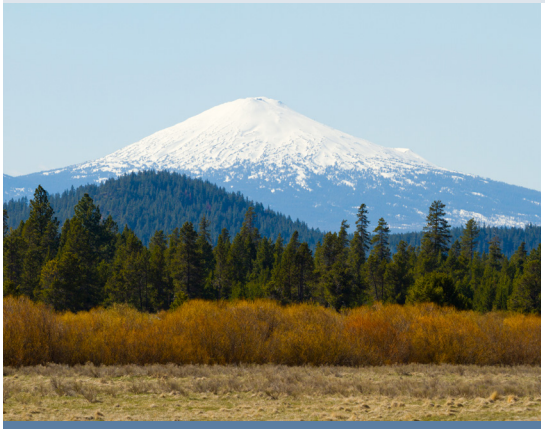
Oregon State Bar CLE Seminars

Real Estate and Land Use Conference 2023



Cosponsored by the
Real Estate & Land Use Section

Friday, August 11, 2023
8:30 a.m.–5:30 p.m.

Saturday, August 12, 2023
8 a.m.–12:45 p.m.

9.25 General CLE credits,
1 Ethics (Oregon specific) credit, and
1 Access to Justice credit (ID 102190)

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SCHEDULE

Friday, August 11, 2023

8:20 Opening Remarks

Ann Davies, RELU Section Chair, *Lane Council of Governments, Eugene*

8:30 Plenary I: The Railroad Runs Through the Middle of the House: Some Thoughts on Railroads, Access Over, and Acquisition of Railroad Property and Mineral Reservations

John LaVeille, *Chicago Title Insurance, Portland*

9:00 Plenary II: Real Estate Case Law Update

Chelsea Glynn, *Foster Garvey PC, Portland*
Paul Trinchero, *Foster Garvey PC, Portland*

10:00 Break

10:15 Plenary III: Land Use Case Law Update

Robert Mauger, *Office of Legislative Counsel, Salem*
Sarah Mitchell, *Kellington Law Group PC, Lake Oswego*

11:15 Plenary IV: Water Rights for Real Estate Attorneys—Best Practices for Managing Water Rights in Real Estate Transactions

Sarah Liljefelt, *Dunn Carney LLP, Portland*

12:00 Lunch

Real Estate Breakouts:

1:15 Breakout A: Hot Topics in Oregon Residential Landlord-Tenant Law in the Post-Covid Landscape

Anna McCormack, *Warren Allen LLP, Portland*
Troy Pickard, *Portland Defender PC, Portland*

2:00 Break

2:15 Breakout C: Model Opinion

Dustin Klinger, *Thede Culpepper Moore Munro & Silliman LLP, Portland*
Bryan Powell, *Lane Powell PC, Portland*

3:00 Breakout E: Basic Priority of Common Statutory Liens

Ian Kyle, *Fidelity National Title, Portland*

Land Use Breakouts:

1:15 Breakout B: Implementing the Oregon Housing Needs Analysis (HB 2001)

Sean Edging, *Department of Land Conservation and Development, Salem*

2:00 Break

2:15 Breakout D: Clear and Objective Standards for Housing

William Kabeiseman, *Bateman Seidel Miner Blomgren Chellis & Gram PC, Portland*

3:00 Breakout F: Best Practices for LUBA Practitioners

Anne Davies, *Lane Council of Governments, Eugene*
Caleb Huegel, *Attorney at Law, West Linn*

3:30 Break

3:45 Plenary V: Environmental Due Diligence in Real Estate Transactions

Fabio Dworschak, *Miller Nash LLP, Seattle*

4:30 Plenary VI: Ethics for Real Estate and Land Use Practitioners

David Elkanich, *Buchalter, Portland*

5:30 Adjourn

Saturday, August 12, 2023

8:00 Plenary VII: Real Estate and Land Use Legislative Updates

Kyle Grant, *Tonkon Torp LLP, Portland*
Caleb Huegel, *Attorney at Law, West Linn*

9:30 Break

Real Estate Breakouts:

9:45 Breakout G: Nuts and Bolts of Foreclosure

Tony Kullen, *Farleigh Wada Witt, Portland*

10:30 Breakout I: The Intersection of Real Estate and Insolvency

Danny Newman, *Tonkon Torp LLP, Portland*
Ava Schoen, *Tonkon Torp LLP, Portland*

Land Use Breakouts:

9:45 Breakout H: Land Use and Renewable Energy

Damien Hall, *Dunn Carney LLP, Portland*

10:30 Breakout J: Drainage Law/ Flood Damage Litigation

Andrew Stamp, *Vial Fotheringham LLP, Lake Oswego*

11:30 Break

11:45 Plenary VIII: Housing Justice: Disparate Impact Discrimination in the Sale and Rental of Real Estate

Matthew Serres, *Fair Housing Council of Oregon, Portland*

12:45 Adjourn

Anne Davies, *Lane Council of Governments, Eugene.* Ms. Davies provides city attorney services to four small cities and provides hearings official services to cities and counties on land use, code enforcement, and other matters. Her main area of expertise is land use and community development. She previously served as assistant city attorney for the City of Eugene, advising Eugene's Planning and Development Department, and before that she served as a board member of the Oregon Land Use Board of Appeals.

Fabio Dworschak (he/him), *Miller Nash LLP, Seattle.* Mr. Dworschak is a member of the firm's energy and shipping team. His practice focuses on environmental and commercial disputes and appeals. He represents private and public clients in a wide variety of disputes arising from the Clean Water Act, Comprehensive Environmental Response, Compensation, and Liability Act, Telephone Consumer Protection Act, Federal Employers Liability Act, breach of contract, and business and environmental torts. He also advises on environmental and natural resources matters and has broad experience with per- and polyfluoroalkyl substances (PFAs) and addressing emerging contaminant issues. He is a member of the Houston Bar Association, past director of the Houston Young Lawyers Association, and cochair of the King County Bar Association Environmental & Land Use Section. Mr. Dworschak holds an LL.M. from the University of Houston Law Center and is admitted to practice in Washington and Texas.

Sean Edging (he/him), *Department of Land Conservation and Development, Salem.* Mr. Edging is a Housing Planner at the Department of Land Conservation and Development. He joined the agency in 2020 to support the implementation of major legislative initiatives, including the legalization of middle housing (HB 2001—2019 Session) and Goal 10 implementation (HB 2003—2019 Session). He was the lead planner on the Oregon Housing Needs Analysis Legislative Recommendations, which lead to the adoption of HB 2001 (2023 Session) that implemented many core recommendations. He is working with the agency's new Housing Division to support the adoption of administrative rules implementing the legislative direction set forth in the bill.

David Elkanich, *Buchalter, Portland.* Mr. Elkanich is chair of the firm's Professional Responsibility Practice Group. He focuses his practice primarily on legal ethics, risk management, and discipline defense. He advises lawyers, law firms, in-house legal departments, and students and other professionals on a variety of ethics issues, including conflicts of interest, confidentiality, fee disputes, internal investigations, law firm dissolutions and partnership disputes, malpractice and professional liability cases, and litigation issues such as withdrawal and disqualification motions. Mr. Elkanich is admitted to practice in Oregon, Washington, and Idaho.

Chelsea Glynn, *Foster Garvey PC, Portland.* Ms. Glynn helps clients with an array of real estate and land use matters, including drafting and negotiating purchase and sale agreements, leases, and easements. She frequently represents municipalities, public hospital districts, and housing authorities in real transactions and leases. Ms. Glynn is an active member of the Institute of Real Estate Management and chairs its Legislative Committee. She is also a member of the American Bar Association Young Lawyers Division, the Oregon State Bar Agricultural Law Section, Animal Law Section, Government Law Section, and Real Estate & Land Use Section, the Campaign for Equal Justice Associates Committee, the Oregon Asian Pacific American Bar Association, the Oregon Association of Defense Counsel, and the Multnomah Bar Association Service to the Public Committee. Ms. Glynn is admitted to practice in Oregon and Washington.

Kyle Grant, *Of Counsel, Tonkon Torp LLP, Portland.* Mr. Grant is an attorney in Tonkon Torp's Real Estate & Land Use Practice Group. He represents clients on commercial real estate transactions and development, purchases and sales, leasing, financing, and land use. His practice includes serving as a general counsel to condominium and planned community homeowner associations. He also advises clients on corporate matters including business acquisitions, entity formation, and negotiation of commercial contracts. Mr. Grant is chair of the Oregon State Bar Real Estate & Land Use Section Legislative Subcommittee, the Oregon Chapter of NAIOP, and the Western Oregon Chapter of Community Associations Institute Education Committee. Mr. Grant is admitted to practice in Oregon and Washington.

Damien Hall, *Dunn Carney LLP, Portland.* Mr. Hall focuses his practice on land use and real estate, issues arising in urban redevelopment, public/private partnerships, and utility scale renewable energy projects. He represents both property owners and local governments, helping them navigate Oregon's unique land use requirements and political sensitivities to controlled growth and land development. In addition to his land use practice, Mr. Hall regularly assists clients with real estate transactions, natural resources law, municipal law, and formation and organization of business entities. Mr. Hall is actively involved in development and affordable housing issues in Portland and in renewable energy development throughout the Pacific Northwest. He has participated in local and state rulemaking for utility scale photovoltaic solar energy generation projects in both Oregon and Washington. Mr. Hall is admitted to practice in California, Oregon, and Washington.

Caleb Huegel, *Attorney at Law, West Linn.* Mr. Huegel recently joined Clackamas County as an assistant county counsel, after spending the first three years of his legal career as a staff attorney for the Land Use Board of Appeals. He is a member of the American Planning Association Amicus Curiae Committee and the Oregon State Bar Real Estate & Land Use Legislative Subcommittee.

William Kabeiseman, *Bateman Seidel Miner Blomgren Chellis & Gram PC, Portland.* Mr. Kabeiseman practices in the firm's Land Use and Municipal Law group.

Dustin Klinger, *Thede Culpepper Moore Munro & Silliman LLP, Portland.* Mr. Klinger's practice focuses on commercial real estate, co-op, and family business transactions. He brings extensive experience in real estate, acquisitions, sales, property management, leasing, secured financing, and entity mergers. He is active in structuring, negotiating, and closing transactions for co-op, family, closely held companies, and nonprofits. He has specific experience representing retail and multi-family landlords, lenders, real estate developers, colleges and universities, and agricultural cooperative businesses. He is a member of the Oregon State Bar Real Estate and Land Use Section Executive Committee, a chapter author of *Commercial Real Estate Financing,* and a contributor to *The Model Loan Opinion and Report.* Mr. Klinger is a frequent CLE and CPE presenter. He holds an LL.M. in Asian and Comparative Law from the University of Washington School of Law, and he is admitted to practice in Oregon and Washington.

Tony Kullen, *Farleigh Wada Witt, Portland.* Mr. Kullen focuses his practice on the life cycle of lending transactions, from loan origination through final collection. He frequently handles complex real estate transactions for buyers and sellers and for financial institutions with an interest in the transaction. He has served as both debtors' and creditors' counsel. Mr. Kullen is chair of the Oregon State Bar Debtor-Creditor Section Legislative Committee and is an active member of the Credit Union National Association and the Oregon Bankers Association. Mr. Kullen regularly presents continuing education classes and client seminars on real estate, lending, foreclosure, legislative updates, and debtor-creditor issues. He is admitted to practice in New York, Oregon, Washington, and Idaho.

Ian Kyle, *Fidelity National Title, Portland.* Mr. Kyle is Underwriting Counsel for Fidelity National Title.

John LaVeille, *Chicago Title Insurance, Portland.* Mr. LaVeille is Legal Counsel for Chicago Title Company of Oregon, Inc., and underwrites for other Fidelity National Finance brands in Oregon. He has spent the majority of his professional life in the title insurance industry. He serves on the Oregon Land Title Association (OLTA) board and heads its Insurance Division Liaison Committee. He has served on the OLTA Educational and Legislation Committee, the OLTA Forms and Practices Committee, and the Oregon State Bar Real Estate & Land Use Section Legislative Committee and as chair of the Oregon State Bar Corporate Counsel Section.

Sarah Liljefelt, *Dunn Carney LLP, Portland.* Ms. Liljefelt specializes in water law; her areas of practice also include real property transactions, service-regulated and rate-regulated water utilities, special districts and municipal entities, environmental compliance, public lands, administrative adjudications, judicial review of agency orders, and state and federal civil litigation and appeals. Ms. Liljefelt is a past vice president of Oregon Cattle Women, chair of the Oregon Cattlemen's Association Water Resources Committee, and a member of the Oregon Farm Bureau, the Oregon State Bar Environmental & Natural Resources Section, the OSB Agricultural Law Section Executive Committee, and the Multnomah Bar Association. She is admitted to practice in Oregon, California, and Utah (inactive) and before the U.S. Supreme Court.

Robert Mauger, *Office of Legislative Counsel, Salem.* Mr. Mauger serves as Deputy Legislative Counsel for the Oregon Legislature.

Anna McCormack, *Warren Allen LLP, Portland.* Ms. McCormack's civil litigation practice emphasizes landlords' rights, real property and business disputes, bankruptcy, consumer law, and employment law. She has appeared in state, tribal, and municipal courts, as well as administrative and appellate proceedings.

Sarah Mitchell (she/her), *Kellington Law Group PC, Lake Oswego.* Ms. Mitchell's practice focuses on all aspects of land use, development, and administrative law and assisting individuals and businesses in obtaining and defending land use entitlements.

Danny Newman, *Tonkon Torp LLP, Portland.* Mr. Newman focuses his work in the firm's Bankruptcy & Reorganization and Government Solutions Practice Groups. He also previously co-taught a negotiations seminar as an adjunct professor at Gonzaga Law and at South Texas College of Law Houston. He maintains an active pro bono practice, including forming and advising nonprofit clients, representing immigrants seeking asylum or special status, and pursuing civil rights claims. He is admitted to practice in Oregon and Texas.

Troy Pickard, *Portland Defender PC, Portland.* Mr. Pickard's practice is focused on affirmative claims against landlords on behalf of residential tenants.

Bryan Powell, *Lane Powell PC, Portland.* Mr. Powell is vice president of Lane Powell. He advises owners, developers, investors, and lenders on all aspects of real estate investment, development, financing, leasing, and operations. He has extensive experience counseling clients on industrial, office and retail mixed-use development, private/public redevelopment, senior housing projects, and real estate financing, including joint venturing, deal structuring, sales and acquisitions, leasing, and management. Mr. Powell is a Fellow of the American College of Real Estate Lawyers and the American College of Mortgage Attorneys, a member of The Counselors of Real Estate®, and a member of the Oregon State Bar Real Estate & Land Use Section Executive Committee. He is admitted to practice in Oregon, California, and Washington.

Ava Schoen (she/her), *Tonkon Torp LLP, Portland.* Ms. Schoen's practice focuses on Chapter 11 corporate reorganizations and debtor-creditor law, as well as commercial litigation. Ms. Schoen is a member of the Turnaround Management Association, the Multnomah Bar Association the Oregon Association of Defense Counsel, Oregon Women Lawyers, and the Oregon State Bar Debtor-Creditor Section, Business Litigation Section, and Litigation Section. She is admitted to practice in Oregon and New York.

Matthew Serres, *Fair Housing Council of Oregon, Portland.* Mr. Serres is a staff attorney at the Fair Housing Council of Oregon.

Andrew Stamp, *Vial Fotheringham LLP, Lake Oswego.* Mr. Stamp has deep experience with zoning issues and land development. He has successfully obtained a wide range of land use entitlements, including post-acknowledgment plan amendments such as urban growth boundary amendments, zone changes, conditional use permits, nonconforming uses, variances, etc. He has been involved with over 100 LUBA cases. He also handles issues that are ancillary to land use entitlements, such as certain environmental issues and transportation (approach road permits, etc. Mr. Stamp primarily represents developers and landowners seeking land use entitlements. He also serves as a Hearings Officer for Coos County and the City of North Bend.

Paul Trinchero, *Foster Garvey PC, Portland.* Mr. Trinchero helps clients resolve complex business and real estate disputes through litigation, arbitration, mediation, and negotiation. He represents clients in litigation relating to business and real estate disputes, condemnation and eminent domain, property tax appeals, commercial landlord-tenant disputes, federal and state securities laws, enforcement of noncompetition agreements, False Claims Act violations, and shareholder class action and derivative lawsuits. He is experienced in litigating cases in state and federal court, as well as in private arbitrations. Mr. Trinchero is a member of the Federal Bar Association, the Multnomah Bar Association, the Oregon State Bar Real Estate & Land Use Section Executive Committee, the OSB Securities Regulations Section, the OSB Taxation Section, and the Oregon Trial Lawyers Association. Mr. Trinchero is a frequent CLE presenter. He is admitted to practice in Oregon and Washington and before the U.S. Tax Court.

Chapter 1

The Railroad Runs Through the Middle of the House: Some Thoughts on Railroads, Access Over, and Acquisition of Railroad Property and Mineral Reservations

John LaVeille
Chicago Title Insurance
Portland, Oregon

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The Railroad Runs Through The Middle Of The House

I. How do Railroads Acquire their Rights of Way

A. Federal Grants and Acts
1. General Railway Act of 1875, 1922 Abandonment Act, Great Northern Railroad v. USA, 315 US 262 (1942), Marvin M. Brand Revocable Trust v. USA, 134 S.Ct (1257)
a. Railroad gets only simple easement
b. reverts to adjoining landowner upon abandonment or when no longer used for railroad purposes
c. 200 ft right of way
d. no checkerboard land grants
e. no deed or conveyance instrument – filing of plat map with Secretary of the Interior

B. Outright acquisition
1. Fee Title (use of words like fee, grants bargains sells and conveys
2. Easement (use of words like right of way connote easement)
a. See State of Oregon v. Tolke, 36 Or. App. 751, 586 P2d 791 (1978), and Bouche v. Wagner, 206 Or. 621, 293 P2 203 (1956) discussion of fee verses easement for railroad

C. Condemnation

II. Acquiring crossing over railroad rights of way

A. Adverse possession – forbidden by ORS 105.608

B. Prescriptive easement – see Albany & Eastern Railroad Co v. Martell et al 298 Or App 99, 445, P3d 319 (2019)

C. Crossing Permit/license
1. Characteristics
a. Not a real property interest
b. personal privilege to use the land of another
c. revocable at will
d. not transferable
e. Not insurable under a title insurance policy

D. Things to consider
1. Agreement sets out terms and conditions for crossing
2. Payment of fees
3. Maintenance obligations
4. Location of crossing
a. good legal description v. reference to some unknown quantity
c. Engineering stations
5. Notice period when revoked
6. recordable

E. Reservation in grant of right of way
   1. Locatable – good legal description
   2. Maintenance provisions

F. Easement
   1. Locatable – good legal description
   2. Runs with the land
   3. Binding on heirs, successors, assigns
   4. maintenance obligations

III. Mineral Reservations

A. Type of reservations
   1. Limited surface extract rights
   2. Unlimited surface extraction rights

B. Removing or modifying mineral reservations and extraction rights
   1. negotiation
   2. Extinguishment of Dormant Mineral Reservations – ORS 517.180
      a. do you qualify under statutory definition of mineral
      b. 30 year qualification period
         i. holder of interest has not recorded a statement of claim
         ii. mineral interest acquired more than 30 years ago
      c. Publish notice for 3 consecutive weeks in newspaper
         i. required statutory information
         ii. must use due diligence to notify the holder of the reservation
      d. record affidavit of publication and within 15 days of date of last publication
         i. statutory required information including statement that copy of notice sent to holder of reservation and if statement not sent, description of due diligence in attempting to locate holder.
      e. holder of mineral reservation must record with 60 days a statement of claim
      f. if holder fails to record statement of claim with 60 days, mineral interest becomes property of landowner

Licenses

A license is a personal privilege to use the land of another for a stated purpose and, unlike an easement, is revocable at the will of the owner of the land. *See* William B. Stoebuck & Dale A. Whitman, *The Law of Property* § 8.1, at 438 (3d ed 2000). A license is an interest too slight and too uncertain to be considered an interest in land that requires compliance with the statute of frauds. Consequently, a writing is not required to create a license. An ineffective oral attempt to create an easement may result in a license because of the failure to satisfy the statute of frauds. Absent a contrary expression of intent by the parties, a license is considered personal to the grantee and is not assignable. *See The Law of Property* § 8.1, at 438–39; Patricia Young, *Real Property—Oral License for the Use of Land—Revocation—Oregon Law*, 31 Or L Rev 242 (1952).

Although a license is by definition normally revocable, a license may become irrevocable if the licensee expends substantial money and labor in reasonable reliance on the express or implied representation of the servient owner that the licensee would have an irrevocable interest. *See*, *e.g.*, *Shepard v. Purvine*, 196 Or 348, 248 P2d 352 (1952) (right to draw water from spring); *Brown v. Eoff*, 271 Or 7, 530 P2d 49 (1975) (right of access). In the *Shepard* and *Brown* decisions, the court employed equitable principles to convert licenses that otherwise would be revocable and temporary in nature to irrevocable easements, in effect estopping landowners from denying that they had granted perpetual easement rights. The legal incidents of an "irrevocable license" are identical to those of an easement. *Luckey v. Deatsman*, 217 Or 628, 343 P2d 723 (1959) (oral agreement regarding easement for water reservoir and pipeline held to be permanent easement); *Shaw v. Profitt*, 57 Or 192, 110 P 1092 (1910) (irrigation ditch).

Text from recorded document; the recorded image PDF with signatures, notarizations, and attachments, is available here:
https://oregonstatebar.s3.us-west-2.amazonaws.com/Seminars/2023/RE23/RE23-1-3.pdf

RAILROAD COMPANIES' COUNTERPART

Portland (Peninsula Jct.), Oregon
PLD 323-4-2.214 Dept. No. 32134

PRIVATE ROAD CROSSING

THIS AGREEMENT, made and entered into as of the 1st day of January, 1977, by and between OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, an Oregon corporation, and its Lessee, UNION PACIFIC RAILROAD COMPANY, a Utah corporation (hereinafter collectively called "Licensor"), and DARLING-DELAWARE COMPANY, INC., a Delaware corporation, doing business as Portland Rendering Company (hereinafter called "Licensee").

