers' position was frivolous. The magistrate upheld the assessment and held that taxpayers' arguments were frivolous. However, the magistrate declined to award damages, because the department's "actual damages" were "trivial," and any award therefore would be *de minimis*. The department appealed to the regular division of the Oregon Tax Court, seeking damages under ORS 305.437. Taxpayers responded, citing the magistrate's decision, that any damages were trivial. The regular division held that taxpayers' positions in both the magistrate and the regular division were frivolous, and awarded the department damages under ORS 305.437 and attorney fees under ORS 20.105. The Supreme Court reversed the judgment of the Oregon Tax Court.

The Court held that in ORS 305.437, the use of the term "damages" reveals a legislative intent to compensate the department for losses caused by a taxpayer's pursuit of a frivolous position in proceedings before the Oregon Tax Court. Because the department had not presented the magistrate with evidence of such losses, the magistrate had not erred in declining to award damages. Secondly, the court held that, under ORS 305.437, the term "position" refers to the entirety of a taxpayer's assertions in a proceeding. Taxpayers' position in the regular division of the Oregon Tax Court was not entirely frivolous because they had asserted a factual and legal argument on which the magistrate had relied, *i.e.*, that the department had not established actual damages. Finally, the Court held that under ORS 20.105, the department was not entitled to receive attorney fees because it was not a prevailing party. Reversed and remanded.

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## CASE NOTES – Continued from page 5

### ***\*Carlton Woodard v. City of Cottage Grove,*** **225 Or App 282, 201 P3d 941 (January 14, 2009)**

Petitioner seeks review of a Land Use Board of Appeals (LUBA) opinion and order remanding three City of Cottage Grove ordinances that rezoned petitioners' property and an adjacent parcel and separately applied a zoning overlay district to both properties. Petitioners argued that (1) LUBA erred in failing to dismiss the appeals of two of the ordinances because a separate notice of intent to appeal was not filed for each challenged ordinance within 21 days after its adoption as required by ORS 197.830(9) and (2) LUBA erred in remanding the ordinances for further findings under the Transportation Planning Rule, OAR chapter 660, division 12. The court held that LUBA was within its statutory authority in adopting OAR 661-010-0015(1)(c) and in allowing correction of a technically defective notice of intent to appeal that appeals more than one land use decision. Thus LUBA did not err in remanding the ordinances for additional findings.

### ***\*Handam v. Wilsonville Holiday Partners, LLC,*** **225 Or App 442, 201 P3d 920 (January 28, 2009)**

Handam was a shift manager at Wilsonville's Holiday Inn. Handam discovered evidence of apparent wrongdoing by employees during an event at the hotel. He reported the wrongdoing to his supervisor, who shortly thereafter began to treat him differently by refusing rest and meal breaks and reducing his work hours. Handam quit his job after being demoted to waiter. Following a jury verdict awarding plaintiff damages on his common-law wrongful constructive discharge claim, plaintiff appealed the trial court's decision to strike punitive damages and disallow attorney fees after a jury found in his favor on a wrongful constructive discharge claim against Wilsonville Holiday Partners, LLC (Wilsonville). Wilsonville cross-appealed, claiming the trial court erred in denying its motion for a directed verdict on the wrongful discharge claim. The Court of Appeals held that no evidence was presented from which the jury could find that plaintiff was discharged for engaging in either a job-related right or carrying out an important societal obligation. Therefore, the trial court erred by denying Wilsonville's motion for directed verdict on the wrongful discharge claim.

### ***\*O'Hara v. Board of Parole,*** S055839 (March 5, 2009)

Petitioner O'Hara allegedly violated the conditions of his post-prison supervision. During a parole violation contested case hearing, the hearings officer denied O'Hara's request to call witnesses, which included parole officers, O'Hara's girlfriend, and O'Hara's friend, concluding that with the exception of one parole officer, the other proposed witnesses testimony

would not be relevant to the violation. O'Hara responded that the witnesses' testimony was relevant because these witnesses were present during his arrest and he explained to the hearings officer how and what his girlfriend would testify to if she were permitted to do so. The Court of Appeals affirmed the denial without opinion. On O'Hara's appeal to the Supreme Court, the Board argued that O'Hara had failed to preserve the relevance issue during the contested case hearing because he did not make an offer of proof or provide a theory of admissibility. The Supreme Court found that because administrative hearings are less formal than litigation, O'Hara's explanation of *what* his witnesses would have testified to was sufficient to demonstrate that the testimony was relevant and therefore he did preserve the relevance issue for appeal. The Court remanded the case to the Board to conduct an additional hearing including the excluded witnesses.