RECITALS:

The Licensee desires:

(a) to maintain and use a private roadway, including appurtenant stop signs, identification signs, and drainage facilities (hereinafter called "Private Roadway"), across the right of way and over the tracks of the Licensor at Portland (Peninsula Jct.), Multnomah County, Oregon, in the location shown on print No. R-784, dated June 24, 1977, attached hereto, marked Exhibit "A", and by this reference made a part hereof; and

(b) to use, and the Licensor to maintain between the rails of the tracks and for one (1) foot on the outside of each rail, a thirty (30) foot wide planked crossing (hereinafter called "Crossing") on said right of way and over said tracks in the location shown on said Exhibit "A".

The Private Roadway and Crossing described in subparagraphs (a) and (b) above shall hereinafter be referred to collectively as "Road Crossing".

NOW, THEREFORE, it is mutually agreed by and between the parties hereto as follows:

Section 1. LICENSOR GRANTS RIGHT.

(a) In consideration of the covenants and agreements herein contained to be by the Licensee kept, observed and performed, the Licensor hereby grants to the Licensee, subject to the terms and conditions herein state<l, the right to maintain said Private Roadway and to use said Road Crossing across said right of way and over said tracks in the location described in the recitals hereof.

(b) Said Road Crossing serves real property which the Licensee represents is owned by the Licensee; and the terms, conditions and covenants of the Licensee contained in this agreement shall be and constitute covenants running with the Licensee's said real property located in Section 5, Township 1 North, Range 1 East, of the Willamette Meridian, Multnomah County, Oregon.

(c) The foregoing grant is subject and subordinate to the prior and continuing right and obligation of the Licensor to use and maintain its entire railroad right of way in the performance of its public duty as a common carrier,· and is also subject to the right and power of the Licensor to construct, maintain, repair, renew, use, operate, change, modify or relocate railroad tracks, signal, communication or other: wire lines, pipelines and other facilities upon, along or across any or all parts of said right of way, all or any of which may be freely done at

any time or times by the Licensor without liability to the Licensee or to any other party for compensation or damages.

(d) The foregoing grant is also subject to all outstanding superior rights (including those in favor of licensees, lessees of said right of way, and others) and the right of the Licensor to renew and extend the same, and is made without covenant of title or for quiet enjoyment. Said Road Crossing is maintained and used pursuant to an agreement dated February 1, 1975, between the Licensor and Baker Commodities, Inc. ~~The Licensee shall secure permission to use said Road Crossing, from said prior licensee.~~ In the event others are or have been authorized by the Licensor to use said Road Crossing, the Licensee may agree with such others as to the use of said Road Crossing and as to the cost of and responsibility for maintenance of the Roadway; but no such collateral agreement shall relieve the Licensee of responsibility to the Licensor nor relieve the Licensee from any liability hereunder with respect to said Road Crossing.

Section 2. MAINTENANCE AND USE.

(a) The Licensor shall maintain the Crossing at the expense of the Licensor; PROVIDED, however, that such maintenance shall be limited to that required by the Licensor for the safe and efficient operation of its tracks, and such additional maintenance work as is requested by the Licensee; PROVIDED, FURTHER, the Licensee shall keep the rail flangeways clear of all obstructions.

(b) The Licensee, at the expense of the Licensee, shall maintain said Private Roadway and shall install, repair, renew and replace any and all appurtenant drainage facilities, traffic signs or devices, and identification signs shown on Exhibit “A” or required at any time by the Licensor, by law, or by any public authority having jurisdiction. All work performed by the Licensee on said right of way in connection with the maintenance of said Private Roadway shall be done to the satisfaction of the Licensor.

(c) Said Private Roadway shall be maintained, and said Road Crossing used by the Licensee, in such manner as to cause no interference whatsoever with the operation of said tracks, and nothing shall be done or suffered to be done by the Licensee which would in any way endanger the safety of operation of said tracks.

(d) The Licensee shall keep any gate affording access to the Road Crossing closed and locked at all times except during the time of actual passage through it onto or from the Road Crossing. The Licensee shall not do, suffer or permit anything which will or may obstruct, endanger or interfere with, hinder or delay the maintenance and operation of the Licensor’s railroad tracks or appurtenant facilities or the facilities or equipment of others lawfully using the Licensor’s property. The Licensee shall adequately supervise and police use of said Road Crossing so that no person, vehicle or livestock stops or stands on the Licensor’s tracks or attempts to cross the Licensor’s railroad tracks when a railroad train, engine or car is approaching or occupying the Crossing.

Section 3. MODIFICATION OR RELOCATION OF ROAD CROSSING.

(a) The right herein granted is subject to the needs and requirements of the Licensor in the operation of its railroad and the improvement and use of its property, and

(1) the Licensee shall, at the Licensee’s sole expense, make any and all modifications or changes in said Private Roadway; and

(2) the Licensor shall, at the Licensee’s sole expense, make any and all modifications or changes in said Crossing,

or move the same to such new location as the Licensor may designate, whenever, in the furtherance of such needs and requirements, the Licensor shall find such action necessary or desirable.

(b) All the terms, conditions and stipulations herein expressed with reference to the maintenance and use of the Road Crossing in the location hereinbefore described shall apply to the Road Crossing when modified or moved to a new location under the terms of this section.

Section 4. ROAD CROSSING TO BE A STRICTLY PRIVATE ONE. It is expressly stipulated that the Road Crossing is to be a strictly private one and is not intended for public use. The Licensee shall not at any time permit or suffer said Road Crossing to become or to be used as a public road. The Licensee, without expense to the Licensor, will take any and all necessary action to preserve the private character of said Road Crossing, including the erection and maintenance of such signs, fences and gates, if any, as in the judgment of the Licensor may be necessary or desirable.

Section 5. ASSUMPTION OF RISK; INDEMNIFICATION.

The Licensee shall use said Road Crossing at the Licensee's own risk, and the Licensee agrees to and does assume all risks thereof and incidental thereto, including, without limitation, risks incident to the Licensor's train operations over the Road Crossing and defects in the construction and maintenance of said Road Crossing. The Licensee acknowledges that the Road Crossing and the use thereof permitted hereunder will subject the Licensor's property and operations to additional hazards and liability; and as a material consideration for this license, the Licensee shall furnish the insurance required in Section 6 hereof, and shall indemnify and hold harmless the Licensor and other railroad companies which use the property of the Licensor, their officers, agents and employees, against and from any and all loss, da ages, claims, demands, actions, causes of action, costs and expenses of whatsoever nature which may result from injury to or death of persons whomsoever or from loss of or damage to property whatsoever (including damage to the roadbed, tracks, equipment or other property of the Licensor and such other railroad companies) when such injury, death, loss or damage is due to or arises in connection with or as a result of:

(a) any work done by the Licensee in connection with the maintenance or removal of said Private Roadway; or

(b) the use of said Road Crossing by the Licensee, or the agents, employees, patrons or invitees of the Licensee, or by others with the consent of the Licensee; or

(c) the breach of any covenant or obligation assumed by or imposed on the Licensee pursuant to this agreement, or the failure of the Licensee to promptly and fully do any act or work for which the Licensee is responsible pursuant to this agreement;

except when such loss, damages, claims, demands, actions, causes of action, or costs and expenses are caused by the sole negligence of the Licensor, its agents, servants or employees.

Section 6. LIABILITY INSURANCE. The Licensee, at the Licensee's sole cost and expense, shall provide to the Licensor a Certificate of Insurance certifying to the effectiveness of insurance as follows:

(a) General Public and Automobile Liability providing bodily injury and property damage coverage with a combined single limit of at least $1,000,000 each occurrence.

(b) Such insurance shall be endorsed to provide that the coverage will not be cancelled or changed without giving thirty (30) days' prior written notice to Licenser, c/o Manager - Insurance, 1416 Dodge Street, Omaha, Nebraska 68179.

Section 7. TERMINATION ON BREACH AND WAIVER OF BREACH. It is agreed that the breach of any covenant, stipulation or condition herein contained to be kept and performed by the Licensee shall, at the option of the Licensor, forthwith work a termination of this agreement and all rights of the Licensee hereunder. A waiver by the Licensor of a breach by the Licensee of any covenant or condition of this agreement shall not impair the right of the Licensor to avail itself of any subsequent breach thereof.

Section 8. TERMINATION ON NOTICE. This agreement may be terminated by written notice given by the Licensor to the Licensee on any date in such notice stated, not less, however, than thirty (30) days subsequent to the date on which such notice shall be given.

Section 9. REMOVAL OF ROAD CROSSING.

(a) Upon termination of this agreement howsoever, the Licensor shall, at the sole expense of the Licensee, remove said Road Crossing and restore the premises of the Licensor to a condition comparable to that existing immediately prior to the construction of said Road Crossing.

(b) In the event of the removal of the Road Crossing as in this section provided, the Licensor shall not be liable to the Licensee for any damage sustained by the Licensee for or on account of such removal, and such removal shall not prejudice or impair any right of action for damage, or otherwise, which the Licensor may have against the Licensee.

Section 10. EFFECTIVE DATE; TERM. This agreement shall take effect as of the date first herein written, and, shall continue in full force and effect until terminated as herein provided.

Section 11. AGREEMENT NOT TO BE ASSIGNED. The Licensee shall not assign this agreement, or any interest therein, without the written consent of the Licensor.

Section 12. SUCCESSORS AND ASSIGNS. Subject to the provisions of Section 11 hereof, this agreement shall be binding upon and inure to the benefit of the parties hereto, their respective successors and assigns.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed as of the date first herein written.

Form Approved, AVP-Engineering 3/01/01

LEASE AUDIT NO: 3118 **RELMIS: FD-756.42-X**

PRIVATE ROADWAY AGREEMENT

This Agreement, made this 8th day of August 2001, between PORTLAND & WESTERN RAILROAD, INC., a New York corporation ("Railroad") a lessee of SOUTHERN PACIFIC TRANSPORATION COMPANY, a Delaware corporation ("Lessor"), and Gestring Enterprises, Inc. an Oregon corporation, to be addressed at: 8920 SW Hall Blvd. Beaverton OR 97005, ("Licensee")

WITNESSETH:

In consideration of Five Hundred and No/100 DOLLARS ($500.00) paid by Licensee, Railroad hereby permits Licensee (subject to the provisions hereof) to maintain and use a private roadway across the tracks and upon property of Railroad at Mile Post 756.42 at or near St. Marys Station, Tillamook District, County of Washington, State of Oregon, in the location shown on the attached print marked Exhibit "A".

1. The permission herein granted is subject to all licenses, leases, agreements, encumbrances and claims of title affecting said property of Railroad. Said roadway shall be a private one and shall not be for public use. Railroad reserves the right to construct, reconstruct, maintain and use existing and future transportation, communication and pipeline facilities in, upon, over, under, across and along said roadway.

2. Licensee, at Licensee's expense and to the satisfaction of Railroad, shall:

    a. Maintain said roadway in a good and safe condition;
    b. Keep the roadway (including track flangeways, if any) clear of all rubbish, debris and other material;
    c. Construct and maintain roadway, whistle and stop signs as designated by Railroad;
    d. Trim shrubbery to provide proper visibility to trains and vehicles;
    e. Install and maintain crossing warning devices and make roadway changes required by public authority, or as agreed to by Railroad and Licensee;
    f. Install and maintain such drainage facilities, barricades and fence gates as Railroad may designate, keeping such barricades and fence gates locked except when roadway is actually being used; and
    g. Reimburse Railroad for any expense incurred, including, but not limited, to the items listed above.

3. Pursuant to the terms set forth in Section 2 above, the Railroad is of the opinion that the crossing warning system (hereinafter Signals) is need of repair and upgrade to protect the Licensor's facilities and train operations at this location. Railroad will furnish all labor, material, equipment, and supervision for, and shall repair and upgrade said Signals.

Form Approved, AVP-Engineering 3/01/01

4. Upon execution of this Agreement, the Licensee shall pay Railroad the sum of Eight Thousand and No/100 dollars as the Licensee fixed portion of the costs of the work performed and materials supplied by the Railroad pursuant to Section 2 (e) of this Agreement.

5. The Railroad's responsibility concerning inspection, maintenance, repair and adjustment of the flashing light signals and gates of the Signals shall be governed by the Federal Railroad Administration's rules, part 49, section 234. Licensee shall pay the Railroad Two Thousand Five Hundred and No/100 Dollars ($2,500.00) annually in advance, commencing on the execution of this Agreement, for Railroad to perform the work prescribed by the Federal Railroad Administration, which charge may be again determined by Railroad at the end of each two-year period that the Agreement may be in effect.

6. In the event o floss, damage to or destruction of Signals involving replacement of major items or components of Signals beyond the purview of Section 5 above (which shall be classified as extraordinary maintenance), the Railroad upon request by the Licensee and at the Licensee's sole cost and expense, shall repair or rebuild Signals so as to restore Signals to substantially as good a condition as existed prior to such loss, damage or destruction; and, if Signals are restored by Railroad, the Licensee shall and hereby agrees to reimburse Railroad for all costs incurred by Licensor from time to time in connection with any work performed by Railroad hereunder within thirty (30) days after receipt of Railroad's bill therefore.

7. Licensee shall not perform any work on Railroad's property (except emergency repairs) unless Railroad's AVP- Engineering is given five days' advance notice thereof and the approval of Railroad for such work is obtained in writing.

8. Operators of vehicles shall comply with posted signs. Licensee's vehicle shall stop before entering the crossing area and ascertain that it is safe to proceed across the tracks before so doing. Licensee shall not obstruct or interfere with the passage of Railroad's trains.

9. Licensee shall pay for all materials joined or affixed to said property, and for all labor performed upon said property, at Licensee's instance or request, and Licensee shall not permit or suffer any mechanics' liens or materialmen's liens of any kind or nature to be enforced against the property of Railroad for any such work done or materials joined or affixed thereto.

10. Licensee agrees to release, investigate, indemnify and defend Railroad from and against all liability, costs and expenses for loss of or damage to property of either party hereto or of third persons, and for injuries to or deaths of Licensee or the agents, employees or invitees of Licensee or third persons or the employees of Railroad caused by or arising out of the presence, construction, reconstruction, maintenance, use or removal of said roadway, regardless of any negligence or alleged negligence, active, passive or otherwise, on the part of any employee of Railroad.

    The word "Railroad" as used in this section shall include the successors, assigns and affiliated companies of Railroad, and any other railroad company that may be lawfully operating upon and over the tracks crossing or adjacent to said roadway, and the officers and employees thereof.

11. This Agreement is effective as of the date first herein written and may be terminated by either party hereto by giving thirty (30) days' notice to that effect to the other party. If licensee makes default in respect to any covenant or condition on Licensee's part hereunder, Railroad

may forthwith terminate this Agreement by notice to Licensee. Termination of this Agreement by either party shall not relieve or release Licensee from any liability incurred prior to such termination.

12. Provisions hereof notwithstanding, Railroad reserves the right to perform, at Licensee's expense, all or any portion of work required in connection with the construction, maintenance, use and removal of said roadway. If Railroad is to perform any work, Licensee shall deposit with Railroad the estimated cost thereof and, after completion of such work, the difference between the actual cost to Railroad, and such deposit shall be promptly paid by Licensee or refunded by Railroad, as the case may be.

13. Upon termination of this Agreement, the permission herein granted shall cease and Licensee, at Licensee's expense, shall remove said roadway and leave Railroad's property and track area in a neat, safe and clean condition, failing in which, Railroad may perform such work at the expense of Licensee.

14. Licensee shall, at its expense, comply with all applicable laws, regulations, rules and orders regardless of when they become or became effective, including, without limitation, those relating to health, safety, noise, environmental protection, waste disposal and waste and air quality, and furnish satisfactory evidence of such compliance upon request of Railroad.

    Should any discharge, leakage, spillage, emission or pollution of any type occur upon or arise on the premises covered hereunder as a result of Licensee's use, presence, operations or exercise of the rights granted hereunder, Licensee shall, at its expense, be obligated to clean all property affected thereby, whether owned or controlled by Railroad or any third persons to the satisfaction of the Railroad (insofar as the property owned or controlled by Railroad is concerned) and any governmental body having jurisdiction in the matter. Railroad may, at its option, clean Railroad's premises; if Railroad elects to do so, Licensee shall pay Railroad the cost of such cleanup promptly upon receipt of a bill therefore. Licensee agrees to investigate, release, indemnify and defend Railroad from and against all liability, cost and expense (including, without limitation, any fines, penalties, judgments, litigation costs and attorney fees) incurred by Railroad as a result of Licensee's breach of this section, or as a result of any such discharge, leakage, spillage, emission or pollution, regardless of whether such liability, cost or expense arising during the time this Agreement is in effect or thereafter, unless such liability, cost or expense is proximately caused solely and exclusively by the active negligence of Railroad, its officers, agents or employees.

15. The Licensee shall provide the Railroad with a certificate, identifying Lease audit number 3118, issued by the insurance carrier providing the insurance coverage required pursuant to Exhibit B, which is herby attached and made part of this Agreement.

16. This Agreement shall not be assigned by Licensee in whole or in part without Railroad's consent, which consent shall not be arbitrarily withheld.

Form Approved, AVP-Engineering 3/01/01

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed in duplicate as of the date and year first herein written.

RAILROAD

By:_____
Larry L. Phipps
President

WITNESSED

By:_____

LICENSEE

By: _____

Title: _____

EXHIBIT B-1
Licensee Right of Entry Agreement
Contract Insurance Requirements

Licensee shall, at its sole cost and expense, procure and maintain during the life of this Agreement the following insurance coverage:

a) General Liability insurance providing bodily injury including death, personal injury and property damage coverage with a combined single limit of at least $2,000,000 each occurrence or claim and an aggregate limit of at least $4,000,000. This insurance shall contain broad form contractual liability with a separate general aggregate for the project (ISO Form CG 25 03 or equivalent), Broad Form Property Damage, severability of interests and name Railroad as an additional insured with respect to all liabilities arising out of Licensee's obligation to Railroad in the Agreement. If coverage is purchased on a "claims made" basis it shall provide for at least a three (3) year extended reporting or discovery period, which shall be invoked should insurance covering the time period of this Agreement be cancelled.

b) Automobile Public Liability insurance providing bodily injury and property damage with a combined single limit of at least $2,000,000 each occurrence or claim. This insurance shall provide contractual liability by endorsement ISO From CA 00 25 or equivalent covering all motor vehicles including hired and non-owned, mobile equipment to the extent it may be excluded from general liability insurance, severability of interests and name Railroad as an additional insured with respect to all liabilities arising out of Licensee's obligation to Railroad in the Agreement.

c) Worker's Compensation insurance covering the statutory liability as determined by the compensation laws of the state(s) affected by this Agreement and Employer's Liability. Also compliance with all laws of states which require participation in their state worker' compensation fund.

d) Railroad Protective Liability Insurance naming Railroad as insured with a combined single limit of $2,000,000 per occurrence with a $6,000,000 aggregate. The policy form shall be AAR-AASHTO with broad form coverage for "Physical Damage to Property" (ISO Form GL 00 30) and include pollution arising out of fuels and lubricants brought to the job site (ISO Form CG 28 31 or equivalent). If the Lloyd's, London policy form is used, limits shall be $3,000,000 per occurrence with a $9,000,000 aggregate and the Extended Claims Made Date shall be determined by adding the length of original policy period plus one year to the policy expiration date.

The Licensee hereby waives its right to subrogation, as respects the above insurance policy (ies), against Railroad for payments made to or on behalf of employees of Licensee or its agents and for loss of its owned or leased property or property under its care, custody and control while on or near Railroad's right-of way or other real property. Licensee's insurance shall be primary with respect to any insurance carried by Railroad.

Licensee shall furnish to Railroad certificate(s) of insurance evidencing the required coverage and endorsement(s) and upon request a certified duplicate original of any of those policies. The insurance company(ies) issuing such policy(ies) shall notify Railroad in writing of any material alteration including any change in the retroactive date in any "claims made" policies or substantial reduction of aggregate limits, if such limits apply, or cancellation thereof at least thirty (30) days prior thereto.

The insurance policy(ies) shall be written by a reputable insurance company or companies acceptable to Railroad or with a current Best's Insurance Guide Rating of B and Class VII or better Such insurance company shall be authorized to transact business in the state(s) affected by this Agreement.

Licensee WARRANTS that this Agreement has been thoroughly reviewed by Licensee's insurance agents(s)/brokers(s), who have been instructed by Licensee to procure the insurance coverage required by this Agreement.

If Licensee fails to procure and maintain insurance as required, Railroad may elect to do so at the cost of Licensee.

The fact that insurance is obtained by Licensee shall not be deemed to release or diminish the liability of Licensee, including, without limitation, liability under the indemnity provisions of this Agreement. Damages recoverable by Railroad shall not be limited by the amount of the required insurance coverage.

EXHIBIT A
PORTLAND & WESTERN RAILROAD, INC.
110 W 10TH AVE., ALBANY, OR 97321
OFFICE OF AVP-ENGINEERING
TILLAMOOK DISTRICT
ST. MARYS
PRIVATE ROAD CROSSING
GESTRING ENTERPRISES, INC.
1 IN. = 100 FT.
DRAWING NO: L-3118 DATE: AUGUST 13, 2001
COOK
30
30
24'
E.S. 630+75
756.42
TULATIN VALLEY HIGHWAY 8
HILLSBORO
LEGEND
SHOWS PRIVATE CROSSING
SHOWS RR RIGHT-OF-WAY

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293 P.2d 203
206 Or. 621
Charles BOUCHE and Alice M. Bouche, his wife, Respondents,
v.
Giles WAGNER and Blanche Wagner, his wife, Appellants.
Supreme Court of Oregon, En Banc.
Argued and Submitted Dec. 7, 1955.
Decided Feb. 8, 1956.

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[206 Or. 622] Bruce Williams, Salem, for appellants. On the briefs was John H. Carson, Salem.

W. C. Winslow, Salem, for respondents.

PERRY, Justice.

This is a suit commenced by the plaintiffs to quiet their title in and to certain real property described in their complaint as follows:

> [206 Or. 623] 'Lot numbered 2 of section 12, township 9 south of range 1 east of the Willamette Meridian; the north half of the west half of the west half of section 7 in township 9 south of range 2 east of the Willamette Meridian; and lot 1 of section 12 in township 9 south of range 1 east of the Willamette Meridian, all in Marion County, Oregon.'

The defendants by answer allege ownership of a strip of land carved out of and running through the above-described real property in a generally easterly and westerly direction, which is more particularly described in the deeds hereinafter set out.

For clarity a drawing is here set forth.