### ***\*In re Hendrick,*** S056041 (April 2, 2009)

Hendrick was charged with violating various provisions of the Rules of Professional Conduct. The Disciplinary Board appointed a trial panel in January 2007 to hear the case. Prior to the hearing, the Oregon State Bar (Bar) and Hendrick made peremptory challenges about members of the panel. The challenged members were replaced and a new hearing was scheduled for July 2007. In the midst of this hearing, a panel member realized she had a conflict of interest. As a result, the entire panel was dismissed, and a new hearing was scheduled for February 2008 with an entirely new panel. Prior to this hearing, Hendrick gave notice of his intent to peremptorily challenge one of the new panel members. The Disciplinary Board disallowed this second peremptory challenge and held the hearing. This resulted in discipline against Hendrick. Hendrick appealed the denial of his challenge to the Supreme Court. The Court remanded the case to the Board, holding that Hendrick was entitled to a new hearing since the Disciplinary Board had erred by not allowing the second peremptory challenge in order to ensure a fair hearing. Two judges dissented, agreeing that there was a procedural error as to the peremptory challenge but nonetheless holding that the legal merits of the disciplinary action were not seriously disputed by Hendrick and that the Court "painted too broad a brush" in ordering a new hearing for the procedural error.

### ***\*Roats Water System, Inc. v. Golfside Investments, LLC,*** **A134978 (February 11, 2009)**

Roats Water System (RWS) filed an action with the Oregon Public Utility Commission (PUC) for residential

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development charges pursuant to a contract for providing water. The PUC ordered Golfside Investments to pay RWS the fees. Golfside Investments appealed the decision to the Court of Appeals arguing the PUC did not have jurisdiction under ORS 756.500 to hear the complaint because the utility, not the customer, filed the complaint. RWS argued that because the case was regarding rates and services, the PUC had jurisdiction to hear the complaint. The Court of Appeals agreed with RWS, holding that the jurisdiction of the PUC extended to actions filed by utilities against their customers so long as the complaint was regarding the utilities' rates or services. The Court of Appeals found the statutory provision relied on by Golfside Investments was specifically excluded from the grant of jurisdiction to the PUC under ORS 756.500 and Golfside Investments could not therefore rely on that limitation to exclude the complaint from the PUC's jurisdiction.

### ***\*Einstein v. Psychiatric Security Review Board,*** **A132659 (February 18, 2009)**

Petitioner Einstein appealed an order of the PSRB that continued his commitment at the Oregon State Hospital. The board found, by looking at Petitioner's record as a whole, that his previously diagnosed psychotic disorder was not resolved. Petitioner appealed that decision to the Court of Appeals. The standard of review under ORS 183.482(8)(c) is not whether the Court agrees with PSRB's finding, but whether there was substantial evidence in the present record from which a reasonable person could find that Petitioner continued to suffer from a mental disease. The Court of Appeals examined the record and found that the evidence would permit a reasonable person to conclude that Petitioner's psychotic disorder was not resolved. The Court further asserted that past evidence still had probative values and that PSRB was entitled to consider such evidence when reviewing the record as a whole.

### ***\*Cyrus v. Board of County Commissioners,*** **A133381 (February 18, 2009)**

Deschutes County Board of Commissioners approved a Measure 37 claim filed by Central Electric Cooperative, Inc. (CEC) seeking either just compensation or a waiver of land use regulations. CEC was granted a waiver and proceeded to construct a power line. Cyrus challenged the order in circuit court. The circuit court affirmed the waiver. Cyrus appealed "contending that CEC was not entitled to relief under Measure 37 for a number of reasons" and that the rights had not vested. Prior to the case being heard by the Court of Appeals, Ballot Measure 49 was passed amending Measure 37. CEC filed a motion to dismiss because the passage of Measure 49 rendered Cyrus's appeal moot. The Court of Appeals dismissed the

appeal holding that the determination of whether the rights had vested must be considered under the language of Measure 49. As such, the court could only make a decision on a claim brought under Measure 49 rather than an appeal brought under Measure 37. Appeal dismissed as moot.

### ***\*SAIF v. Uptegrove, A136093 (February 18, 2009)***

Claimant Uptegrove incurred an injury to her ankle after she fell at work while walking down a flight of stairs. There was no identifiable cause of the fall, but the heel of Claimant's shoe broke as a result of the fall. Claimant's employer denied workers' compensation benefits on the basis that Claimant had not satisfied her burden of proving that the injury was compensable because her broken heel may have caused her to fall down the stairs. An administrative law judge found that while the cause of the fall was unknown, Claimant established a sufficient inference that the injury was work-related because the injury occurred during the course of her job duties. The Court of Appeals agreed, reasoning that Claimant did not need to disprove other possible causes of the injury but merely needed to establish an inference that the injury was work-related by demonstrating that it arose from a neutral, work-related risk.

### ***\*Cogan v. City of Beaverton, A139820*** **(March 4, 2009)**

Petitioner City of Beaverton appealed a decision of the Land Use Board of Appeals (LUBA) that reversed the City's decision to deny Cogan's petition for a minor boundary change on the basis that the City's prior annexation of Cogan's land was invalidated by the passing of SB 887, which prohibited the annexation by the municipality of industrial-zoned land meeting certain statutory criteria. LUBA reversed the city's decision that the words "area of land" in the Bill required that the land in question be put to some actual business use and which led to the city's erroneous conclusion that Respondent's residential lot did not qualify as an "area of land." LUBA found that interpretation to be contrary to the plain meaning of the words "area of land." The Court of Appeals agreed holding that to qualify an "area of land" that a municipality may not annex under SB 887, an owner need only set aside the area of land for a specific use or purpose and need not occupy it in any practical way.