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NOTE: OPINION CONTAINS TABLE OR OTHER DATA THAT IS NOT VIEWABLE

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On November 7, 1921, the owners of the land in section 7 conveyed to the Silverton Lumber Company (from whom the defendants deraign title) a portion of land in that section as follows:

> 'This Indenture Witnesseth: That * * * (grantors) for the consideration of the sum of Six Hundred Fifty ($650.00) Dollars to them paid, have bargained and sold and by these presents do bargain, sell and convey unto [206 Or. 624] the Silverton Lumber Company, a corporation, the following described premises, to-wit:
>
> 'Beginning on the West line of the Northwest Quarter of Section 7 in Township 9 South Range 2 East of the Willamette Meridian in Marion County, Oregon, at a Point thereon where the center of the Silverton Lumber Company's Logging Railroad track, as now located and established, intersects said West line, and running thence Southerly along said West line 25 feet; thence Easterly and paralled with said Center line of said logging railroad 1384 feet, more or less, to the East line of the West Half of the Northwest Quarter of said Section; thence Northerly, along said East line 50 feet; thence Westerly and parallel with said center line of said logging railroad 800 feet; thence Northerly parallel with said West line of said Northwest Quarter of said Section 50 feet; thence Westerly parallel with said logging railroad 584 feet more or less, to the West line of the

Northwest Quarter of said Section 7; thence Southerly along said West line 75 feet to the place of beginning; $1.00 U.S. Rev. Stamps cancelled B.S.N. 1/18/22.

'To Have And To Hold the said premises, with their appurtenances, unto the said Silverton Lumber Company, its successors and assigns forever.

'And the said grantors do hereby covenant to and with the said Silverton Lumber Company, Its Successors And Assigns, that they are the owners in fee simple of said premises; that they are free from all incumbrances and that they will warrant and defend the same from all lawful claims whatsoever.

'As a part of the consideration for this conveyance, the grantee agrees to provide such reasonable crossings over and under the railroad right of way herein conveyed to it as may be necessary for the convenient use of the West Half of the Northwest Quarter of Section 7 in Township 9 South Range [206 Or. 625] 2 East of the Willamette Meridian by the present owners thereof, their heirs and assigns.

'In Witness Whereof, said grantors * * *.'

On October 12, 1918, Lizzie M. Burdick and S. J. Burdick, being the then owners of Lot 2 in section 12, conveyed a strip of land to the Lumbermens Engineering Company. This deed of conveyance was not introduced in evidence and is not before us.

On September 9, 1919, the Lumbermens Engineering Company, in accordance with their agreement as trustees of the land for the benefit of the Silverton Lumber Company (from whom these defendants deraign title), conveyed to that company the strip of land in dispute in Lot 2, section 12, together with other lands, by deed as follows:

'Know All Men By These Presents, That Lumbermens Engineering Company, a corporation, incorporated and organized under the laws of the State of Oregon, in consideration of One ($1.00) Dollar and other valuable considerations to it in hand paid by Silverton Lumber Company, a corporation, incorporated and organized under the laws of the State of Oregon, the receipt whereof is hereby acknowledged, has bargained and sold and does by these presents grant, bargain, sell and convey unto the said Silverton Lumber Company and unto its successors and assigns forever, the following described strips of land lying and being situate in the State of Oregon and particularly described as follows, to-wit:

* * *

* * *

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'(8) A strip of land in Lot Two (2), Section Twelve (12), Township Nine (9) South, Range One (1) East, Willamette Meridian, fifty (50') feet in width, being twenty-five (25') feet in width on each [206 Or. 626] side of and parallel with the following center line; Beginning at the intersection of the East line of said Section Twelve (12) with the center line of the proposed railroad as located on the ground, which point of intersection is five hundred and sixty (560') feet North of the one-quarter section corner on the East side of said Section Twelve (12) and at Engineer's Station 296+50; thence on a six (6) degree curve to the right, the tangent to which at said point of intersection bears North seventy-two (72) degrees thirty-eight (38) minutes West, two hundred fourteen and four-tenths (214.4') feet to the point of tangency of said curve; thence North fifty-nine (59) degrees forty-six (46') minutes West along the tangent, one hundred fifty-one and eight-

tenths (151.8') feet to the point of curve of a twelve (12) degree curve to the left; thence along said twelve (12) degree curve three hundred ninety-two and five-tenths (392.5') feet to the point of tangency; thence South seventy-three (73) degrees eighteen (18) minutes West along the tangent two hundred ninety-three and six-tenths (293.6') feet to the point of curve of an eighteen (18) degree curve to the right; thence along said eighteen (18) degree curve four hundred twenty-two (422') feet to the point of tangency; thence North thirty (30) degrees fifty-seven (57) minutes West along the tangent fifty-six and four-tenths (56.4') feet to the point of curve of an eighteen (18) degree curve to the left; thence along said eighteen (18) degree curve two hundred ninety-eight and eight-tenths (298.8') feet to an intersection with the East line of the A. Fitzgerald Donation Land Claim, containing two and ten one-hundredths (2.10) acres, more or less, in Marion County.

* * *

* * *

'To Have And To Hold said above described and granted premises unto the said Silverton Lumber Company and unto its successors and assigns forever.'

[206 Or. 627] The Silverton Lumber Company constructed a railroad running through the strip of land in dispute, and some time in 1931 or 1932 abandoned further use of the road, and removed the rails and a portion of the ties therefrom.

The Silverton Lumber Company was granted a certificate of dissolution by the state corporation commissioner on June 30, 1936. On December 20, 1939, the Silverton Lumber Company, by its board of directors, executed two quitclaim deeds to Earl and Jessie Chapel, the then owners of land adjoining plaintiffs' property on the east; the deeds being in part as follows:

'Know All Men By These Presents, that Silverton Lumber Company, a corporation a corporation [sic] duly organized and incorporated under the laws of the State of Oregon [,] in consideration of One And No/100 Dollars, And other valuable consideration to it paid by Earl Chapel and Jessie Chapel, his wife, do hereby remise, release and forever Quitclaim unto the said Earl Chapel and Jessie Chapel, his wife, and unto their heirs and assigns [,] all its right, title and interest in and to the following described parcel of real estate, situate in County of Marion [,] State of Oregon, to-wit:

'A strip of land in Lot Two (2), Section Twelve (12), Township Nine (9) South, Range One (1) East, Willamette Meridian, said land being the premises granted to the Lumbermans Engineering Company by Lizzie M. Burdick and S. J. Burdick on the 12th day of October, 1918 and recorded in the Marion County Records in the Book of Deeds Vol. 147 and Page 468.

'To Have And To Hold the same, together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining to the said Earl Chapel and

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[206 Or. 628] Jessie Chapel, his wife [,] and to their heirs and assigns forever.

'In Witness Whereof, Silverton Lumber Company, a corporation, pursuant to a resolution of its Board of Directors, duly and legally adopted, has caused these presents to be signed by its President and Secretary, and its corporate seal to be hereunto affixed this 20th day of December A.D.1939.'

The deed quitclaiming the land in section 7 is identical to the above-deed, except for the description of the property which reads as follows:

> 'A strip of land in Section Seven (7) Township Nine (9) South, Range Two (2) East, Willamette Meridian, said land being the premises granted to the Silverton Lumber Company by Valerine Stein and Edward P. Stein; Lila Johnson and Walker D. Johnson; Ellen Cole and Ray C. Cole on the 7th day of November, 1921 [,] and recorded in the Marion County Records in the Book of Deeds, Vol. 162 and Page 618.'

Each deed was signed by the president and secretary, and acknowledged by them as having been done by authority of the board of directors, and the corporate seal was affixed.

The Chapels conveyed their land adjoining the plaintiffs' land and the strips of land set forth in the above conveyances from the Silverton Lumber Company to the defendants herein on May 24, 1945.

The plaintiffs base their claim of ownership in fee simple upon two propositions: (1) The Silverton Lumber Company operating a railroad obtained only an easement in the property, and, since the plaintiffs and their predecessors in interest were the owners of the lands surrounding the strip, upon abandonment of the [206 Or. 629] railroad the lands reverted to them; (2) they obtained title by adverse possession.

The defendants base their claim of ownership to the strip of land upon the assertion of a fee title in the Silverton Lumber Company, and also claim by adverse possession.

A decree for the plaintiffs was entered in the trial court, and the defendants have appealed.

We are satisfied from a search of the record that the claim to ownership by adverse possession was not proven by either the plaintiffs or the defendants.

It is, therefore, necessary to consider the nature of the estate in the real property acquired by the Silverton Lumber Company. If an easement, then the plaintiffs should prevail; if a fee simple title, then the defendants should prevail.

The plaintiffs rely upon the following words, found in the conveyance of November 7, 1921, as restricting the conveyance to an easement only:

> 'As a part of the consideration for this conveyance the grantee agrees to provide such reasonable crossings over and under the railroad right of way herein conveyed to it as may be necessary for convenient use [of grantors' adjoining land].'

'Whether an instrument conveys ownership of land or only an easement depends upon the intention of the parties.' 28 C.J.S., Easements, § 27, p. 681.

ORS 93.120 provides:

> 'Any conveyance of real estate passes all the estate of the grantor, unless the intent to pass a lesser estate appears by express terms, or is necessarily implied in the terms of the grant.'

The intention to convey less than the full fee must be clearly expressed or necessarily implied from [206 Or. 630] the words used in the conveyance. Weniger v. Ripley, 134 Or. 265, 293 P. 425. The courts and textbooks writers have suggested many tests as aids in determining the intention of the parties. See 2 Thompson, Real Property (perm. ed.) §§ 459 and 462; Sherman v. Petroleum Exploration, 280 Ky. 105, 132 S.W.2d 768, 132 A.L.R. 137, and annotation following; Brightwell v. International-

Great Northern Ry. Co., 121 Tex. 338, 49 S.W.2d 437, 84 A.L.R. 265, and annotation following. Some of these tests are set forth and applied by this court in Bernards v. Link and Haynes, 199 Or. 579, 248 P.2d 341, 263 P.2d 794.

A study of the cited cases suggests that the courts have little difficulty, where a railroad company is grantee, in declaring that the instrument creates only an easement whenever the grant is a use to be made of the property, usually, but not invariably, described as for use as a right of way in the grant.

On the other hand, the general rule concerning the grant of land to a railroad as distinguished from the grant of a right or use thereof is stated by the author of the annotation of 132 A.L.R. 145 as follows:

> 'Conveyances to railroads, which purport to grant and convey a strip, piece, parcel, or tract of land, and which do not contain additional language relating to the use or purpose to which the land is to be put or in other ways cutting down or limiting, directly or indirectly, the estate conveyed, are usually construed as passing an estate in fee.'

The courts, however, seem to express a divergence of opinion when the conveyance merely has a reference to the use or purpose to which the land is to be put, and which is contained in either the granting or habendum clause, and, except for the reference, would uniformly[206 Or. 631] be construed as passing title in fee. This confusion, we think, arises for the most part in the failure to distinguish the twofold meaning of the words 'right of way.'

In Territory of New Mexico v. United States Trust Co., 172 U.S. 171, 183, 19 S.Ct. 128, 132, 43 L.Ed. 407, it is stated:

> 'In Keener v. [Union Pacific] Railway Co., C.C., 31 F. 128, Mr. Justice Brewer defined the words 'right of way' as follows: 'The term 'right of way' has a twofold significance. It sometimes is used to mean the mere intangible right to cross,--a right of crossing, a right of way. It is often used to otherwise indicate that strip which the railroad company appropriates for its use, and upon which it builds its roadbed.'
>
> 'Mr. Justice Blatchford said in Joy v. [City of] St. Louis, 138 U.S. 44, 11 S.Ct. 256 [34 L.Ed. 843]: 'Now, the term 'right of way' has a twofold signification. It is sometimes used to describe a right belonging to a party,--a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their roadbed.' That is, the land itself, not a right of passage over it. So, this court in [Missouri, Kansas & Texas] Railway Co. v. Roberts, 152 U.S. 114, 14 S.Ct. 496 [38 L.Ed. 377], passing on a grant to one of the branches of the Union Pacific Railway Company of a right of way 200 feet wide, decided that it conveyed the fee.' (Italics theirs.)
>
> See also Johnson v. Valdosta, M. & W. R. Co., 169 Ga. 559, 150 S.E. 845.

Let us now consider the conveyance of the strip in Section 7, conveyed to the Silverton Lumber Company. The conveyance is not entitled (1) a 'right of way deed'; (2) the granting clause conveys land, not a right; (3) the consideration was substantial ($650); (4) there is no reverter provided for; (5) the words [206 Or. 632] 'over and across the lands of the grantors' do not appear; and (6) the land conveyed is described with precision. The only indication that the parties may have intended an easement should pass is the incidental reference to a 'right of way' in the covenant following the granting and habendum clause. Thus the term 'right of way' as used in the deed could have referred to either the right of passage or to the land itself. There is nothing therein which in anywise limits the company in the use it might make of the land, and in every other particular the conveyance clearly states the conveyance of the fee.

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We must, therefore, conclude that it was the intention of the parties that the fee in the land should pass.

The deed of the strip of land across Lot 2, Section 12, from Lizzie M. and S. J. Burdick to the Lumbermens Engineering Company was not introduced as evidence in the trial court. All we have is the deed from the Lumbermens Engineering Company to the Silverton Lumber Company, which includes eleven parcels of land.

Paragraph (8) of the deed described the strip in Lot 2, section 12, and, while there was no mention of the phrase 'right of way' in paragraph (8), it is urged by the plaintiff that we should look to the conveyance of the strip across Lot 7, section 13, conveyed to the Lumbermens Engineering Company by Henry and Alice Lyons and described in paragraph (3), and to the conveyance of the strip across a portion of section 8 conveyed by Frank, Caroline and Chester Kubin and described in paragraph (10). Both of these descriptions incidentally refer to the strip conveyed as a 'right of way.' It is doubtful whether these references carry any more weight than the reference[206 Or. 633] in the Burdick-Silverton Lumber Company deed, but we do not feel it necessary to consider that issue.

This situation does not come within the rule first set out in this state in Kruse v. Prindle, 8 Or. 158, which provided that two conveyances executed at the same time between the same parties and relating to the same subject matter may be construed together. The three deeds described in paragraphs 3, 8 and 10 refer to three separate instruments by three separate grantors, dealing with three separate parcels of land. The rule is well-stated in Rogers v. Powers, 204 Mass. 257, 264, 90 N.E. 514, 517:

'We cannot attempt to discover and give effect to a conjectural intention of the parties interested in these lots to create this right of way, by construing together all the deeds and mortgages which have been made at different times, by different parties, and with different objects, having indeed nothing in common except that they refer to some one or more of the five lots with which we are concerned. That would be very different from the rule declared in some of our decisions that instruments made at the same time between the same parties, and concerning the same subject-matter, may be taken together to ascertain the intent with which they were made.'

See, also, Blagen v. Thompson, 23 Or. 239, 31 P. 647, 18 L.R.A. 315.

Thus, we see that the deed to the strip across Lot 2, section 12 contained no mention of a right of way; it described the subject of the grant as 'a strip of land,' not as a 'right,' and there was no statement of the purposes for which it was granted; it described the land conveyed with a relatively high degree of precision; and the habendum clause is of the type usually employed to convey a fee simple title. This deed conveyed the fee simple title to the land involved.

[206 Or. 634] The plaintiffs make a further attack upon the defendants' record title. They state in their brief:

'Again we say that the deeds from the Silverton Lumber Company to the Chapels (Def. Ex. 'F' and 'G') were not admissible. Upon dissolution of a corporation in states that have statutes like Oregon, title to any real property owned by the corporation is vested in the board of directors as trustees for the stockholders, and some courts hold that the title is even vested in the stockholders. (See 14-A, C.J., pp. 1152-3) Now, while the deeds referred to recite in the acknowledgments that they are executed by authority of its board of directors, it would take more than that to give these men authority to make these deeds. The stockholders would have to authorize the conveyance and there is no showing of any such authority.'

In answer to this contention, we quote from 19 C.J.S., Corporations, § 1099b, p. 659:

> 'While recitals in conveyances showing the authority under which they are executed are sometimes very useful, and under some statutes are required, generally, in the absence of a contrary statute or charter provision the conveyance need not show on its face, or recite, the authority for its execution or of the persons purporting to act for the corporation.'

In 19 C.J.S., Corporations, § 1100b, we find:

> 'A deed purporting to have been executed by a corporation which bears the seal of the corporation and is signed by its officers or agents will be presumed to have been executed by its authority, particularly after the lapse of time, unless a statute exists providing that it shall be the duty of a specific officer of the corporation to execute its conveyances.'

A certificate of dissolution was filed by the Silverton Lumber Company on June 30, 1936. The deeds [206 Or. 635] to the Chapels were executed by the Silverton Lumber Company in 1939--within the five year period during which a dissolved corporation was then authorized to continue its existence as a body corporate for winding up its affairs. § 25-221, Oregon Code 1930. The burden of proof was upon the plaintiffs to show that the deeds from the Silverton Lumber Company were executed without proper authority. Atlantic & Pacific R. Co. v. City of St. Louis, 66 Mo. 228.

In view of our conclusions as to the deeds in question, it is unnecessary to consider the validity or invalidity of defendants' tax foreclosure deed from Marion County.

The decree of the trial court is reversed, and the cause is remanded to the circuit court with instructions to enter a decree not inconsistent with our opinion.

Neither party shall recover costs in this court.

TOOZE, J., not participating.

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586 P.2d 791

36 Or.App. 751

STATE of Oregon By and Through DEPARTMENT OF TRANSPORTATION, HIGHWAY DIVISION, Appellant,
v.
William I. TOLKE, Respondent.

No. 36-648; CA 9262.

Court of Appeals of Oregon.

Argued and Submitted June 21, 1978.
Decided Oct. 30, 1978.

[36 Or.App. 752]

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Mary Deits, Asst. Atty. Gen., Salem, argued the cause for appellant. On the briefs

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were James A. Redden, Atty. Gen., Al J. Laue, Sol. Gen., and James C. Rhodes, Asst. Atty. Gen., Salem.

David G. Frost, Hillsboro, argued the cause for respondent. With him on the brief were Albert T. Kemmer, Beaverton, and Frost & Hall, Hillsboro.

Before SCHWAB, C. J., and THORNTON, TANZER and BUTTLER, JJ.

[36 Or.App. 753] BUTTLER, Judge.

Plaintiff Department of Transportation (State) appeals from a decree of the circuit court quieting title to certain real property in the defendant and his wife. This proceeding commenced as an action by the State for damages for trespass against defendant, in which the State alleged ownership in fee simple of described real property. Defendant filed an answer denying the State's ownership of the land in question, and by way of a countersuit defendant claimed that he and his wife owned the land in question, and prayed that tile be quieted in them. The trial court proceeded to try the case as a suit to quiet title, apparently pursuant to ORS 16.460(2). [1] No error is assigned to the procedure followed, to the pleadings, or to the nonjoinder of parties. For purposes of this appeal, however, we treat the sole issue as being whether the State owns the real property described in the complaint.[1]

In 1919, A. L. Stephens and Ella S. Stephens owned a parcel of real property which was farmed by them as a unit. That year, the Portland, Astoria and Pacific Railroad Company (Railroad) sought to acquire a strip of land across the Stephenses' farm as a right-of-way [36 Or.App. 754] for its tracks. Having failed to negotiate successfully for the acquisition, the Railroad commenced proceedings to take the strip of land by condemnation, and thereafter the action was settled by the Stephenses' executing a

[1] ORS 16.460(2) provides in part:

> " * * * When such an equitable matter is interposed, the proceedings at law shall be stayed and the case shall thereafter proceed, until the determination of the issues thus raised, as a suit in equity by which the proceedings at law may be perpetually enjoined or allowed to proceed in accordance with the final decree; or such equitable relief as is proper may be given to either party. * * *"

But see Corvallis Sand & Gravel v. Land Board, 250 Or. 319, 439 P.2d 575 (1968).

warranty deed on February 25, 1920, conveying the strip to the Railroad. That deed[2] contained the following language:

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> "* * * so long as said property herein granted shall be possessed, used and occupied as a railroad right of way and be used and occupied for the purposes of construction, maintenance and operation thereon and thereover, railroads and railroad trains, and the above named grantors do hereby covenant to and with the above named grantee, its successors in interest and [36 Or.App. 755] assigns, that they are lawfully seized in fee simple of the above granted premises and that they are free and clear of all liens and incumbrances and that they will and their heirs, executors and administrators, shall warrant and forever defend the above granted premises and every part and parcel thereof against the lawful claims and demands of all persons whomsoever. Except and provided however, that in the event of and whenever the said land hereinabove described shall be abandoned as a railroad right of way and shall cease to be used as such, and the operation of the trains thereover shall cease, then, and in that event, this conveyance shall thereupon become null and void and the right, title and interest in the land hereby conveyed shall immediately revert to and reinvest in the grantors above named, their heirs, executors, administrators or assigns, and all rights hereby conveyed by or received from the grantors hereunder shall at said time utterly cease and terminate."

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[2] In its entirety, the deed read:

> "KNOW ALL MEN BY THESE PRESENTS: that A. L. Stephens and Ellas Stephens, his wife, of the County of Washington, State of Oregon, in consideration of the sum of one thousand ninety-eight and 60/100 ($1098.60) dollars, and other good and valuable considerations, as evidenced by a certain agreement in writing made and entered into by and between the parties hereto and of even date herewith, to A. L. Stephens paid by the Portland, Astoria & Pacific Railroad Company, a corporation, organized, existing and doing business under and by virtue of and in pursuance to the laws of the State of Delaware, and duly licensed to do business in the State of Oregon, have bargained and sold and by these presents do hereby grant, bargain, sell and convey unto the said Portland, Astoria & Pacific Railroad Company, a corporation, its successors in interest and assigns, all the following bounded and described real property, lying, being and situate within Washington County, Oregon, and being more particularly bounded and described as follows, to-wit:
>
> "(Description omitted.)
>
> "Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, including all our right, title and interest in and to the same, except as hereinafter set forth.
>
> "TO HAVE AND TO HOLD the above described and granted premises unto the said Portland, Astoria & Pacific Railroad Company, a corporation, its successors in interest and assigns, so long as said property herein granted shall be possessed, used and occupied as a railroad right of way and be used and occupied for the purposes of construction, maintenance and operation thereon and thereover, railroads and railroad trains, and the above named grantors do hereby covenant to and with the above named grantee, its successors in interest and assigns, that they are lawfully seized in fee simple of the above granted premises and that they are free and clear of all liens and incumbrances and that they will and their heirs, executors and administrators, shall warrant and forever defend the above granted premises and every part and parcel thereof against the lawful claims and demands of all persons whomsoever. Except and provided however, that in the event of and whenever the said land hereinabove described shall be abandoned as a railroad right of way and shall cease to be used as such, and the operation of the trians thereover shall cease, then, and in that event, this conveyance shall thereupon become null and void and the right, title and interest in the land hereby conveyed shall immediately revert to and reinvest in the grantors above named, their heirs, executors, administrators or assigns, and all rights hereby conveyed by or received from the grantors hereunder shall at said time utterly cease and terminate."

On March 23, 1920, another document was executed, and subsequently recorded, which provided that in further consideration of the conveyance by the Stephenses to the Railroad, the Railroad would construct grade earth farm crossings across the strip of land and undertake the construction and operation of the Railroad right of way so as not to interfere with farming activities.

In 1937, the Stephenses conveyed their farm to C. P. and Elva Tolke, parents of the defendant herein. The deed conveyed the entire farm, "* * * (e) xcepting therefrom that certain tract of land described in Deed [36 Or.App. 756] Book 118, page 29, records of deeds, Washington County, Oregon." The reference is to the deed conveying the strip of land to the Railroad.

In 1956 defendant and his brother acquired an undivided 1/2 interest in the farm from their mother, then a widow, and in 1975 title to the entire farm was conveyed by warranty deed to defendant and his wife.

Subsequent to the acquisition of the strip of land, the Railroad merged with and became a part of the Spokane, Portland and Seattle Railroad and the Burlington-Northern (SPS Railroad). SPS Railroad, in 1974, ceased to use the property as a Railroad right-of-way, and on October 2, 1974, quitclaimed whatever interest it had in the strip to Orth Industries, a California salvage company. Orth Industries removed the rails and ties from the disputed property, and in August, 1975, quitclaimed whatever interest it had in the property to defendant. In September, 1975, however, the State obtained a bargain and sale deed[3] from the

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purported heirs of the original grantors, the Stephenses.

The State contends it owns the strip of land because the original conveyance from the Stephenses to the Railroad conveyed a fee simple determinable (subject to special limitation) with a possibility of reverter in the grantors and their heirs, which vested in possession in the grantors' heirs when the Railroad abandoned the use of the strip as a right-of-way. Defendant, on the other hand, contends primarily that deed created only an easement over and across the farm, which was extinguished when the Railroad abandoned its use of the strip; he further contends that the deed from the Stephenses to defendant's parents must be construed as being "subject to" the rights of the Railroad rather than as excepting the strip of land from the conveyance. The trial court agreed with defendant.

[36 Or.App. 757] I

THE DEED TO THE RAILROAD

It is apparent from a close reading of the deed from the Stephenses to the Railroad that it was very carefully and thoughtfully prepared with the express intention of creating a fee simple determinable. As we said in City of Klamath Falls v. Flitcraft, 7 Or.App. 330, 334, 490 P.2d 515 (1971), Rev. den. (1972):

> "We conclude that the estate that passed to the city under this deed was a fee simple on a special limitation, which is also known as a fee simple determinable, or a base or qualified fee.
>
> "The 'magic' words 'so long as' have generally been held to create such an estate. Simes and Smith, The Law of Future Interests 345, § 287 (2d ed 1956), states:
>
> "'* * * The words of duration "so long as" will almost certainly be judicially recognized as the distinctive insignia of such an estate, and, if coupled with a provision which clearly calls for an automatic termination of the estate granted, there is little room for construction. * * *'"

[3] The deed to the State recited a consideration of $1,000.

Not only does the deed employ the so-called "magic" words "so long as" in the habendum clause, but the warranty provisions, after the usual general warranty language, add:

> "Except and provided however, that in the event of and whenever the said land hereinabove described shall be abandoned as a railroad right of way and shall cease to be used as such, and the operation of the trains thereover shall cease, then, and in that event, this conveyance shall thereupon become null and void and the right, title and interest in the land hereby conveyed shall immediately revert to and reinvest in the grantors above named, their heirs, executors, administrators or assigns, and all rights hereby conveyed by or received from the grantors hereunder shall at said time utterly cease and terminate."

See O'Connell, Estates on Condition Subsequent and Estates on Special Limitation in Oregon, 18 Or.L.Rev. 63, 73 (1939), where the author states that Any [36 Or.App. 758] language in the instrument indicating an intent that the estate automatically ends upon the occurrence of a specified event is sufficient to create an estate on a special limitation (fee simple determinable).

Here the deed used both the phrase "so long as" and clearly and expressly provided that the estate shall terminate and the title to the land conveyed "shall immediately revert to" the grantors, etc. Defendant relies on a constructional preference leaning toward the grant of an easement with respect to railroad deeds, citing Bernards et ux. v. Link and Haynes, 199 Or. 579, 248 P.2d 341, 263 P.2d 794 (1953). In this case, however, we see no room for construction: the deed is a classic example of the creation of a fee simple determinable.

Defendant also contends that the document executed approximately one month after the deed in question supports his position because it refers to the conveyance as a "right-of-way deed" in several places. He points out that the Supreme Court, in Cappelli v. Justice, 262 Or. 120, 128, 496 P.2d 209, 213 (1972), stated that "(i)n common

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parlance the term 'right of way' signifies an easement." It is also true, however, that the term has a generic meaning: an area or strip where a railroad operates its trains. Black's Law Dictionary, 4th Ed (1968). The Court in Cappelli went on to state: "In the absence of special circumstances indicating a contrary meaning, the courts have generally construed the term in accordance with common usage. (Footnote omitted.)" 262 Or. at 128-29, 496 P.2d at 213. Here there was clearly a special circumstance: the carefully drawn deed to which reference was made in the agreement and which used the term "right-of-way" in its generic sense in providing that "in the event * * * said land * * * shall be abandoned as a railroad right of way."

We hold that the deed to the Railroad created a fee simple determinable estate in the Railroad.

[36 Or.App. 759] II

1937 DEED FROM STEPHENS TO DEFENDANT'S PARENTS

Having determined that the Stephenses, as grantors, retained a possibility of reverter in the strip of land, it remains to be determined the effect of their subsequent conveyance to defendant's parents, his predecessors in interest.

The 1937 deed conveyed from the Stephenses to the Tolkes (defendant's parents) "all the following bounded and described property, situated in the County of Washington, State of Oregon, (description of entire farm, omitted) containing 79 acres, more or less, excepting therefrom that certain tract of land described in Deed Book 118, page 29, records of deeds of Washington County, Oregon." The latter reference is to the 1920 deed to the Railroad relating to the strip of land here in controversy.

Ordinarily, the purpose of an exception "is to take something out of the thing granted that would otherwise pass by the deed." Rall et ux. v. Purcell et ux., 131 Or. 19, 21, 281 P. 832, 833 (1929). The question here is what did the grantors intend to except from the conveyance? That question may be

answered best by considering the purpose of the exception in the context of the 1937 deed. The Railroad deed, the subject of the exception and incorporated by reference in the 1937 deed, conveyed a narrow strip running through the farm conveyed by the 1937 deed, and retained a possibility of reverter in the Stephenses. Because the 1937 deed was a general warranty deed, it was necessary to exclude from the warranty the rights of the Railroad under the earlier deed, but nothing more. The only circumstance in which it would make sense to construe the deed as excluding any interest in that strip from the conveyance would be where the Railroad has acquired title in fee simple absolute to the strip by virtue of the Railroad deed; in that event, the grantors would have had nothing to transfer and the purpose of [36 Or.App. 760] the exception would be to exclude fee simple title to the strip from the conveyance. But that was not the case here.

It could also be argued, however, that the grantors intended to reserve to themselves the remote contingency that the possibility of reverter would occur, thereby revesting title to the strip in themselves or their heirs. There is nothing in the 1937 deed, however, to suggest that the grantors were reserving Any Interest in themselves, much less a remote interest which, if it became vested in possession, would make them or their heirs the owners of a narrow strip running through the farm conveyed. In the absence of a clearly expressed intent to reserve an interest in themselves, it seems far more likely that their only concern was to exclude the rights of the Railroad from their general warranty of title.

Accordingly, whatever was intended by the 1937 deed it is not clearly expressed by its language; either it meant "except for the rights of the Railroad under the deed" referred to, or it meant that in addition, the grantors were reserving to themselves the possibility of reverter under the Railroad deed. We must decide which meaning was intended.

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In resolving this problem, we are aided by a constructional preference in favor of the grantee. In Hurd v. Byrnes, 264 Or. 591, 598, 506 P.2d 686, 690 (1973), the Supreme Court said:

> " * * * Where narrow strips of land have been the subject of dispute in construing various conveyances, we have held that there should be a constructional preference in favor of the grantee. We have pointed to a number of considerations which warrant this preference. We have taken the view that where the conveyance or reservation of title to narrow strips of land is in question, the probable intent of the grantor is not to retain title if he does not own abutting land. Our previous cases recognizing this principle have involved conveyances bordering on a street or stream. We have assumed that in the absence of an express provision to the contrary the grantor, in conveying land described as bordering a [36 Or.App. 761] street or stream, ordinarily intends to also convey his title to the street portion of the lot or to the bed of the stream. This rule of construction is also founded on policy considerations, including the prevention of vexatious litigation and the prevention of the existence of strips of land the title to which would otherwise remain in abeyance for long periods of time. (Footnote omitted.) Supporting this conclusion is the general rule that ambiguities in a deed are to be construed against the grantor. (Footnote omitted.)"

In this case, the Stephenses conveyed their entire farm, and there is no evidence that they owned any other property abutting the strip, and since there is no express provision reserving any rights therein to the grantors, the probable intent of the grantor was not to retain any interest in the narrow strip. The most logical construction of the language is that it was intended to exclude from the conveyance, and thus from the grantors' warranty, the rights of the Railroad under the earlier deed.[4]

[4] If we needed to resort to extrinsic evidence, the record here supports our conclusion. A surviving grantee under the 1937 deed said she was told by the Stephenses that if and when the Railroad abandoned its use of the right-of-way, the strip would belong to the grantees. The fact that the Stephenses did not intend to retain any interest in the narrow strip, and didn't think

Accordingly, we hold that the 1937 deed conveyed the entire farm then owned by the Stephenses to defendant's predecessors, excepting therefrom the rights of the Railroad under the 1920 deed to occupy the narrow strip as a right-of-way, and did not reserve any interest therein to the grantors. As a result, the deed transferred whatever rights the Stephenses had in the strip to the grantees. The question remains as to whether they had the right to do so.

III

ALIENABILITY OF POSSIBILITY OF REVERTER

Discussion of the question as to whether a possibility of reverter may be transferred is clouded by Dicta in [36 Or.App. 762] two early Oregon cases, Wagner v. Wallowa County, 76 Or. 453, 148 P. 1140 (1915), and Magness v. Kerr et al., 121 Or. 373, 254 P. 1012 (1927). Wagner involved a fee simple subject to a condition subsequent which the Court had held to be nontransferable until the grantor actually regained possession by reentry after breach of the condition. School Dist. No. 21 v. Wallowa Co., 71 Or. 337, 142 P. 320 (1914). The question in Wagner was whether the original grantor's attempt to transfer the right of reentry destroyed that right, and the Court held that it did.

In arriving at that result, the Court discussed in detail the differences between an estate subject to a condition subsequent and an estate subject to a special limitation. It pointed out that with respect to the former, the grantor has conveyed his entire estate leaving him with "no estate whatever, but only a chose in action which is personal to himself and cannot be granted to another." (76 Or. at 464, 148 P. at 1143.) The Court went on to assume, without deciding, that

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there had been a breach of the condition, and that the attempted transfer of the right of reentry destroyed it. The grantee acquired a fee simple absolute because the attempted alienation amounted to a renunciation by the grantor of his potential future right to reenter for condition broken. On the other hand, the grantor of an estate subject to a special limitation has conveyed less than his entire estate, and the estate so granted "contains within itself the elements of its own dissolution, so that it returns spontaneously to the grantor upon the happening of the event." (76 Or. at 464, 148 P. at 1143.)

Based upon the Court's discussion in Wagner, then, the key distinction between the two estates appears to be that the grantor of an estate on a condition subsequent retains no estate in the land conveyed, but only a chose in action, whereas the grantor of an estate on a conditional limitation does retain an estate in the land conveyed. Wagner holds only that an attempt to convey a right of reentry destroys it.

[36 Or.App. 763] In Magness v. Kerr, supra, the Court Held that after the happening of the contingency by which the estate on a conditional limitation reverted to the grantor, the grantor could convey it. While the opinion contains, by way of Dicta, a discussion of the two estates discussed in Wagner, and the differences between them, the discussion is confusing because it concludes with the following statement which seems to indicate that there are no differences between the two types of estates which was recognized earlier in that opinion as well as in Wagner :

> "* * * Hence, whichever view may be taken the right of a grantor of an estate subject to a special limitation is until the event happens which terminates the estate, a mere naked possibility of reverter and in the absence of a statute, the right is not assignable, since it is neither an estate nor an interest in lands. But however that may be, the rule applied in the Wallowa county cases that an attempted conveyance by the grantor of his possibility of reverter, operates to destroy his right and vest an indefeasible estate in his first grantee, ought not to be applied in this case. First, the rule is a harsh one, and produces a result not

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they had done so, is further evidenced by the omission of any mention of that interest in the inventory filed in the probate proceedings of Mr. Stephens.

> contemplated by the parties to the transaction, and therefore ought not to be applied, unless required by some positive rule of law; secondly, in this case under the admitted facts in the case, the estate granted to the Equity Queen Canning Company had been determined by its failure to use the property for co-operative purposes, which was the contingency by which the estate was to be divested, and since by the happening of such a contingency the estate had been determined and the property had reverted, it was subject to conveyance by the defendants, and, upon its reconveyance to them, they owned the whole estate in the land."

As a result of that apparent confusion,[5] the Court assumed that its holding in Wagner was applicable to the deed in dispute, but was avoided because the [36 Or.App. 764] grantee's estate had automatically reverted to the grantor, who thereafter conveyed it.

Accordingly, prior to this Court's decision in City of Klamath Falls v. Flitcraft, supra, the state of the law in Oregon was that a right of reentry incident to an estate on a condition subsequent was inalienable, and an attempt by the original grantor to alienate his right of reentry destroyed it; however, the grantor of an estate on a conditional limitation could convey his estate after the contingency occurred which caused an automatic reverter to him. In City of Klamath Falls, we were confronted with a deed which we held created an estate on a conditional limitation, with an executory interest in others than the grantors. We further held that the executory interest was

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void under the rule against perpetuities,[6] and were then confronted with the question of whether the attempted alienation of the possibility of reverter destroyed it. In discussing that issue, we stated that this state was one of a small minority of states that holds that a possibility of reverter cannot be alienated, citing Magness. We went on to point out that no Oregon case has held that an attempt to alienate a possibility of reverter destroys it, and that the language of the Court in Magness criticizing the holding in Wagner was Dictum. We held [36 Or.App. 765] that the attempt by the grantor to transfer his possibility of reverter did not destroy it.

We did not hold in City of Klamath Falls v. Flitcraft, supra, that a possibility of reverter cannot be alienated. We held that an attempt to do so by an executory limitation was void under the rule against perpetuities and that notwithstanding that void attempt, the possibility of reverter remained viable in the grantor. The language in Magness to which we referred in support of our Dictum (which is part of the language quoted above) that a possibility of reverter cannot be alienated, was also Dictum. In City of Klamath Falls we did not follow the Dictum of Magness that an attempt to alienate a possibility of reverter destroys it, and we do not now follow the Magness dictum with respect to inalienability.

In fact, in order to decide City of Klamath Falls as we did, we had to decide that a possibility of reverter was descendable to the heirs at law of the shareholders of the dissolved corporate grantor, that is, that the grantor had retained an interest in land. Our conclusion was consistent with the Dictum in

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[5] "What the law is in Oregon today is left in doubt by the case of Magness v. Kerr.'' O'Connell, Estates on Condition Subsequent and Estates on Special Limitation in Oregon, 18 Or.L.Rev. 63, 85 (1939).

[6] While the rule against perpetuities applies to executory interests (Agan et al. v. U. S. National Bank, 227 Or. 619, 363 P.2d 765 (1961); City of Klamath Falls v. Flitcraft, 7 Or.App. 330, 334, 490 P.2d 515 (1971), Rev. den. (1972)), it is well settled that it does not apply to possibilities of reverter. Gray, The Rule Against Perpetuities 46, 348, 349, § 41, 313, 314 (4th ed 1942). While this anomaly has been criticized as contrary to the policy of the rule because it permits long-outstanding "contingent" interests, O'Connell, Estates on Condition Subsequent and Estates on Special Limitation in Oregon, 18 Or.L.Rev. 63, 79 (1939), argues that it is preferable to make such rights expressly subject to the rule against perpetuities rather than accomplish the same result by restricting their alienation. See City of Klamath Falls v. Flitcraft, supra, note 3.

The Oregon legislature has taken the suggestion by setting a 30-year maximum period within which the contingency must occur. (Oregon Laws 1977, ch. 23, § 1; codified as ORS 105.770-105.774.) Although the new legislation is inapplicable to the deed to the Railroad here involved, it does indicate that the legislature addressed the problem by limiting the duration of the contingency rather than by restricting alienation.

Wagner but not consistent with the Magness dictum that the right was "a mere naked possibility of reverter" and was "neither an estate nor an interest in lands." (121 Or. at 383, 254 P. at 1015). We pointed out that the weight of authority supported the descendability of such interests and that we could discern no public policy against such a conclusion.

It is also true that the weight of authority supports the alienability of a possibility of reverter, 2 Restatement of Property, § 159 (1936); Simes and Smith, The Law of Future Interests, § 1860 (2nd Ed., 1956). Cf. O'Connell, Estate as Condition Subsequent and Estates on Special Limitation in Oregon, Supra, and we see no reason based on public policy to reach a different conclusion. The most that can be said is that even though the language in Magness was Dictum, it has been assumed that the Dictum is the law of this state. See O'Connell, Ibid; City of Klamath Falls v. [36 Or.App. 766] Flitcraft, supra. As we have pointed out, however, we did not in City of Klamath Falls follow the Magness dictum with respect to the destruction of the possibility of reverter by attempted alienation. Indeed, we held the interest was an interest (if not an estate) in land which descended to the heirs of the grantor.

Furthermore, it can hardly be said that one of the parties to the lawsuit relied on Magness dictum any more than the other. The plaintiff paid the Stephenses' heirs $1,000 for a deed to the two acres, and immediately brought this action to collect

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almost $35,000 in damages for defendant's cutting of trees and removal of aggregate from the property. The purchase price does not support the conclusion that plaintiff confidently relied on the inalienability of the possibility of reverter. On the other hand, defendant obtained a quitclaim deed from the Railroad's successor, apparently on the theory that the Stephenses' alienation of the possibility of reverter might have destroyed it, leaving the Railroad as the owner in fee simple absolute. It seems apparent that the law is uncertain and should be clarified.

Therefore, we hold that the Stephenses were entitled to convey their possibility of reverter under the 1937 deed to defendant's predecessors. It follows that the heirs of Stephens conveyed nothing to plaintiff by their deed.

IV

The question remains as to the proper disposition of the case. The trial court entered a decree on defendant's counterclaim quieting title to the disputed land in the defendant. However, as we stated at the outset, we treat the issue on appeal as whether the plaintiff in this trespass action owns the real property, as it alleges, and the defendant denies. Because we have concluded that the State is not the owner of the real property, the appropriate disposition is a judgment in favor of defendant. Accordingly, we remand for the entry of such a judgment.

[36 Or.App. 767] Remanded with instructions to enter judgment for defendant.

Filed: July 23, 2020

IN THE SUPREME COURT OF THE STATE OF OREGON

ALBANY & EASTERN RAILROAD COMPANY, an Oregon corporation,

Respondent on Review.

v.

MICHAEL MARTELL and CINDY MARTELL, a married couple; JOHN HARCROW and ELAINE HARCROW, a married couple; JEFFREY KAISER and BEVERLY KAISER, a married couple; JOANNE FAGAN, an individual; RAY MCMULLEN and MICHELLE MCMULLEN, a married couple; JEREMY ORR and KAREN ORR, a married couple; RICHARD HUTCHINS and JILL HUTCHINS, a married couple; LAURA MITHOUG, an individual,

Petitioners on Review.

(CC 13CV00291) (CA A161921) (SC S066941)

En Banc

On review from the Court of Appeals.*

Argued and submitted March 12, 2020.

Dan Armstrong, Heilig Misfeldt &Armstrong, LLP, Corvallis, argued the cause and filed the briefs for the petitioners on review.

Martin E. Hansen, Francis Hansen & Martin, LLP, Bend, argued the cause and filed the brief for respondent on review. Also on the briefs was Christopher J. Manfredi, Bend.

BALMER, J.

The decision of the Court of Appeals is reversed. The judgment of the circuit court is affirmed.

4831-5194-9258

*Appeal from Linn County Circuit Court,
David E. Delsman, Judge.
298 Or App 99, 445 P3d 319 (2019)

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Petitioners on Review

[ ] No costs allowed.

[X] Costs allowed, payable by: Respondent on Review

[ ] Costs allowed, to abide the outcome on remand, payable to:

4831-5194-9258

BALMER, J.

This case requires us to consider once again the circumstances in which one's use of another's property gives rise to a prescriptive easement. Following a bench trial, the trial court determined that the residents of a small neighborhood (or their predecessors) who since 1942 have used a railroad crossing on a private roadway to access their homes had established a prescriptive easement over the crossing. The Court of Appeals reversed, holding that the residents could not take advantage of the "presumption of adversity" long recognized by this court because their use of the crossing was not likely to put the landowner on notice of the adverse nature of the use. *Albany & Eastern Railroad Co. v. Martell*, 298 Or App 99, 108, 445 P3d 319 (2019). That court went on to consider whether, without the presumption, clear and convincing evidence at trial proved that the residents' use of the crossing had been adverse and held that it did not. *Id.* at 109. For the reasons set out below, we conclude that the presumption of adversity applied to the residents' claims and that no evidence rebutted that presumption. Accordingly, we reverse the decision of the Court of Appeals and affirm the judgment of the trial court.