### ***\*Leupold & Stevens, Inc. v. City of Beaverton,*** **A138294 (March 4, 2009)**

Plaintiff Leupold & Stevens, Inc. (Leupold) sued the City of Beaverton (Beaverton) for a declaratory judgment and injunctive relief over a land annexation. In 2005, Beaverton

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adopted Ordinance 4350, which annexed Leupold's land without Leupold's consent, and Leupold sought review of Beaverton's decision, initially before the circuit court and then before LUBA. LUBA declined to address the issue and the circuit court dismissed the case for lack of subject matter jurisdiction asserting that LUBA had exclusive jurisdiction over land use decisions so it could not hear the case. The Court of Appeals reversed. The Court ruled that Leupold was not appealing the initial land use decision of Ordinance 4350, but only if Ordinance 4350 was valid with the passage of SB 887. Although LUBA maintains exclusive jurisdiction over land use decisions, the Court held that the *court* retains the power to determine the meaning of statutes and to declare the rights and duties of parties.

### \*Pete's Mountain Homeowners Assn. v. Clackamas County, A140272 (April 1, 2009)

Pete's Mountain Homeowners Assn. (Pete's) obtained waivers for land use regulations under Measure 37. While their application for rezoning was pending, Measure 49 was enacted. Measure 49 rendered waivers issued under Measure 37 legally ineffective. The application was challenged and appealed to LUBA, which denied the application. Pete's argued that "ORS 215.427(3)(a) \*\*\* guarantees that, once they filed their application, the standards and criteria that apply to that application--including the Measure 37 waivers--cannot be changed. The county agreed with this argument and approved [the] application. LUBA reversed, concluding that, because Measure 37 itself was not a standard or criterion that applies to petitioners' application, [ORS 215.427(3)(a)] simply did not apply; thus, nothing prevented Measure 49 from taking effect as to their application." Pete's appealed to the Court of Appeals. The Court affirmed LUBA and held that Measure 49 specifically overrides Measure 37 and through that specific-ity overrides the application of ORS 215.427(3)(a).

### \*Thompson v. LCDC, A134989 (April 1, 2009)

Petitioner Thompson appealed a LCDC decision to approve a "go-below" amendment in Umatilla County. The amendment reduced the minimum parcel size of an area of farmland from 160 to 40 acres. Thompson's main assignment of error was LCDC's interpretation of the standard for establishing minimum parcel size on agricultural land. Thompson argued that maintaining the "existing commercial agricultural enterprise" of the area should be construed solely based on the dominant agricultural enterprise (wheat). The LCDC interpreted the standard to include new and upcoming vineyard enterprises, as well as others. The Court of Appeals held that the LCDC's interpretation of "existing enterprise" was plausible and not outside its discretion.

### \*Bowen v. PERB, A136290 (April 15, 2009)

Petitioner Bowen worked for the Union County Court for seven years. When the state took over county operations Bowen continued to work as a state employee for an additional twenty-three years. Bowen wished to retire and sought benefits. The Public Employee Retirement System (PERS) determined that Bowen's service with Union County would not count toward her thirty years. The Public Employee Retirement Board (PERB) affirmed PERS's determination. Bowen appealed to the Court of Appeals and argued that a transfer form she signed bound PERB to include her seven years as part of her thirty. Even if the form was not a valid contract, she argued, PERB should be estopped from denying her the thirty-year retirement benefits. The Court disagreed, reasoning that her work for the county did not fall into the permissible grounds for non-PERS work to count toward retirement. Furthermore, the Chief Justice did not have the power to create an agreement contrary to the PERS statutes. Because the Chief Justice lacked authority, and because reliance on an agreement contrary to statute is unreasonable as a matter of law, the transfer form Bowen was attempting to rely on was unenforceable.

### \*Burlington Northern v. Dept. of Transportation, A124009 (April 15, 2009)

Two BNSF trains blocked a street in Klamath Falls on February 3, 2004, one for 34 minutes in the morning and one for 20 minutes in the afternoon. The first train stopped to conduct a federally mandated brake test, the second stopped for a federally mandated "1,000 mile test." ODOT issued civil penalty notices to BNSF for "violating OAR 741-125-0010, which generally prohibits trains from blocking railroad-highway grade crossings for more than 10 minutes." BNSF requested a contested case hearing and argued that this rule was preempted by 49 USC 10501(b), the preemption clause of the federal Interstate Commerce Commission Termination Act (ICCTA). ODOT disagreed and imposed the penalties. BNSF appealed to the Court of Appeals. The Court found that the ICCTA expressly grants the Federal Surface Transportation Board (STB) exclusive jurisdiction over, among other things, rail transportation, the operation of tracks and facilities, and remedies related to the operating rules and practices of rail carriers. Thus, it broadly precludes state regulations of general applicability that discriminate against or unreasonably burden rail transportation. Since OAR 741-125-0010 specifically targets rail transportation, it is preempted by the ICCTA.