We take the facts from the trial court's findings and the record. In 1910, the owner of an approximately 75-acre parcel of land on the west side of the South Santiam River in rural Linn County divided the parcel into two parts, deeding the north parcel to his daughter, Murray, and the south parcel to his son. The owner's son sold his parcel to

4831-5194-9258

Sharinghousen in 1915.[1] A road that is now Highway 20 has long passed through the two adjoining parcels in a northwesterly direction. A private roadway allowed access to the two parcels from Highway 20. In 1928, Sharinghousen and Murray both sold strips of their property to the predecessor in interest of plaintiff Albany & Eastern Railroad Company (AERC) to enable the buyer to construct a railroad along the east side of, and parallel to, Highway 20. Murray's deed retained an easement at the location of the private roadway across the property she sold to the railroad that provided access to her property from Highway 20. The deed required the railroad to "construct and maintain a private grade crossing" for the private roadway across that land. Sharinghousen did not retain an easement, and his deed warranted that the property he transferred was free from all encumbrances. AERC's predecessor presumably laid the tracks for the railroad along the land purchased from Sharinghousen and Murray and, as required by the deed from Murray, established a crossing across the tracks at the location of the easement.

In 1942, Sharinghousen divided the part of his parcel that was east of the railroad into eight lots and created the Country Lane neighborhood, the current residents of which are the defendants here. By 1953, three of the lots were occupied, and all eight lots were occupied by 1963. The trial court found that, since 1942, the owners and

[1] The trial court and the Court of Appeals appear to have made a minor factual error in stating that Sharinghousen received his parcel from his father, the prior owner, in 1910. Documents in the record indicate that the prior owner deeded the land to his son, Strickler, and that Sharinghousen purchased the land from Strickler in 1915. The error is irrelevant to any issue in the case.

residents of the Country Lane neighborhood "have regularly come and gone to and from their property across the railroad at the crossing located on the old Murray easement." The trial court also found that the only means of access to the Country Lane lots was the crossing at the Murray easement. Two early residents testified that access across the tracks was never restricted and that they did not feel like they were trespassing or that they needed the railroad's permission to cross the tracks. The trial court further found that "from at least 1953 the railroad treated the crossing as a public crossing," that the railroad always had maintained the crossing at its own expense, that at some point the railroad had installed crossbuck signs indicative of a public crossing, and that no "no trespassing" or "private crossing; access restricted" signs were ever installed.

AERC purchased the railroad in 2007 and the land underlying the tracks in 2012. After it purchased the land, AERC reviewed the property records and determined, according to the trial court, that "the old Murray easement/Country Lane crossing did not provide deeded access to the Country Lane properties." AERC attempted to negotiate permits that would authorize use of the crossing by the residents in exchange for a permit fee and an annual maintenance fee, but those efforts were unsuccessful. In 2012, AERC posted new signs labeling the crossing as private and prohibiting trespassing across the tracks.

AERC then filed this action seeking to quiet title in the disputed crossing and also alleging and seeking damages for trespass. AERC named as defendants the residents of the eight homes on Country Lane. The residents asserted various affirmative defenses and counterclaims, including that they each have a prescriptive easement over

the crossing because they and their predecessors had used the crossing openly, notoriously, and adversely to AERC and its predecessors for at least 10 continuous years. The parties agreed that the residents had used the crossing for more than 10 years and that that use had been open, notorious, and continuous, and the only issue at trial was whether the use was "adverse or permissive." The trial court held that, based on the evidence at trial, the "presumption of adversity applies in this case," citing *Feldman et ux. v. Knapp et ux.*, 196 Or 453, 471, 250 P2d 92 (1952) ("[W]here a claimant has shown an open, visible, continuous, and unmolested use of land for the period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right."). Separately from the application of the presumption of adversity, the trial court found that the residents had proved, by clear and convincing evidence, actual adversity and the other elements required to establish a prescriptive easement.

The Court of Appeals, however, concluded that the trial court erred in following cases that allowed a "presumption of adversity" based on longstanding open and notorious use. The presumption did not apply, the court held, because "'the *nature of the land* or the relationship between the parties is such that the use of the owner's property *is not likely to put the owner on notice of the adverse nature* of the use.'" *AERC*, 298 Or App at 108 (quoting *Wels v. Hippe*, 360 Or 569, 579, 385 P3d 1028 (2016), *adh'd to as modified on recons*, 360 Or 807, 388 P3d 1103 (2017) (emphasis in *AERC*)). The court then considered whether, in the absence of the presumption of adversity, the residents had proved that "their use of the railroad crossing had been adverse or otherwise under a claim of right." *AERC*, 298 Or App at 109. The court held that "there was no

evidence that defendants' use of the crossing in any way interfered with AERC's use of its property," *id.* at 110, and similarly rejected the claim that the insurance and maintenance costs AERC incurred because of the residents' use of the crossing demonstrated any interference with AERC's use. *Id.* On review, the parties reprise their arguments regarding what a claimant must show to establish a prescriptive easement over a landowner's property.

We begin with a brief review of the law of prescriptive easements and the presumptions that have developed to apply that law. The equitable doctrine of prescriptive easements evolved to accommodate -- and, when they conflict, to resolve -- two groups of important but competing interests. The first includes the owner's interest in controlling the use of his or her property. After all, as this court observed in *Wels*, "the doctrine permits one person to acquire an interest in land without paying the owner for it." 360 Or at 578. For that reason, courts often say that prescriptive easements are not favored by the law. *Id.* (citing *Wood v. Woodstock*, 276 Or 49, 56, 554 P2d 151 (1976)). But another important interest is that "established patterns of land possession and use should be protected," *Wels*, 360 Or at 577 (internal quotation marks and citation omitted), which a prescriptive easement does by "reward[ing] the long-time user of property[,] * * * fulfill[ing] expectations fostered by long use, and * * * conform[ing] titles to actual use of the property." *Restatement (Third) of Property (Servitudes)* § 2.17 comment c (2000). As we stated in *Wels*, however, "not just any use will suffice to establish a prescriptive easement." *Wels*, 360 Or at 577. Rather, the party asserting an easement "'must establish an open and notorious use of [the] land adverse to the rights of [the owner] for a

continuous and uninterrupted period of ten years.'" *Id.* (quoting *Thompson v. Scott*, 270 Or 542, 546, 528 P2d 509 (1974)). A use is "adverse" if that use is "inconsistent with the owner's use of the property or if it is undertaken not in subordination to the rights of the owner"; moreover, "[u]se by permission is not adverse." *Wels*, 360 Or at 578-79.

Courts have long recognized the evidentiary difficulties of determining whether a longstanding use of land was initially adverse and have used presumptions to aid in that task:

> "The question whether a use was adverse, made pursuant to an implied servitude, or permissive, in the inception is often difficult to answer, particularly in cases of long-established uses where the original parties are not available to describe the circumstances of the initial use. Courts have developed a series of presumptions to assist in determining whether the use was permissive or prescriptive."

Restatement § 2.16 comment g.

Over 120 years ago, we held, "as a general proposition of law, that if there has been an uninterrupted user and enjoyment of an easement, in a particular way for more than ten years, it affords a * * * presumption of right in the party who shall have enjoyed it." *Coventon v. Seufert*, 23 Or 548, 550, 32 P 508 (1893); *see also Feldman*, 196 Or at 471 ("The prevailing rule is that where a claimant has shown an open, visible, continuous, and unmolested use of land for the period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right."). That general rule is consistent with the majority rule across the country:

> "The majority of American states apply a presumption that an unexplained, open or notorious use of land, continued for the prescriptive period, is adverse, or made pursuant to an implied servitude. *This presumption of prescriptive use gives effect to the idea that long-continued uses create*

> *expectations of entitlement and favors existing users over newcomers who would disrupt established neighborhood patterns of land use and access*."

Restatement § 2.16 comment g (emphasis added).

As we discuss in greater detail below, however, the presumption may not apply in some circumstances, and, even where it does apply, it can be overcome by evidence that the use was not adverse. In *Wels*, we stated that the presumption of adversity based on open and notorious use for the prescriptive period "applies in ordinary cases, in which the person claiming the easement by prescription is a stranger to the landowner; under such circumstances, it makes sense to assume that obvious use of the owner's property is adverse to his or her rights." 360 Or at 579. But we also described two situations in which the presumption does not apply: first, when "an owner supplies *permission* to use a road across the owner's property," *id.* (emphasis added), and, second, in "common road" cases, "when a claimant uses a road that the landowner constructed or that is of unknown origin," *id.* Those exceptions, too, are consistent with the majority of other jurisdictions, which hold that "particular fact situations overcome the presumption of prescriptive use, creating a counter-presumption that the initial use was permissive." *Restatement* § 2.16 comment g.

Here, the trial court concluded that the residents could rely on the presumption of adversity based on their and their predecessors' open and notorious use of the crossing since at least 1942 and because no evidence supported either the "permission" or "common road" exceptions that would overcome the presumption. The Court of Appeals, however, held that "the presumption is not as broadly applicable as the

trial court understood it to be," *AERC*, 298 Or App at 108, and instead concluded, citing *Wels*, that the presumption did not apply because "the nature of the railroad crossing at issue here was such that defendants' use of that crossing was not likely to have put plaintiff on notice that the use was adverse." *Id.* We turn to a closer examination of the circumstances in which the presumption of adversity does or does not apply to determine whether the Court of Appeals erred in holding that it did not apply here.

An adverse use "is a use made without the consent of the landowner, or holder of the property interest used, and without other authorization." *Restatement* § 2.16 comment b. The Court of Appeals looked to our decision in *Wels*, where, as noted, we described the exceptions to the presumption of adversity. The first exception is where the landowner gives the user permission; in those circumstances, the use, by definition, cannot be adverse. Second, the "common road" exception recognizes that, when the landowner and the claimant (and perhaps other users) make use of a road that was constructed by the landowner or is of unknown origin, "'it is more reasonable to assume that the use was pursuant to a friendly arrangement between neighbors rather than to assume that the user was making an adverse claim.'" *Wels*, 360 Or at 579-80 (quoting *Woods v. Hart*, 254 Or 434, 436, 458 P2d 945 (1969)).

The Court of Appeals did not disagree with the trial court's finding regarding permissive use, which was that "there is no evidence in the record that the railroad granted permission to the Country Lane residents to use the crossing." And the Court of Appeals also agreed with the trial court that the crossing was not a "common road," unlike the road at issue in *Wels:* "There is no indication that the crossing at issue

here was built to benefit the railroad and, unlike the traditional common road cases, the defendants here are not incidental users of a roadway that was constructed by the railroad or is of unknown origin." *AERC*, 298 Or App at 109. Moreover, as noted, although the railroad constructed the "private grade crossing," as agreed in its deed from Murray, the private roadway itself that provided access to Highway 20 already existed in 1928 when the railroad acquired the property. No party argues that the "common road" exception applies here.

Instead of relying on those longstanding exceptions to the presumption of adversity, the Court of Appeals stated that it would apply "the court's rationale [in *Wels*] for those exceptions," which it took to be that "in some cases, even those involving strangers to the landowner, 'the *nature of the land* or the relationship between the parties is such that the use of the owner's property *is not likely to put the owner on notice of the adverse nature* of the use.'" *Id.* at 108 (quoting *Wels*, 360 Or at 579) (emphases in *AERC*). The court went on to hold that "the nature of the railroad crossing at issue here was such that defendants' use of that crossing was not likely to have put plaintiff on notice that the use was adverse." *Id.* It stated that the "trial court's express findings dictate that conclusion," and quoted the following from the trial court opinion:

> "'[I]t is clear that from at least 1953 the railroad treated the crossing as a public crossing. The railroad has always maintained the crossing at its own expense. The railroad installed crossbuck signs indicative of a public crossing. There is no evidence that restrictive signs were installed such as "no trespassing" or "private crossing, access restricted." Beginning in 1970 the crossing was erroneously listed as a public crossing by the United States Department of Transportation.'"

Id. Thus, the Court of Appeals' conclusion that the "nature of the railroad crossing" was

such that the use of the crossing by the residents was not likely to have put the railroad on notice that the residents' use was adverse turned solely on the railroad's mistake of historical fact that the crossing at the Murray easement was a "public crossing."

We disagree with the Court of Appeals' conclusion that the facts here preclude the application of the presumption of adversity; on the contrary, the facts found by the trial court fully support the trial court's holding that the presumption applies. We first consider those facts and then turn to the role, if any, of the mistaken belief that the crossing was public.

The record shows that the 1928 deed from Murray to AERC's predecessor required the railroad company to construct a "private grade crossing" across the tracks at the location of the existing road over which Murray retained an easement. The railroad company apparently built the crossing when it laid the tracks at around that time, as required by the deed. As noted, the crossing was a private crossing for Murray.

There is no evidence in the record as to whether Sharinghousen, as well as Murray, used the crossing once the railroad was built and before 1942, although no other road or crossing would have given him access to his land east of the railroad tracks. As discussed, the trial court found that "[s]ince the creation and development of the Country Lane neighborhood" -- in 1942, when Sharinghousen created the development by dividing his property into eight lots -- "residents have regularly come and gone to and from their property across the railroad at the crossing located on the old Murray easement." Nor is there any dispute that the railroad company and Sharinghousen were "strangers," rather than family members or neighbors who permitted each other to cross

their land through a "friendly arrangement." *Woods*, 454 Or at 236.

The trial court also found that there was "no evidence in the record that the railroad granted permission to the Country Lane residents to use the crossing." The railroad never restricted the residents' access across the tracks or posted no-trespassing signs. The trial court found that the residents and their predecessors "didn't feel they were trespassing, nor did they feel they needed the railroad's permission to cross the tracks." Evidence in the record supports the residents' claim that Sharinghousen, the predecessor in interest of the properties that they now own, was using the crossing by 1942 and that he and the owners of the property who purchased lots from him after that date (and their successors) have used the crossing continuously ever since. That open, notorious, and continuous use for more than ten years allows the residents to invoke the presumption that their use was adverse -- that is, under a claim of right -- to the landowner and thus to establish their right to prescriptive easements.[2] *Wels*, 360 Or at

[2] Because the parties agreed that the residents' use of the crossing was "continuous" for decades, neither they nor the lower courts discussed the issue of whether use for the required time period can be established by adding together, or "tacking," periods of ownership by different residents. For present purposes, it is enough to note that Oregon allows use by successive owners to be added together to meet the statutory time requirement. *See Evans v. Hogue*, 296 Or 745, 755, 681 P2d 1133 (1984) ("The period of [adverse] possession may be completed by one possessor for the full statutory period or by a series of possessors in privity with each other under the doctrine of tacking."); *Feldman*, 196 Or at 474 ("tacking" doctrine applies in prescriptive easement cases; "if necessary, the adverse users of successive owners in privity might be tacked to complete the prescriptive right.") *See also Restatement* § 2.17 ("Periods of prescriptive use may be tacked together to make up the prescriptive period if there is a transfer between the prescriptive users of either the inchoate servitude or the estate benefited by the inchoate servitude.")

577.

AERC argues, however, that because its predecessor mistakenly believed that the crossing was "public," the presumption of adversity cannot be invoked because the predecessor railroad could not have known that the residents' use was under a claim of right. Similarly, the Court of Appeals appears to have relied almost entirely on that fact in holding that the presumption of adversity did not apply here.[3] Because the railroad crossing was thought to be "public," the court stated, the use of the crossing by the residents would not have "put the landowners on notice that they needed to take action to protect their interests against" the residents. *AERC*, 298 Or App at 109.

There are two responses to that argument. First, even if the mistake regarding whether the crossing was "public" would make a difference in the application of the presumption -- which we discuss in greater detail below -- the trial court findings indicate that that mistake likely did not arise until around 1953 and thus would have occurred after the prescriptive period of 10 years had run. The trial court found that the use began in 1942 and that "from at least 1953 the railroad treated the crossing as a public crossing." The uncertainty as to the latter date appears to be based on the limited evidence available as to the date when the railroad began to treat the crossing as "public."

[3] As noted, the Court of Appeals stated that "[t]he trial court's express findings dictate [the] conclusion" that "the nature of the crossing at issue here was such that defendants' use of that crossing was not likely to have put plaintiff on notice that the use was adverse." *AERC*, 298 Or App at 108. The court then quoted facts found by the trial court, all of which relate to the misunderstanding from at least 1953 that the crossing was "public." *Id.*

If that occurred in 1952 or 1953, then the prescriptive period already had run, and the residents' prescriptive easements already had been established, before the crossing began to be treated, mistakenly, as "public."

But even if the mistaken belief as to the "public" nature of the crossing began before the prescriptive period had run, we conclude that that mistake does not preclude the availability of the presumption of adversity on the facts here. We begin by reiterating several facts that undercut AERC's argument. AERC's predecessor knew from the 1928 deed from Murray that it had agreed to construct a "private grade crossing." It also knew that the unpaved road where the crossing was constructed was a private road that existed before it acquired the strips of land from Murray and Sharinghousen and that none of the land at issue was owned by any public body. There is no evidence of any "public" crossing, public right of way, or relevant public property ownership in 1928, 1942, or at any time before 1953. No reason has been offered as to why AERC's predecessor would not have been on notice that the crossing was "private," rather than public and that Sharinghousen and his successors in interest were using the crossing.

Moreover, the trial court did not accept AERC's argument that the fact that its predecessor installed a "public" designation on the crossbuck constituted sufficient evidence that the landowner had granted *permission* to the general public (or some subset of the public) to use its land. Rather, the trial court found -- and the Court of Appeals did not disagree -- that there was no evidence that AERC's predecessor ever gave permission

to use the crossing to Sharinghousen, any person who purchased from him, any of the current residents, or the general public.[4]

In these circumstances, to allow the mistaken belief of an historical fact -- that the crossing was "public" rather than "private" -- to interrupt a period of continuous use by the residents and their predecessors for almost 70 years would fly in the face of the basic rules of prescriptive rights. As we said in *Wels*, the "principal justification" for the doctrine of prescription is that "established patterns of land possession and use should be protected and that a diligent occupant should be rewarded at the expense of a careless owner." 360 Or at 577 (internal quotation marks and citation omitted); *see also id.* ("Prescription doctrine * * * penalizes the property owner who sleeps on his or her rights.") (alteration in original; internal quotation marks and citation omitted).[5] Here,

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[4] The Court of Appeals framed the issue before it as whether the presumption of adversity "is unavailable here, even though the claimants did not have permission for their use, and their dispute does not involve a common road * * *." *AERC*, 298 Or App at 101.

[5] To be sure, as we emphasized in *Wels*, "the owner of land against whom a prescriptive easement is being claimed must have reason to know of the adverse use of his or her property before being held responsible for failing diligently to take action to protect it." 360 Or at 577. That is the reason for the common road exception: a claimant's use of a road of unknown origin or built by the landowner -- along with use by the landowner or others -- is unlikely to put the landowner on notice that the use is adverse or hostile to the landowner's interests. AERC argues that the circumstances here are similar to those underlying the common road exception, but that is incorrect. AERC's predecessor did not build the crossing for its own use and did not use the crossing at all, so the use of the crossing by the residents and their predecessors was visible and apparent to all. Moreover, we agree with the trial court's finding that the residents' use, in fact, was adverse: crossing the tracks plainly created the possibility of a collision between a vehicle using the crossing and a train using the tracks; AERC and its predecessors

AERC's predecessors failed, since at least 1942, and perhaps since 1928, to assert that Sharinghousen and those who purchased lots from him were trespassing when they used the crossing, to prevent them from using it, or to take any action of any kind to protect their right to prevent the unauthorized use of their land.[6] That absence of any action by AERC's predecessor continued after 1953, when the misunderstanding regarding the public status of the crossing apparently arose. AERC's predecessor was a "careless owner" that slept on its rights. It was not until 2012 that AERC sought to exercise its rights as the owner of the crossing, but by then the adverse use had continued for far longer than the prescriptive period, as the trial court found.

No Oregon case has considered whether a mistaken understanding by the claimant or the landowner that a crossing was "public" affects the presumption of adversity or other aspects of prescriptive rights, but other courts have stressed that the *subjective* beliefs and understandings of the parties generally are not relevant in determining whether a use is adverse. In *Cardenas v. Kurpjuweit*, 116 Idaho 739, 779 P2d 414 (1989), the landowner argued that the claimant could not establish a prescriptive easement because the claimant believed, incorrectly, that the land that the claimant was crossing was public. The court stated that "[t]he subjective belief of the claimant is not

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incurred insurance premium costs to insure against possible harms; and AERC and its predecessors incurred maintenance expenses along the tracks and related to the crossing.

[6] Murray, too, as the owner of an easement by deed also could have prevented Sharinghousen and his successors from using the private crossing at the location of her easement, but there was no evidence that she did.

controlling; rather, the focus is upon the nature of the use exercised by the claimant." 116 Idaho at 740.[7] Similarly, the Washington Supreme Court has held that whether a use is adverse does not depend upon the subjective understandings of the parties; rather, it "is to be measured by an objective standard; that is, by the objectively observable acts of the user and the rightful owner." *Dunbar v. Heinrich*, 95 Wash 2d 20, 27, 622 P2d 812 (1980).

Here, the "objectively observable acts of the user and the rightful owner" were that the residents openly and notoriously, and in full view of the rightful owner, continuously used the crossing for decades. And here too, of course, it was always within the ability of the owner, had it been diligent, to review its own property deeds to confirm its ownership of the crossing, including the presence or absence of any recorded easements, and to take action to prevent the repeated trespass by Sharinghousen and those who purchased the residential lots from him. AERC's predecessors failed to do so. We conclude that any subjective misunderstanding regarding the public or private nature of the crossing does not affect the application of the presumption of adversity. Accordingly, whether one takes the initial period of the prescriptive use to begin in 1928, when the Murray crossing was established; in 1942, when the neighborhood was initially

[7] *See Restatement* § 2.16 illustration 13 ("A, the owner of Whiteacre, used a road crossing Blackacre for access to Whiteacre for the prescriptive period believing that it was a public road. In the absence of other facts or circumstances, the conclusion would be justified that A's use was adverse. A's mistaken belief that the road was public is irrelevant.").

created; in 1953, when some of the homes were occupied; or in 1963, when all the homes were occupied, the prescriptive period would have been met, at the latest, by 1973.

For the reasons explained above, we hold that the trial court correctly applied the presumption of adversity to the facts here. AERC did not present evidence of permissive use or other facts that would rebut that presumption. We therefore conclude that each of the residents established a prescriptive easement to use the crossing to access their properties.

The decision of the Court of Appeals is reversed. The judgment of the circuit court is affirmed.

105.618 Adverse possession of railroad property. A person may not acquire by adverse possession, as defined in ORS 105.620, property owned by a railroad or used for a railroad operation. [2007 c.440 §1]

EXTINGUISHING DORMANT MINERAL INTEREST

517.170 Policy. It is in the interest of the State of Oregon to provide a mechanism for the removal of dormant encumbrances on property which prevent a landowner from using or developing that property in a manner which contributes to the economy and increases the state's tax base. [1983 c.421 §1]

517.180 Procedure for extinguishing dormant mineral interest. (1) An owner of land in which another person holds a mineral interest, may extinguish the holder's interest by publishing notice and submitting an affidavit of publication for recording as described in subsections (4) to (9) of this section, unless:

(a) Within the last 30 years, the holder of the mineral interest has submitted a statement of claim for recording in the manner set out in subsection (3) of this section; or

(b) The holder of the mineral interest acquired the mineral interest within the previous 30 years.

(2) For the purposes of this section:

(a) "Mineral interest" includes any interest that is created by an instrument transferring, either by grant, assignment, reservation or otherwise, an interest of any kind in coal, oil, gas or other minerals and geothermal resources, except an interest vested in the United States, the State of Oregon or a political subdivision of the State of Oregon. A mineral interest does not include an interest in sand or gravel.

(b) "Owner of land" includes a vested fee simple owner or a contract purchaser.

(3) The statement of claim referred to in subsection (1) of this section shall be submitted for recording in the office of the clerk of the county in which the land affected by the mineral interest is located and shall contain:

(a) The name and address of the holder of the mineral interest as that name is shown in the instrument that created the original mineral interest; and

(b) The name and address of the current holder of the mineral interest.

(4) To extinguish the mineral interest held by another person, and acquire ownership of that interest, the owner of the land shall publish notice of the lapse of the mineral interest at least once each week for three consecutive weeks in a newspaper of general circulation in the county in which the lands affected by the mineral interest are located. If the address of the mineral interest holder is known or can be determined by due diligence, the notice shall also be mailed by the owner of the land to the holder of the mineral interest before the first publication.

(5) The notice required in subsection (4) of this section shall include:

(a) The name of the holder of the mineral interest, as shown of record;

(b) A reference to the instrument creating the original mineral interest, including where it is recorded;

(c) A description of the lands affected by the mineral interest;

(d) The name and address of the person giving the notice;

(e) The date of first publication of the notice; and

(f) A statement that the holder of the mineral interest must submit a statement of claim to the county clerk within 60 days after the date of the last publication or the mineral interest of the holder may be extinguished.

(6) A copy of the notice and an affidavit of publication of the notice, as described in subsection (7) of this section, shall be submitted to the county clerk within 15 days after the date

of the last publication of the notice in the office of the clerk of the county where the lands affected by the mineral interest are located.

(7) The affidavit of publication shall contain either:

(a) A statement that a copy of the notice was mailed to the holder of the mineral interest and the address to which it was mailed; or

(b) If no copy of the notice was mailed, a detailed description, including dates, of the efforts made to determine with due diligence the address of the holder of the mineral interest.

(8) If the owner of the land affected by the mineral interest gives notice as required in subsection (4) of this section and submits a copy of the notice and the affidavit of publication for recording as required by subsection (6) of this section, the mineral interest of the holder shall be extinguished and become the property of the owner of the lands, unless the holder of the mineral interest submits a statement of claim to the county clerk within 60 days after the date of the last publication of the notice.

(9) Upon receipt, the clerk of the county shall record a statement of claim or a notice and affidavit of publication of notice in the Mineral and Mining Record. When possible, the clerk shall also indicate by marginal notation on the instrument creating the original mineral interest the recording of the statement of claim or notice and affidavit of publication of notice. The clerk of the county shall record a statement of claim by cross-referencing in the Mineral and Mining Record the name of the current holder of the mineral interest and the name of the original holder of the mineral interest as set out in the statement of claim.

(10) The provisions of this section may not be waived at any time. [1983 c.421 §2; 1997 c.819 §10; 1999 c.654 §31]

Text from recorded document; the recorded image PDF with signatures, notarizations, and exhibits, is available here:
https://oregonstatebar.s3.us-west-2.amazonaws.com/Seminars/2023/RE23/RE23-1-10.pdf

Grantor: LOCKHEED MARTIN CORPORATION
6801 Rockledge Drive
Bethesda, Maryland 20817

Grantee: NORTHWEST ALUMINUM SPECIALTIES, 1NC.
2929 West Second Street
The Dalles, Oregon 97058

After recording return to:

Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, Washington 98104
Attn: Jennifer Faubion

EASEMENT AGREEMENT

This EASEMENT AGREEMENT (this "**Agreement**") is made as of September 2015 by LOCKHEED MARTIN CORPORATION, a Maryland corporation ("**Lockheed Martin**") as successor in interest to Martin Marietta Corporation, and NORTHWEST ALUMINUM SPECIALTIES, INC., an Oregon corporation ("**Specialties**"), to create perpetual non-exclusive easements for access and utilities, as further described in this Agreement.

RECITALS

A. Lockheed Martin owns that certain real property (the "**Lockheed Martin Tract**") in the City of The Dalles, Wasco County, Oregon located generally west of River Road and east of Second Street, as more fully described on the attached Exhibit A. incorporated herein by this reference.

B. Northwest Aluminum Company, an Oregon corporation ("NAC") owns those certain three tracts of real property that adjoin the Lockheed Martin Tract. One tract (the "**East NAC Tract**"), as legally described on the attached Exhibit B, incorporated herein by this reference, lies east of the Lockheed Martin Tract, between the Lockheed Martin Tract and River Road. The second tract (the "**West NAC Tract**"), as legally described on the attached **Exhibit II**, incorporated herein by this reference, lies west of the Lockheed Martin Tract, between the Lockheed Martin Tract and a railroad right-of-way. Toe third tract (the "South NAC Tract'', together with the East NAC Tract and the West NAC Tract, the "**NAC Tracts**"), as. legally described on the attached Exhibit B, incorporated herein by this reference, lies south of the Lockheed Martin Tract, between the Lockheed Martin Tract, the Specialties Tract (as defined herein) and a railroad right-of-way.

C. Specialties owns that certain real property (the "**Specialties Tract**") that adjoins the NAC Tracts. The Specialties Tract is legally described on the attached Exhibit C. incorporated herein by this reference. The Specialties Tract does not adjoin any public street.

D. For several years, Specialties has used a private driveway across portions of the NAC Tracts and the Lockheed Martin Tract as a vehicular and pedestrian access way between the Specialties Tract and River Road. By a separate easement agreement, NAC has granted Specialties a non-exclusive access easement across a portion of the NAC Tracts to travel between River Road and the Specialties Tract.

E. Specialties has water supply lines and drainage lines that cross over portions of the Lockheed Martin Tract, for which Specialties desires to obtain an easement from Lockheed Martin.

F. Specialties has asked Lockheed Martin to grant to Specialties a non-exclusive access easement to cross that certain portion of the Lockheed Martin Tract over which a relocated private driveway is to be built. Lockheed Martin desires to grant and convey to Specialties a non-exclusive access easement for ingress and egress for vehicles and pedestrians over, upon, and across that certain portion of the Lockheed Martin Tract as more particularly set forth below, for the benefit of Specialties and its respective successors, assigns, mortgagees; licensees, invitees, agents and employees, now or in the future.

G. Specialties has asked Lockheed Martin to grant to Specialties a non-exclusive utility easement in, over, under, upon, through and across the Utility Easement Area (as hereinafter defined), for the benefit of Specialties and its respective successors, assigns, mortgagees, licensees, invitees, agents and employees, now or in the future.

H. Lockheed Martin is willing to grant the easements described below, on the terms and conditions of this Agreement.

NOW, THEREFORE, for other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and in consideration of the mutual covenants and agreements herein contained, Specialties and Lockheed Martin agree as follows:

1. **Grant of Access Easement to Specialties.** Lockheed Martin does hereby grant and convey to Specialties a perpetual, non-exclusive. access easement appurtenant to the Specialties Tract, for the purposes of vehicular and pedestrian access upon, over and across that certain portion of the Lockheed Martin Tract (the "**Crossing Point**"), as legally described on the attached Exhibit D and as depicted on the attached Exhibit D-1, both incorporated herein, for the benefit of the Specialties Tract. The parties intend that this Agreement will allow the owner of the Specialties Tract to continue to use the Easement Areas (as hereinafter defined) and to operate the facilities on the Specialties Tract in the same manner as historically and customarily used at full capacity, and this Agreement will be interpreted to allow Specialties to maintain, install, repair, replace and inspect portions of the Easement Areas to make the parties' intentions possible. If Lockheed Martin and NAC adjust the locations of the Lockheed Martin Tract or the NAC Tracts due to potential sale or redevelopment interests, Grantee and Lockheed Martin will negotiate in good faith to identify an alternative Crossing Point.

2. **Grant of Utility Easement to Specialties.** Lockheed Martin does hereby grant and convey to Specialties a perpetual, non-exclusive utility easement appurtenant to the Specialties Tract, for the purposes of constructing, installing, using, operating, maintaining, oversizing (to provide sufficient capacities), repairing, relocating, removing and replacing underground and overhead utility lines, supporting poles and related facilities, including but not limited to, sewers, storm drains, water and gas pipes and systems, electrical power conduits, telephone conduits, lines, wires and other utilities (collectively, the "**Utility Improvements**") reasonably required by

Specialties in, over, under, upon, through and across that portion of the Lockheed Martin Tract legally described on the attached Exhibit E and as depicted on the attached Exhibit E-1 (the "**Utility Easement Area**" and, together with the Crossing Point, the "**Easement Areas**"), for the benefit of the Specialties Tract. The parties intend that this Agreement will allow the owner of the Specialties Tract to continue to operate the facilities on the Specialties Tract in the same manner as historically and customarily used at full capacity, and this Agreement will be interpreted to allow Specialties to construct, maintain, repair, and replace the utility facilities to make this operation possible.

Specialties shall provide written notice to Lockheed Martin at least fourteen (14) days before commencing work on any Utility Improvements whenever practicable. Specialties shall use best efforts to minimize interference with Lockheed Martin's operations, and, in the event that work on the Utility Improvements completed by Specialties is likely to result in an obstruction of Lockheed Martin's access, in the written notice to be provided pursuant to the immediately preceding clause Specialties shall present Lockheed Martin with the option of electing to have such activities or work conducted in a staggered fashion – geographically and temporally – so that Lockheed Martin will have continued access and Lockheed Martin's operations will be uninterrupted.

3. **Specialties' Right to Improve the Crossing Point.** Specialties may pave the Crossing Point and construct, install, maintain, repair, relocate, remove and replace curbs and drainage lines; provided, that Specialties may not direct the storm water runoff from the Crossing Point onto any other portion of the Lockheed Martin Tract and any such improvements or construction by Specialties shall not materially interfere with storm water runoff from Lockheed Martin's property. Specialties must notify Lockheed Martin of the proposed work at least seven (7) days before commencing the work and receive Lockheed Martin's approval (which shall not unreasonably be withheld, conditioned or delayed) to proceed before work begins; provided, that, if Lockheed Martin fails to respond within seven (7) days after receipt of Specialties' notification, the work to be performed shall be deemed approved by Lockheed Martin. Lockheed Martin reserves the right to inspect the work and request commercially reasonable modifications as necessary.

4. **Maintenance Work.** Specialties shall maintain the Easement Areas in good and safe operating condition and repair. The parties shall share the costs of maintaining, replacing, and repairing the Easement Areas, in proportion to their respective use of the Easement Areas. Specialties shalt cause all work on the Easement Areas by Specialties or its agents, independent contractors or employees to be done in a lien free, good, and workmanlike manner and in compliance with applicable law. Specialties shall pay when due for all work and materials provided to, for or through Specialties in connection with the Easement Areas or exercise of Specialties' rights hereunder and shall keep the Easement Areas and the Lockheed Martin Tract free from any liens created or suffered by Specialties, its agents, independent contractors or employees. If Specialties fails to maintain the Easement Areas or complete the restoration activities as noted below, and pay the related costs in accordance with this Agreement, and if Specialties' failure continues for seven (7) business days after Lockheed Martin notifies Specialties of the failure, then Lockheed Martin shall have the right, but not the obligation to cure Specialties' failure. In the event Lockheed Martin cures Specialties' failure in accordance with this Section 4, Specialties shall reimburse Lockheed Martin the related costs within seven (7) business days of written notice. Provided Specialties is in compliance with applicable law and the terms of this Agreement, this Section 4 should not be construed to require Specialties to maintain, repair, remediate, clean or enhance the Easement Areas with respect to any wetlands

or any environmental condition, hazard or contamination caused or released by parties other than Specialties or its agents, or wetlands, within the Easement Areas.

5. **Depiction.** The map attached as Exhibit F depicts the relationship and orientation among the East NAC Tract, the West NAC Tract, the South NAC Tract, the Specialties Tract and the Lockheed Martin Tract.

6. **Reservation of rights.** Lockheed Martin reserves the right to make any use of the Easement Areas as may be reasonably necessary to comply with Lockheed Martin's remediation obligations arising under the Controlling Documents (as defined below), provided that: (a) Lockheed Martin provides written notice to Specialties at least fourteen (14) days before commencing any work related to its remediation obligations or the Controlling Documents; (b) Lockheed Martin shall use best efforts to minimize interference with Specialties' business operations, and, in the event that Lockheed Martin's use of the Easement Area or work or activities therein are likely to result in an obstruction of Specialties' access thereto, in the written notice to be provided pursuant to the immediately preceding clause (a) Lockheed Martin shall present Specialties with: (i) the option of electing to have such activities or work conducted in a staggered fashion – geographically and temporally – so that Specialties will have continued access and Specialties' business operations will be uninterrupted, and (ii) a reasonable, good faith estimate of the costs by which the staggering described in the immediately preceding clause (i) exceed the total costs that Lockheed Martin would otherwise incur absent such staggering, provided that to the extent Specialties elects such staggered approach in writing and such staggering results in additional costs to Lockheed Martin, Specialties shall reimburse Lockheed Martin for the amount by which the total costs incurred for the work or activities conducted according to Specialties' election of the staggered approach exceed the total costs that Lockheed Martin would have otherwise incurred absent Specialties' election, except that Specialties shall not be responsible for any such costs in excess of the estimate required by clause (ii), above; and (c) after Lockheed Martin completes the specific remediation obligations of which Lockheed Martin provided notice to Specialties, the Easement Areas shall be promptly restored to substantially the same capacity, function, size and quality that existed prior to the commencement of any work contemplated by such notice, at Lockheed Martin's sole cost and expense. Without limiting Lockheed Martin's reservation of rights, and subject to the immediately preceding sentence, Lockheed Martin reserves the right to make any use of the Easement Areas that it deems necessary or desirable to carry out its obligations under that certain: (i) Consent Decree by and among U.S. Environmental Protection Agency, State of Oregon Department of Environmental Quality and Martin Marietta Corporation; (ii) the Agreement between Northwest Aluminum Corporation and Martin Marietta Corporation as of September 15, 1986; (iii) Amendment to Agreement between Northwest Aluminum Corporation and Martin Marietta Corporation dated January 1, 1990; (iv) Closing Agreement and Guarantee of Performance dated April 6, 1990; (v) the Amendment to Agreement between Northwest Aluminum Corporation and Martin Marietta Corporation dated September 20, 1991; and (vi) the Permit for the Post-Closure Care at a Hazardous Waste Landfill issued by the Oregon Department of Environmental Quality effective July 3, 2000 (and subsequent revisions) (collectively, the "**Controlling Documents**").

7. **No Representation or Warranty.** Lockheed Martin makes no representation or warranty about the physical condition of the Easement Areas.

8. **Insurance.** Throughout the term of this Agreement, Lockheed Martin shall maintain a policy or policies of commercial general liability insurance (and provide Specialties with a certificate or other proof reasonably satisfactory to Specialties evidencing such insurance

in effect) in (a) an amount equal to or greater than $1,000,000 with respect to injuries and property damage suffered in any one accident or occurrence, with a $2,000,000 general aggregate, or (b) the amount of insurance approved from time to time in writing by the parties. Such policies of insurance shall: (i) name Specialties as an additional insured; (ii) be issued for periods of not less than one (1) year; (iii) be issued by an insurance company or companies qualified to do business in the State of Oregon and having a general policyholder's rating of not less than A (as rated in the most current available "Best's" Insurance Reports); (iv) be written on an "occurrence" not a "claims made" basis; and (v) be primary as to such risks. Lockheed Martin may satisfy the insurance requirements of this Agreement and other easement agreements between Lockheed Martin and Specialties that affect the Specialties Tract and that contain similar insurance requirements by providing a single insurance policy that complies with the insurance requirements of each of the agreements. If Lockheed Martin or Lockheed Martin's successor in interest is a publicly-traded corporation with a tangible net worth of at least $1,000,000,000, then, subject to Specialties' approval which may be withheld in Specialties' sole discretion, Lockheed Martin may satisfy the insurance requirements of this Agreement and the other agreements by self-insurance.

Throughout the term of this Agreement, Specialties shall maintain a policy or policies of commercial general liability insurance (and provide Lockheed Martin with a certificate or other proof reasonably satisfactory to Lockheed Martin evidencing such insurance in effect) in (a) an amount equal to or greater than $1,000,000 with respect to injuries and property damage suffered in any one accident or occurrence, with a $2,000,000 general aggregate, or (b) the amount of insurance approved from time to time in writing by the parties. Such policies of insurance shall: (i) name Lockheed Martin as an additional insured; (ii) be issued for periods of not less than one (1) year; (iii) be issued by an insurance company or companies qualified to do business in the State of Oregon and having a general policyholder's rating of not less than A (as rated in the most current available "Best's" Insurance Reports); (iv) be written on an "occurrence" not a "claims made" basis; and (v) be primary as to such risks. Specialties may satisfy the insurance requirements of this Agreement and other easement agreements between Lockheed Martin and Specialties that affect the Lockheed Martin Tract and that contain similar insurance requirements by providing a single insurance policy that complies with the insurance requirements of each of the agreements. If Specialties or Specialties' successor in interest is a publicly-traded corporation with a tangible net worth of at least $1,000,000,000, then, subject to Lockheed Martin's approval which may be withheld in Lockheed Martin's sole discretion, Specialties may satisfy the insurance requirements of this Agreement and the other agreements by self-insurance.

9. **Indemnity.** To the full extent not prohibited by applicable law, Lockheed Martin shall indemnify, defend, reimburse and hold harmless Specialties, its tenants, officers, members, affiliates, employees, partners, agents and contractors for, from and against any and all liens, claims, demands, actions, causes of action, damages, costs, losses, expenses (including attorneys' fees) and other liabilities incurred by Specialties, including, without limitation, personal injury or death of any person, and for any damage to or loss or destruction of property, to the extent arising out of or relating to: (a) Lockheed Martin's negligence or misconduct with respect to use, maintenance, installation, repair, replacement and inspection of the Easement Areas, (b) breach of this Agreement, or (c) exercise of rights under this Agreement.

To the full extent not prohibited by applicable law, Specialties shall indemnify, defend, reimburse and hold harmless Lockheed Martin, its tenants, officers, members, affiliates, employees, partners, agents and contractors for, from and against any and all liens, claims,

demands, actions, causes of action, damages, costs, losses, expenses (including attorneys' fees) and other liabilities incurred by Lockheed Martin, including, without limitation, personal injury or death of any person, and for any damage to or loss or destruction of property, to the extent arising out of or relating to: (a) Specialties' negligence or misconduct with respect to use, maintenance, installation, repair, replacement and inspection of the Easement Areas, (b) breach of this Agreement, or (c) exercise of rights under this Agreement.

10. **Attorneys' Fees.** In the event suit or action is instituted to interpret or enforce the terms of this Agreement or to rescind this Agreement, the prevailing party shall be entitled to recover from the other party such sum as the court may adjudge reasonable as attorneys' fees at trial. on any appeal, on any petition for review, and in any other proceeding, including any bankruptcy case (including any contested matter or adversary proceeding therein and matters peculiar to bankruptcy) or arbitration proceeding, in addition to all other sums provided by law.

11. **Notices.** Notices given under the rights and reservations described above shall be in writing and delivered by certified or registered U.S. Mail, postage paid, return receipt requested, by United States Express Mail or other established express delivery service (such as Federal Express or UPS), postage or delivery charge prepaid; by confirmed facsimile transmission (provided that for a facsimile transmission contemporaneous written notice is mailed to the intended recipient), or other telecommunication device capable of transmitting or creating a written record, or personally, at the respective address set forth below or such other address as the party may designate by written notice to the other. Such notices shall be effective upon receipt, or, if delivery is refused by the addressee party, upon refusal of such delivery. Until a party designates another address for notice by notice given pursuant to this Section 11, notices must be delivered, mailed, or sent by facsimile to the following addresses and telephone numbers:

LOCKHEED MARTIN: LOCKHEED MARTIN CORPORATION
6801 Rockledge Drive
Bethesda, Maryland 20817
Telephone: (301) 214-3397
Facsimile: (301) 897-6606

SPECIALTIES: NORTHWEST ALUMINUM SPECIALTIES
c/o: Jennifer Faubion
Cairncross & Hempelmann
524 2nd Avenue, Suite 500
Seattle, Washington 98108
Telephone: (206) 587-0700
Fax: (206) 587-2308
Email: jfaubion@caimcross.com

12. **Entire Agreement/Amendment.** This Agreement supersedes and replaces all written and oral agreements previously made or existing only with respect to the matters expressly set forth herein, provided that this Agreement shall not negate, supersede or replace those written agreements entered into by and among the parties, or by and among NAC and Specialties, simultaneously hereto. No modification or amendment of this Agreement or any provision of the rights declared, reserved or granted herein shall be binding unless in a written instrument referring to this Agreement, signed and notarized by the parties and recorded in the real property records of Wasco County, Oregon.

13. **Binding Effect.** The parties agree that the rights and obligations set forth in this Agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto; and shall be deemed to be covenants running with the land. Any reference to either party in this Agreement shall apply as to such party only so long as the party owns the respective parcel described above, and thereafter such reference shall be intended to apply to such party's successors or assigns with respect to such parcel, but such transferor shall not thereby be relieved of liability that arose before such transfer and which remains unsatisfied or for any interest that such owner continues to own in such parcel.

14. **No Dedication.** This Agreement is not intended to create and shall not in any way be interpreted or construed to create any third party beneficiary rights in any person other than the parties hereto and their respective successors and assigns with respect to the fee ownership of their respective properties benefited or burdened hereby, and any subdivision or parcel thereof burdened or served by the rights or obligations set forth herein. Nothing contained herein shall be deemed to be a gift or dedication of any portion of the Easement Areas or any other portion of any property to any third parties or to the general public or for the use of the general public or for any public purpose whatsoever.

15. **Captions.** Section captions used in this Agreement are for convenience only and shall not affect the construction of this Agreement.

16. **Counterparts.** This Agreement and any document or instrument executed pursuant hereto may be executed in any number of counterparts each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

17. **Compliance with Law.** Each party in its operation, use, maintenance, installation, repair, replacement and inspection of the Easement Areas will comply with all applicable laws and regulations.

18. **Recitals.** The recitals hereby are incorporated m this Agreement by this reference, as if the same had been fully set forth in this Agreement.

19. **No Partnership or Joint Venture.** The parties are not partners, fiduciaries or in a joint venture, and nothing in this Agreement creates or will create the relation of partners, fiduciaries or a joint venture among or between the parties. Without limiting the generality of the foregoing, each is acting independently, is obligated to separately account for their respective activities for tax and other purposes, and expressly disclaim any fiduciary duty to the other.

Text from recorded document; the recorded image PDF with signatures, notarizations, and exhibits, is available here:
https://oregonstatebar.s3.us-west-2.amazonaws.com/Seminars/2023/RE23/RE23-1-11.pdf

AFTER RECORDING RETURN TO:
Michelle D. Da Rosa LLC
Attorney at Law
SE Spokane Street, Suite 300
Portland, OR 97202

WITH A COPY TO:
City of Portland
Portland Parks and Recreation – Property Manager
1120 SW Fifth Avenue, Room 858
Portland, OR 97204-1933

SPRINGWATER TRAIL CROSSING AGREEMENT

RECITALS:

The City of Portland, a municipality of the State of Oregon, through its Bureau of Parks and Recreation ("Parks" or "PP&R" or "City") is the owner of certain real property known as the Springwater Corridor, a portion of which is located in Clackamas County ("Trail").

5300 Johnson Creek LLC ("Owner") owns real property in Clackamas County that has an address of 5300 SE Johnson Creek Road in Milwaukie, Oregon, which is more particularly described in the attached Exhibit A ("Property"). Accessing the Property from a public road requires crossing the Trail. A portion of the Trail is adjacent to the Property.

Owner and Owner's predecessors in interest to the Property have long utilized a driveway over the Trail to access the Property from the nearest public road, Johnson Creek Blvd. This driveway has been located and used for crossing the Trail since at least 1964, when the driveway's construction was permitted by Clackamas County.

Owner acknowledges that the paramount use of the Trail is for the public's use and enjoyment and that the Owner's use does not materially affect the public's use of the Trail.

The purpose of this Springwater Trail Crossing Agreement ("Agreement") is to provide Owner with a long-term, nonexclusive right of record to cross to and from the Property over the Trail in the area of the existing crossing driveway in accordance with the terms and conditions below, for so long as Owner does not have another access easement to a public road for ingress and egress to the Property, or does not have contiguity with a public right of way, or for the Term of the Agreement, whichever comes first.

AGREEMENT

Effective as of 5/18/21 , 2021 (the "Effective Date"), City and Owner agree as follows:

1. **Premises Area.** The Premises Area ("Premises Area") consists of the paved driveway crossing the Springwater Trail as depicted and legally described in Exhibit B.

2. **Grant of Crossing Agreement.** PP&R hereby grants a non-exclusive easement for the term set forth below to Owner over and through the Premises Area and on the conditions set forth in this Agreement, for vehicular and pedestrian ingress and egress to the Property from Johnson Creek Boulevard to access Owner's Property and any portion or subdivision thereof, by Owner, Owner's members, managers, tenants, employees, permittees, invitees, agents, and contractors ("Owner Parties"), and Owner's heirs, successors and permitted assigns and for the location of underground utilities that serve the Property. Owner shall not park or store any items in the Premises Area. Owner agrees to use the Premises Area in such a manner to reasonably preserve the public's use of the Trail, the integrity of the Trail, and the safety of the public. Nothing contained in this Agreement shall be interpreted to create anything other than the rights granted in this a Crossing Agreement and shall specifically not create any other right, title or interest in the Trail or any other property owned or managed by the City of Portland not granted expressly herein over the Premise Area. All improvements located in the Premise Area, including those constructed pursuant to this Agreement by Owner, are the assets of Parks.

3. **Term.** The initial term of this Crossing Agreement is twenty-five (25) years, commencing on the Effective Date of this Agreement, unless otherwise terminated pursuant to this Agreement. The Effective Date shall be the date on which the Agreement is fully executed and recorded, but in any case, not before 5300 Johnson Creek LLC obtains fee title to the Property. The term for this Agreement shall automatically renew for two (2) additional, consecutive ten (10) year terms unless Owner is then in material default of this Agreement following notice and the right to cure as set forth in Section 16 below or Owner gives City at least 90 days' advance written notice of its intention not to renew this Agreement. After Owner has exhausted its two extension renewals, requests for further extension of this Agreement given by Owner by notice to City at least one hundred-eighty days (180) before the expiration of the prior renewal term shall not be unreasonably denied; provided, however that the City reserves the right to adjust the Crossing Right Fee and insurance requirements to conform with the formulae of fee calculation and insurance requirements then being used in agreements with other like-situated private property owners with rights to cross the Trail.

4. **Acceptance of Premise Area.** Owner has examined the Premises Area and accepts it in an "as is" condition. City or its officers, agents or employees have made no representations or warranties, express or implied, as to the condition of the Premise Area. City shall have no liability to Owner or Owner Parties for any damage or injury caused by the condition of the Premise Area. Furthermore, Owner accepts the Premise Area subject to any and all valid rights or interests, including, but not limited to: rights of the federal government; rights of access by the public; licenses; leases; easements; franchise agreements; railroad facilities; pipelines, telephone, telegraph, communication, power and signal lines; or any similar facilities, together with any future installations thereof.

   Owner is hereby placed on notice that Portland General Electric Company owns and operates electric transmission facilities within the Springwater Corridor. If Owner's use or work will occur in the Springwater Corridor, then Owner shall be responsible for obtaining the approval of and consulting with Portland General Electric Company in order to avoid conflicting uses. Written evidence of said permission will be provided to the City prior to the commencement of construction under this Agreement.

   Owner acknowledges City's obligation to maintain the Trail in such a way as to accommodate construction and operation of a rail line in the future pursuant to applicable law. In the event that Owner is notified by City that a rail line is to be constructed over the

Premises Area, Owner shall not be responsible for any expense of removal of any improvements constructed and maintained by Parks in the Premise Area as necessary for the construction of the rail line.

5. **Crossing Agreement Fee and Other Charges.** Owner shall pay a yearly fee based on the following formula: Premises Area Square Feet x Current Market land value per Square Feet ($11.54) x .08. ("**Crossing Agreement Fee**"), due upon the Effective Date. "Current Market land value" for purposes of this formula is the value identified in the most recent real property tax invoice issued before the Effective Date for the land that comprises the Property; the square footage of the Premises Area for purposes of this formula is stipulated by the parties to be 3,478 square feet. The Crossing Agreement Fee will be increased each year by Three and one half percent (3.5%) each anniversary of the Effective Date, subject to rights to otherwise increase the Crossing Agreement Fee expressly set forth in this Agreement. This yearly fee shall be due on execution of this Agreement and on each anniversary of the Effective Date and is payable without invoice or offset. All payments shall be paid to the "City of Portland" and sent to City of Portland, Parks & Recreation, PO Box 5066, Portland, OR 97208-5066 or to such other place as City may designate in writing. In the case the Property is subdivided or re-zoned for substantially different uses, and the corresponding use of the Premises Area is reasonably expected to result insignificant increases the number of crossings over the Trail and the impact on the condition of the Trail so as to reasonably raise concerns of interference of the public's use of the Trail for its intended purposes or the costs of maintaining the Trail, the City reserves the right to adjust the Crossing Right Fee requirements to conform with the formulae of fee calculation and insurance requirements then being used in agreements with other like-zoned private property with rights to cross the Trail or to otherwise reasonably reflect the increased use and impacts on the Trail.

   Additionally, Owner agrees to pay all taxes, including, but not limited to, real property taxes or other assessments or levies assessed on the Premises Area that arise out of Owner's construction, maintenance, or use of the Premises Area. All such taxes shall be paid within thirty (30) days of receipt of billing.

6. **Maintenance.** Owner, at its cost, shall maintain the Premise Area, and the improvements therein, in a neat and safe condition, free of trash and debris, in good or better than the condition of the adjacent Springwater Trail. Owner shall repair, at its cost and with prior written approval by Parks pursuant to Section 8 of this Agreement, any damage to the Premise Area, Trail or surrounding City of Portland property or improvements caused by the maintenance, repair, or use of the Premise Area by Owner, its employees, agents, or contractors. Any maintenance or repair work that is invasive (e.g., digging), will impact Park Trail users (e.g., partial trail closure, repaving), or will change the existing improvements (e.g., new pavement striping) will require the prior written consent of Parks pursuant to Section 8 of this Agreement, not to be unreasonably withheld. Restoration shall be made to conditions equal to or better than those pre-existing the damage. After City provides Owner notice and thirty (30) days to repair damage caused by Owner or Owner Parties to the Premises, Trail, or surrounding City of Portland property or improvements, and Owner's fails to effect the needed repairs, Parks, at its sole discretion, may elect to repair any such damages. However, in the case of an emergency or imminent danger to the public because of such damages, no notice or cure period will be necessary. In any case in which the City repairs such damages, Owner agrees to pay reasonable costs of repairs performed by the City. Parks, in its sole discretion Parks has the primary responsibility to maintain, repair, and keep in good condition the asphalt bike trail that crosses the Premises Area for public use.

Any damage caused to the Premises Area by Owner or Owner's Parties will be the responsibility of Owner to restore to the same or better condition as before the damage occurred.

7. **Safety Measures.** Owner, at its sole cost, shall install, repair, and maintain any traffic signs, gates, or other safety devices that may be required by law, any public authority having jurisdiction, or Parks. Any such work shall be done to the reasonable satisfaction of Parks. If Owner wishes to install any safety devices or features in the Premises Area not so required, it must obtain Parks' prior written consent pursuant to Section 8 of this Agreement, which shall not be unreasonably withheld, as set forth in Section 8 below.

8. **Improvements.** Owner shall make no other improvements or perform reconstruction or expansion of the driveway crossing the Trail in the Premise Area without the prior written consent of Parks. To obtain consent, Owner will submit a Non-Park Use Permit application (accessible at https://www.portlandoregon.gov/parks/41434. At the sole discretion of Parks, a Non-Park Use Permit may be required and applicable fees charged.

9. **Park or Trail Closures.** Owner's work or use of the Premises Area shall not result in the Trail being closed at any time without PP&R's prior approval. From time to time, PP&R may need to close the Premises Area for repairs and maintenance or to accommodate public events such as the Hood to Coast relay race. If a temporary closure becomes necessary, the notice of and closure will be managed by PP&R in accordance with then current PP &R policies for temporary Trail closures. PP&R shall work in good faith with Owner to schedule closures and accommodate work within the Premises Area in a manner that minimizes impacts to Owner's operations.

   In the event of an immediate, material safety concern or emergency impacting the Owner's use of the Premises Area, the City may temporarily close the Premises Area by notifying Owner. Such temporary suspension shall only impact the rights of parties under this Agreement and shall not impact PP&R's rights to use of the Trail for parks or other purposes. If the parties, working in good faith, cannot agree upon a resolution to address the safety concern or emergency within thirty (30) days, either party will have the right to submit the issue to be settled by binding arbitration.

10. **Trees.** Owner may not prune or otherwise cut any trees on the Premise Area without the written permission of PP&R. Any safety concerns about a tree should be directed to (503) 823-TREE.

11. **Indemnification.** Owner shall indemnify, defend, and hold harmless the City, its officers, directors, agents and employees from any and all liability, damages, expenses, reasonable attorneys' fees, causes of action, suits, claims or judgments, arising out of or connected with (i) Owner's entry, use or occupancy of the Premise Area, (ii) any failure of Owner to comply with the terms of this License or any violation of law or ordinance with respect to the Premise Area, and (iii) the acts or omissions of Owner, its officers, directors, agents and employees or invitees in regard to the Premise Area ("Claims"); provided, however, the Owner shall not be liable for claims or damages caused by the sole negligence of the City, its officers, directors, agents and employees. Owner shall, at its own cost and expense, defend (with counsel reasonably acceptable to City) any and all suits in connection with Claims which may be brought against Owner or City, their officers, directors, agents and employees, either alone or in conjunction with others upon any such above mentioned cause or Claim, and shall satisfy, pay, and discharge any and all judgments; including

attorneys' fees and costs, that may be recovered against City or Owner, their officers, directors, agents and employees in any such action or actions in connection with Claims, including any appeals, in which they may be party defendants.

City, its officers, directors, agents and employees shall not be liable for any damage to equipment or any other property of Owner or of Owner Parties at the Premise Area or liable to Owner or Owner Parties in or upon the Premise Area including but not limited to damage by fire, explosion, electricity, flooding, vandalism, water or rain, or any other cause whatsoever, unless caused by or due to the sole negligence of City, its officers, directors, agents and employees.

City or its officers, directors, agents and employees shall not be liable to Owner or Owner Parties for any latent defect on the Premises Area. Owner shall indemnify, defend and hold City harmless from any claims, judgments, damages, penalties, fines, costs, liabilities of losses which arise during or after the term of this Agreement expires or is earlier terminated as a result of environmental contamination of the Premises Area as a result of the acts or omissions of Owner, its employees or agents. This indemnification of City by Owner includes, without limitation, costs incurred in connection with any investigation of site conditions or any environmental cleanup, remedial, removal or restoration work in response to hazardous substances, hazardous materials, pollutants, toxics or regulated environmental contaminants of any kind at the Premises Area as a direct or indirect result of Owner's activities. Owner shall promptly take all action at its sole expenses as are necessary to return the Premises Area to the condition existing prior to the release of contaminants. Except for immediate initial response actions necessary to protect human health and the environment from substantial imminent harm, Owner shall obtain City's approval of all such response action which approval shall not be unreasonably withheld. This environmental indemnity shall survive the expiration or earlier termination of this Agreement for a period often (10) years.

Owner, as a material part of the consideration to the City, hereby assumes all risk of damage to Owner's and Owner Parties' property or injury to Owner or Owner Parties in, upon or about the Premises Area from any cause other than the City's sole negligence or willful misconduct.

12) Insurance. Owner shall obtain and maintain in full force at Owner expense, throughout the duration of the Agreement and any extension periods, the required insurance identified below. The City reserves the right to require additional insurance coverage as required by statutory or legal changes to the maximum liability that may be imposed on Oregon cities during the term of the Agreement.

Owner shall obtain workers' compensation insurance as required by ORS Chapter 656 as it may be amended. Unless exempt under ORS Chapter 656, the Owner shall maintain coverage for its employees and for those to whom it has a legal or contractual obligation.

Owner shall obtain general commercial liability (CGL) insurance covering bodily injury, personal injury, and property damage, including coverage for independent contractor's protection (required if any work will be subcontracted), Premises Area liability, ongoing operations, contractual liability, products and completed operations, in per-occurrence limit of not less than $2,000,000, and an aggregate limit of not less than $4,000,000.

Owner shall obtain automobile liability insurance with coverage of not less than $2,000,000 each accident. The insurance shall include coverage for any automobile owned by Owner, or all scheduled, hired, and non-owned automobile(s) under Owner's legal control.

Owner agrees to maintain continuous, uninterrupted coverage for the duration of the Agreement. There shall be no termination, cancellation, material change, potential exhaustion of aggregate limits or nonrenewal of coverage without thirty (30) days advance written notice days from Owner to the City. If the insurance is canceled or terminated prior to expiration of the Agreement, Owner shall immediately notify the City and provide evidence of insurance as required in this Agreement. Any failure to comply with this clause after notice from City and 14 days in which to cure shall constitute a material breach.

The liability insurance coverages, except workers' compensation, shall be without prejudice to coverage otherwise existing, and shall name the City of Portland and its officers, agents and employees as additional insureds, with respect to the Owner's activities to be performed, or products or services to be provided. Coverage shall be primary and non-contributory with any other insurance and self-insurance. Notwithstanding the naming of additional insureds, the insurance shall protect each additional insured in the same manner as though a separate policy had been issued to each, but nothing herein shall operate to increase the insurer's liability as set forth elsewhere in the policy beyond the amount or amounts for which the insurer would have been liable if only one person or interest had been named as insured.

Owner shall provide proof of insurance through acceptable certificate(s) of insurance, including additional insured endorsement form(s) and all other relevant endorsements, to the City prior to execution of the Agreement. The Certificate(s) will specify all of the parties who are endorsed on the policy as Additional Insureds (or Loss Payees). Insurance coverages required under this Agreement shall be obtained from insurance companies reasonably acceptable to the City of Portland. The Owner shall pay for all deductibles and premium.

13) **Compliance with Laws.** In connection with its activities under this Agreement, Owner shall comply with all applicable federal, state and local laws and regulations. Owner shall correct at Owner's own expense any failure of compliance created by the fault or use of Owner or their agents, employees or invitees. Owner is responsible for determining and acquiring all other permits, licenses and approvals that may be required. This Agreement does not bind the City to take any particular course of action in regard to adjudicating other license or permit applications which are necessary to make the intended use of the Premises Area.

14) **Notice.** All notices under this Agreement shall be in writing and shall be deemed validly given if sent by electronic mail with receipt required, first class or certified mail, or nationally recognized courier and shall be effective upon receipt. Notices should be addressed as follows:

To Parks: City of Portland
Portland Parks and Recreation – Property Manager
1120 SW Fifth Avenue, Room 858
Portland, OR 97204-1933
Electronic Mail: ParksPropertygroup@portlandoregon.gov
Telephone: 503-823-5229
With copy to: City Attorney's Office

1225 SW 4th Avenue
Portland, OR 97204

To Owner: 5300 Johnson Creek LLC
Attn: Preston Greene
1200 NW Naito Pkwy., Suite 280
Portland, OR 97209
Electronic Mail: preston@sitkapartners.com
Telephone: 503-628-0174

With a copy to: Fred Hines, Jr.
PCF Management Services, Inc.
8625 Evergreen Way, Suite 200
Everett, WA 98208
Telephone: 425-438-1925
Electronic Mail: hinespcf@aol.com
And attention to: Fred Hines, III
Telephone: 425-931-4499
Electronic Mail: fred3@pcfre.com

15) **Oregon Law and Forum, Dispute Resolution.** The Parties will make a good faith effort to resolve disputes in a reasonable manner prior to resorting to litigation. This Agreement shall be governed by the laws of the State of Oregon. Any suit or action arising under this Agreement shall occur, if in the state courts, in the Multnomah County Court having jurisdiction thereof, and if in the federal courts, in the United States District Court for the District of Oregon.

16) **Early Termination.** This Agreement may be terminated as follows:
   a. Any material breach of any term or condition contained herein to be performed by the Licensee shall, at the option of PP&R, be grounds for termination of this Agreement after notice describing the breach and the opportunity to cure such breach within one hundred eighty (180) days' of such written notice of its intent to terminate if the breach is not timely cured. If the breach has not been cured within the 180-day period, then this Agreement shall terminate, and Owner will restore the Premises as required herein.
   b. [Reserved]
   c. [Reserved]
   d. This Agreement shall terminate upon one hundred eighty (180) days written notice that PP &R has been notified that PP &R has determined that Owner has obtained comparable, alternative access to the Property for vehicular ingress and egress that does not cross the Trail; provided, however, that Owner will have the right to reasonably dispute PP &Rs determination regarding such determination, and if after the parties have worked together in good faith, will have the right to submit the issue to binding arbitration.
   e. This Agreement shall terminate upon one-hundred eighty (180) days' notice, or as much notice as is reasonably possible under the circumstances, that the Trail must be returned to rail use and after PP &R has used diligent efforts, PP&R has been unable to identify and acquire rights to an alternative location for the Premises Area.
   f. Any rights or interests granted under this Agreement shall revert back to the City upon Owner's abandonment for a period of six (6) months or longer.
   g. Upon mutual written agreement, this Agreement shall terminate in accordance with such agreement.

Termination of this Agreement shall not relieve or release Owner from any liability that occurred or arose prior to termination or obligation that expressly survives such termination hereunder. In the event the Agreement is terminated within five (5) years of the Effective Date of this Agreement, PP&R's obligation is limited to refund prepaid Crossing Agreement Fees, if any, prorated on an annual basis for the remainder of the term of this Agreement.

17) **Waiver of Breach.** The waiver by PP&R of the breach of any condition, covenant, or agreement herein contained to be kept, observed and performed by the Owner shall in no way impair the right of the City to avail itself of any subsequent breach thereof. No waiver is effective unless such waiver is in writing and signed by the waiving party.

18) **Termination.** Prior to the termination date provided for herein, or upon this Agreement being terminated early by PP&R pursuant to the terms of this Agreement, Owner shall restore the Premises Area to the condition as of the Effective Date of the Agreement to the reasonable satisfaction of PP&R and shall cease all activities on the Premises Area. Improvements authorized hereunder shall not remain in the Premises Area without written authorization from PP&R, except the existing driveway.

19) **No Liens:** Owner shall keep the Premises Area and adjacent PP&R or City property used in connection with this Agreement free from any liens arising from any work performed, materials furnished, or obligations incurred by or at the request of Owner.

20) **Entire Agreement.** This Agreement contains the entire agreement between PP&R and the Owner and supersedes all prior written or oral discussions or agreements; however, the grant of rights to Owner over the Trail herein is subject to and in no way terminates or derogates, or lessens any pre-existing crossing rights benefitting the Property, including without limitation formerly vested unrecorded or prescriptive rights of Owner's predecessors in interest or pre-existing recorded easements that may benefit the Property; and Owner's acceptance of the rights granted herein may never be deemed to be a waiver, abandonment, or termination of such prior rights or claim of right to the Premises Area or due compensation upon unreasonable termination by City of this Agreement.

21) **Illegality.** If any provision of this Agreement is determined by a proper court to be invalid, illegal or unenforceable, such invalidity, illegality or unenforceability shall not affect the other provisions of this Agreement, and this Agreement shall remain in full force and effect without such invalid, illegal, or unenforceable provision.

22) **Assignability; Runs with the Land.** This Agreement may be assigned to anyone to whom Owner, or Owner's successor(s) in fee title to the Property, transfers fee title to the Property, with notice to PP&R. The rights granted herein run with the land, the Property and the Trail, and inure to the benefit of and burden the parties, their successors and assigns.

23) **Counterparts.** This Agreement may be signed in counterparts.

24) **Recording.** Owner may record this Agreement at Owner's expense.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed on the dates shown below.

Text from recorded document; the recorded image PDF with signatures, notarizations, and exhibits, is available here:
https://oregonstatebar.s3.us-west-2.amazonaws.com/Seminars/2023/RE23/RE23-1-12.pdf

After recording return to:
Portland Parks & Recreation
City of Portland
1120 SW 5th Ave, #1302
Portland, OR 97204

Until a change is requested all tax statements shall be sent to:
Portland Parks & Recreation
City of Portland
1120 SW 5th Ave, #1302
Portland, OR 97204

DRIVEWAY EASEMENT

The City of Portland, a municipal corporation, acting through its Bureau of Parks and Recreation ("Grantor" or "City'') does hereby grant, in consideration of payment of $9,193.00, to Jerzy M. Gizowski, owner of 7813 SE Luther Rd, Portland, Oregon ("Grantee''), a nonexclusive perpetual driveway easement (the "Easement") over a portion of the Springwater Corridor (Park). The Easement Area is over the parcels identified as 1S2E20DD 5900 and 1S2E29AB 4000 and is particularly described and depicted in Exhibit A and B (''Easement Area") hereto. Improvements to the Easement Area will consist solely of a driveway that is approximately 5376 square feet in size. This Easement is granted subject to the terms and conditions described herein.

TERMS, CONDITIONS and COVENANTS

1. The Easement is granted to Grantee and its successors in title, agents, contractors, licensees, tenants and other invitees, in accordance with authority provided by City Council Ordinance No. 18490 for all purposes necessary or incidental to Grantee's construction, operation, maintenance, use, modification, and repair of the Easement Area. The Grantee shall have the sole duty to maintain the Easement Area. All other rights are reserved to Grantor, its successors or assigns.

2. This Easement is subject to all prior existing rights or interests within the Easement area, including those granted to Portland General Electric Company, as of the date of this Easement. Grantor makes no representations or warranties, expressed or implied, as to suitability, title, access, or quiet enjoyment of the Easement Area, or any portion thereof. The Parties also acknowledge that the Springwater Corridor is "railbanked" and may in the future be needed as a rail transportation corridor.

3. The Easement shall run with the Grantor's land for the benefit of Grantee, its successors and assigns in perpetuity unless terminated or relocated as provided for herein. In the event of an abandonment of this Easement by Grantee or upon termination, Grantee shall promptly execute and deliver to Grantor documents sufficient to record and remove this Easement as an encumbrance against the property.

4. Grantee hereby acknowledges the paramount use of the Park is for the public's use and enjoyment and hereby agrees to conduct all activities approved under this Easement in strict accordance with the administrative rules adopted by the City of Portland for the Park, as those rules may change over time.

5. The Easement Area shall be operated and maintained by Grantee in accordance with all applicable federal, state, municipal and county laws, orders, rules, and regulations existing on the date of this Easement or enacted thereafter and shall assume all costs, expense, and responsibility in connection therewith. Grantee shall perform maintenance in a manner and at such frequency as necessary to keep the Easement Area in good order and safe condition.

6. In the event that Grantee should be found in breach of this Easement Agreement and said breach is not remedied by Grantee, after providing Grantee with reasonable notice in the case of an emergency, or thirty (30) days written notice in the case of a non-emergency, Grantor may make reasonable and necessary repairs to the Easement Area and charge Grantee for the actual costs incurred. Notwithstanding the foregoing, if any such breach or failure (not of an emergency nature) is of a nature that cannot reasonably be corrected within thirty (30) days, such thirty day period shall be extended for a period reasonably necessary to complete performance if, within said thirty day period, performance has commenced and completion is diligently being pursued. In the event that Grantor makes repairs to the Easement Area, Grantee, its successors and assigns hereby indemnify, defend and hold harmless the Grantor, its officers, directors, agents and employees from any and all liability, damages, expenses, attorneys fees, causes of action, suits, claims or judgments, arising out of or connected with Grantor's repairs to the Easement Area.

7. Except in the case of emergency repairs, maintenance work will be completed in accordance with the written approval of Grantor, which will not be unreasonably withheld. Requests to complete maintenance work will be submitted to Grantor in writing not less than thirty (30) calendar days prior to the planned maintenance. At a minimum, written requests will address timing, public use impacts, access routes and other matters relevant to the goal of minimizing impacts to Grantor's property and the public's use and enjoyment of the Park. Grantee, at its sole cost, will take reasonable measures to address Grantor's concerns, if any, and, if requested, will reimburse Grantor for reasonable administrative costs incurred in association with the maintenance work, including time spent reviewing the request for permission to conduct maintenance.

8. Unless otherwise agreed in writing, all areas affected by maintenance work will be restored to equivalent condition(s) as existed prior to the commencement of said maintenance work, with the restoration to be finished within seven (7) days of the maintenance work being completed. At the sole discretion of the Grantor, the Grantor may determine that it should do the restoration work for which the Grantee shall reimburse the Grantor.

10. Grantee, its contractors and its subcontractors, if any, shall maintain public liability and property damage insurance that protects the Grantor and its officers, agents and employees from any and all claims, demands, actions and suits for damage to property or personal injury, including death, arising from work under this Easement. The insurance shall provide coverage for not less than $1,000,000 for personal injury to each person, $1,000,000 for each occurrence, and $1,000,000 for each occurrence involving property damage; or, a single limit policy of not less than $1,000,000 covering all claims per occurrence. The insurance shall be without prejudice to coverage otherwise existing and shall name as additional insureds the Grantor and its officers, agents and employees. Notwithstanding the naming of additional insureds, the insurance shall protect each insured in the same manner as though a separate policy had been issued to each, but nothing herein shall operate to increase the insurer's liability as set forth elsewhere in the policy beyond the amount or amounts for which the insurer would have been liable if only one person or interest had been named as insured. The coverage must apply as to claims between insureds on the policy.

The Grantee and its contractors shall maintain continuous, uninterrupted coverage during any periods of construction, maintenance or repair of the Easement Area.[If the insurance is canceled or terminated prior to completion of any work being performed, the Grantee or its contractors, if any, shall provide a new policy with the same coverage. The insurance shall include coverage for any damages or injuries arising out of the use of automobiles or other motorized vehicles by the Grantee and its contractors, if any.

Required levels of insurance are subject to increase, upon 30 days' notice from Grantor, when increases are needed to insure that the coverage levels are not less than the amount for which public bodies are responsible under the Oregon Constitution and the Oregon Tort Claims Act.

11. Grantee shall indemnify and defend the Grantor, its officers, directors, agents and employees from any and all liability, damages, expenses, attorneys fees, causes of action, suits, claims or judgments, including costs and attorney's fees related to appeals, arising out of or connected with (i) Grantee's use or occupancy of the Easement Area, (ii) any failure of Grantee to comply with the terms of this Easement or any violation of law or ordinance related to Grantor's use of the Easement Area, and (iii) the acts or omissions of Grantee, its officers, directors, agents and employees or invitees; provided, however, the Grantee shall not be liable to indemnify and defend the City for such claims caused by the sole negligence of the City, its officers, directors, agents and employees.

Except as otherwise set forth herein, City, its officers, directors, agents and employees shall not be liable for any damage to the Facilities or any personal property of Grantee or to any person (including Grantee) in or upon the Easement Area including but not limited to damage by fire, explosion, electricity, flooding, vandalism, water or rain, or any other cause whatsoever, unless caused by or due to the sole negligence of the City, its officers, directors, agents and employees.

City or its officers, directors, agents and employees shall not be liable for any latent defect at the Park or the Easement Area. In addition to the indemnity provided above, Grantee agrees to indemnify, defend and hold harmless City, its officers, directors, agents and employees from and against all damages, costs, liabilities, and expenses by, arising out of, or in connection with, Grantee's handling, storage, discharge, transportation or disposal of hazardous or toxic wastes or substances, pollutants, oils, materials or contaminants, as those terms are defined by federal, state or local law or regulation, as amended from time to time. Damages, costs, liabilities and expenses shall include any amounts claimed to be owed by any regulating and administering agency.

Grantee, as a material part of the consideration to the City, hereby assumes all risk of damage to property or injury to persons in the Easement Area from any cause other than the City's sole negligence, and Grantee waives all claims in respect thereof against City

12. Grantee's privileges issued under this Easement shall not limit the Grantor's authority to use or to grant additional rights, privileges or interests within the Easement Area, so long as such use does not unreasonably interfere with the Grantee's use.

13. Grantee shall fully pay for all materials joined or affixed to and labor performed upon the Easement Area, and shall pay all taxes, if any, including but not limited to leasehold interest taxes, assessments, use and occupancy taxes, charges for public utilities, excesses and levies, levied on the Easement Area that arise out of easement rights granted herein.

14. Neither party shall be deemed to have waived any breach of this Easement except by an express waiver in writing. Waiver of any one breach of any provision of this Easement shall not be deemed to be a waiver of any other breach of the same or any other provision of this Easement.

15. Grantee acknowledges Grantor's ownership of the Park is subject to any future rail transportation needs and, therefore, this Easement may be terminated or relocated as needed to accommodate construction and operation of a rail line in the future. Grantee also acknowledges that the Grantor may terminate or relocate this Easement if it is determined by City Council to be reasonably necessary for the effective use of the Springwater Corridor. In the event that relocation and/or reconstruction of the driveway is needed, said relocation and/or reconstruction will be completed at Grantee's sole expense and liability. Grantee shall not be required to construct any part of the rail line and shall not be responsible for signals or crossings for the line. Grantee and Grantor shall make a good faith effort to agree on the most economical design to permit relocation and/or reconstruction of the driveway, but Grantor shall not be liable for any harm or costs to Grantee, including harm or cost incurred in the event that no reasonable alternative exists for relocating and/or reconstructing the driveway on Grantor's property. In the event of no reasonable relocation alternative on Grantor's property, the Easement will terminate and the driveway will be removed at Grantee's cost from Grantor's property in full compliance with the terms herein.

16. Upon abandonment or termination of this Easement, Grantee shall, at Grantee's sole expense, remove the driveway from the Easement Area and restore the Easement Area to equivalent condition(s) as they were prior to the construction of the driveway and, if the Grantee fails to do so within a reasonable time after receipt of written notice, Grantor may do such work of removal and restoration at a reasonable cost and expense to the Grantee. In the event of the removal by the Grantor of the property of the Grantee and of the restoration of the Easement Area as herein provided, the Grantor shall in no manner be liable to the Grantee for any reasonable damage sustained by the Grantee for or on account thereof and such removal and restoration shall in no manner prejudice or impair any right of action for damages, or otherwise, that the Grantor may have against the Grantee. Grantor shall use reasonable and proper precautions to avoid damage to either the Easement Area. Grantor may, at its sole discretion, allow the driveway to remain in the Easement area, in which event Grantee shall be deemed to have relinquished all right, title, and interest thereto and the driveway shall be and become the property of Grantor.

17. Grantor agrees that the consideration recited herein is just compensation for the property rights conveyed, however, this consideration does not include damages resulting from any act or omission by the Grantee, its officers, agents and employees beyond or outside of those uses expressed here or damages arising from any negligence, and does not include damages, if any, to Grantor's remaining property, which may result from the acquisition or use of said property or property rights.

18. This Easement shall be governed by the laws of the State of Oregon. Any suit or action arising under this Easement shall occur, if in the state courts, in the Multnomah County Court having jurisdiction thereof, and if in the federal courts, in the United States District Court for the District of Oregon.

19. Grantee shall keep the land in the Easement area and adjacent City property used in connection with this Easement free from any liens arising from any work performed, materials furnished, or obligations incurred by or at the request of Grantee.

20. All notices under this Permit shall be in writing and shall be deemed validly given if sent by first class or certified mail, nationally recognized courier or facsimile transmission, and shall be effective upon receipt. Notices should be addressed as follows:

GRANTOR
Portland Parks and Recreation
1120 SW 5th Ave, Suite 1302
Portland, OR 97204-1933
Attention: Property Manager

GRANTEE
Jerzy M. Gizokwski
7766 SE 82nd Ave.
Portland, OR 97266

Text from recorded document; the recorded image PDF with signatures and exhibits, is available here:
https://oregonstatebar.s3.us-west-2.amazonaws.com/Seminars/2023/RE23/RE23-1-13.pdf

EASEMENT AGREEMENT FOR ACCESS, CONSTRUCTION, LIGHT RAIL NOISE AND VIBRATION

THIS AGREEMENT is entered into this 20th day of Sept. 1994, by and between the City of Portland (City) and Citation, Inc. (Owner).

RECITALS

A. Owner owns property between the Willamette River and SW Riverside Drive, more particularly described in Exhibit A hereto (the Property).

B. City holds a 17-foot rail right-of-way, commonly known as the Willamette Shore Line right-of-way, across the Property.

C. City has adopted an agreement between several governmental entities (the Consortium) and a policy which includes no new, at-grade crossings. The Consortium includes the Tri-County Metropolitan Transportation District of Oregon (Tri-Met), which may operate a light rail line on the right-of-way, and succeed to the City's interest in the right-of-way.

D. Owner claims a private at-grade crossing across the right-of-way.

E. The right-of-way is currently being used for a trolley and could be used for street car or light rail use.

F. City wishes to avoid future claims.

G. The parties desire an appropriate solution to their conflicting claims.

TERMS

NOW, THEREFORE, based on the foregoing recitals, the parties agree as follows:

1. From its interest, City hereby grants to Owner a private, temporary, appurtenant, nonexclusive construction easement across the right-of-way at the location shown in Exhibit B hereto for the benefit of the Property. Plans for the construction easement shall be subject to approval by the City of Lake Oswego Engineer prior to any construction thereof: The temporary construction easement shall terminate when Owner received its residential occupancy permit.

2. Owner will manage its use of the proposed construction access easement so as not to interfere with current trolley operations. Owner will coordinate all construction with the City of Lake Oswego Engineer. Owner will remove the temporary construction easement and all dirt and debris from the right-of-way caused by Owner's construction, Owner will restore at Owner's expense the slope and the track and trackway to their condition as existed before the construction, which is Class I condition, as approved by Tri-Met Engineer. A copy of the Federal Railroad Administration specifications for Class I has been provided to Owner. Owner will post a bond in an amount not less than $10,000 to repair any damage caused by Owner's activities.

3. From its interest, City hereby grants to Owner a permanent, appurtenant, exclusive above-grade pedestrian crossing in the area shown in Exhibit B hereto. The crossing will have the dimensions and be of a design similar to that shown on Exhibit C hereto.

4. The elevation of the above-grade pedestrian crossing shall be eighteen (18) feet above the track bed. However, at its election Owner may construct an above-grade crossing down to a level of fourteen (14) feet. If light rail or some other project requiring vehicles and infrastructure at an elevation of higher than that of the then-existing above-grade crossing is

approved and funded, City shall so notify Owner, and Owner within sixty (60) days of receipt of the notice and at its expense, shall raise the crossing to the said eighteen (18) feet above the track bed.

5. If the right-of-way is moved, the Owner agrees to exchange commensurate property along SW Riverside Drive for the alternative access to the garage and the dwelling. City will assure that Owner has alternative access to the garage and the dwelling. Costs of moving or replacing the garage to be built in the area between the crossing and SW Riverside Drive will be for Owner's account.

6. Owner· acknowledges that the Property is intersected by the railroad right-of-way which is listed as a right-of-way in the Regional Transportation Plan and as a regional transit trunk, and such plan provides for possible operation of light rail thereon. Owner agrees not to protest implementation of light rail or comparable transit within the existing right-of-way.

7.A. For the consideration listed in Paragraph 7.B. below, the receipt and sufficiency of which is hereby acknowledged, the Owner does hereby grant to the City, its successors and assigns, to have and to hold a perpetual easement for noise and vibration until the Willamette Shore Line right-of-way shall be abandoned or shall cease to be used for public purposes, which easement shall be over, under and across the Property.

7.B. Consideration from City to Owner tor the mutual promises contained herein includes, but is not limited to the following:

a. The right of Owner to construct or reconstruct the subject Property for residential use.

b. ~~The right, but not the duty, to have City install vibration control materials under, around or on the tracks in front of or nearby the Property provided that City has a track improvement plan underway and the tracks are being upgraded with vibration control materials.~~ City shall, at its expense, install the vibration control materials on the track across the Property to the extent otherwise necessary to protect nearby existing properties with homes on them. City shall notify Owner of the planned construction and the opportunity to install vibration control material on the portion of trackway over the Property to protect the Owner's residence (i.e., Extra Vibration Control Materials). If the installation right is exercised, Owner shall pay the installed cost of the Extra Vibration Control Materials. Also, notwithstanding the foregoing, Owner shall retain the right to insist on compliance with any applicable laws concerning train speeds and proper operation.

7.C. Owner, for itself, its heirs, administrators, executors, successors, and assigns, does hereby fully waive, remise, and release any right or cause of action which it may now have or which it may have in the future against the City, its successors and assigns, due to noise and vibration and all other effects of any noise or vibration and all other effects of any noise or vibration impacts that may be caused or may have been caused by the construction of track work or the operation of passenger or light rail vehicles at or on the said Willamette Shore Line right-of-way.

8. The granting of this Easement shall establish the Owner's right to construct or reconstruct for residential use the Property as described in Exhibit A hereto for residential use in accordance with all applicable laws.

9. In the event any covenant, condition or provision herein contained is held to be invalid by any court of competent jurisdiction, the invalidity of such covenant, condition or provision shall in no way affect any other covenant, condition or provision herein contained.

10. It is understood and agreed that .these covenants and agreements shall run with Owner's land and shall be recorded, and the covenants and agreements shall be binding upon, heirs, administrators, executors, successors and assigns of the Owner,

11. Owner will carry liability insurance, approved by the Portland City Attorney, with limits of coverage that will meet the maximum requirements for liability of a public body as set forth in ORS 30.260-.300, or as it may be amended from time to time. The City, its officers, agents and employees shall be named as additional insureds. Owner and all subsequent purchasers agree to hold harmless, indemnify, and defend the City from and against all liability, claims, demands, actions, costs, expenses, and suits (including attorney's fees and costs) brought against any of them arising without limitation from the existence, construction, operation, use, maintenance, repair, renewal, modification, reconstruction, relocation or removal of the private crossing. Each new property owner or owners shall be required to provide a certificate of insurance to the City Auditor. It shall be approved by the City Attorney.

12. This agreement shall bind all successors and assigns of both parties.

13. Any notice required hereunder shall be by certified mail, return receipt requested, to the then-owner, with a copy to Citation, Inc, and to the Portland City Attorney and Steven R. Schell.

14. This document shall be recorded in the Deed Records of Multnomah County, and shall benefit the Property described in Exhibit A hereto and shall be an encumbrance against the right-of-way of the City.

15. This Agreement and any permits or easements issued pursuant to it shall not exempt Owner from obtaining any license or permit required by state statute or local ordinance for any act to be performed under this Agreement, permit or easements nor shall they waive the provisions of any state statute or local ordinance, except as herein stated.

16. The permission hereby granted is subject to all licenses, leases, easements, encumbrances and claims of title affecting the rail right-of-way of the City. The City reserves the right to permit and/or construct, reconstruct, maintain, and use existing and future transportation, communication and pipeline facilities in, upon, over, under, across, and along the rail right-of-way.

17. The fee for processing this Agreement and for inspecting the installations shall be the full cost incurred by the City for such services. The minimum fee shall be $250.00, payable upon acceptance of the ordinance approving this Agreement. If full cost exceeds $250.00, the applicant shall pay any additional costs. The permittee shall pay the City the remaining cost of the work in excess of the $250.00 minimum fee within 10 days after notice from the City of the full cost.

18. Owner shall reimburse the City for the City Auditor's cost of filing a certified copy of the ordinance approving this Agreement with the appropriate county's deed records for the Property described in Exhibit A.

19. This Agreement and the ordinance approving it will not become effective until Owner has paid the fees, filed a document with the City Auditor accepting the terms and conditions herein, and submitted a certificate of insurance which has been approved by the City Attorney.

Text from recorded document; the recorded image PDF with signatures, notarizations, and exhibits, is available here:
https://oregonstatebar.s3.us-west-2.amazonaws.com/Seminars/2023/RE23/RE23-1-14.pdf

Grantor and Grantor's Address:
Ronnie K. Wilson
9990 Riverside Drive
Portland, Oregon 97219

Grantee and Grantee's Address:
City of Portland
1221 SW Fourth Ave Rm 430
Portland, Oregon 97204

Until A Change is Requested, All Tax Statements Should Be Sent To:
Ronnie K. Wilson
9990 Riverside Drive
Portland, Oregon 97219

After recording please return to:
Heidi M. Ware/106/800

FIRST AMENDMENT TO EASEMENT AGREEMENT FOR ACCESS, CONSTRUCTION, LIGHT RAIL AND NOISE VIBRATION

THIS AMENDMENT, made this 25th day of July, 2000, by and between the City of Portland, a municipal corporation organized and existing under the laws of the State of Oregon (hereinafter "City"), and Ronnie K. Wilson, a single person (hereinafter "Owner").

RECITALS

A. Wilson owns certain real property located between the Willamette River and SW Riverside Drive, legally described in Exhibit A to this Amendment (the "Property");

B. The City holds a 17-foot wide rail right-of-way across the Property, commonly known as the Willamette Shore Line right-of-way (the "Rail Right-of-Way''), for the benefit of an intergovernmental entity (the ''Consortium"), created pursuant to ORS 190.010 by that certain Intergovernmental Agreement for the Management of the Willamette Shore Line Right-of-Way;

C. The City and Citation, Inc., predecessor-in-interest to Owner, entered into that certain Easement Agreement for Access, Construction, Light Rail Noise and Vibration, dated September 20, 1994 and recorded as Document No. 94178723 (the "1994 Easement Agreement"); and

D. The parties wish to clarify the extent of the Rail Right-of-Way and to make certain other agreements as contained herein.

AGREEMENT

Therefore, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Owner and the City agree as follows:

1. The easement area for the Rail Right-of-Way shall be an area extending for 8.5 feet (measured at right angles) on each side of the centerline of the existing railroad tracks, as legally described in Exhibit B to this Amendment and depicted in Exhibit C to this Amendment (the "Easement Area").

2. Consistent with the Willamette Shore Line Right-of-Way Management Policy, Owner shall not construct or allow any fixed improvements within the Easement Area; provided, however, that the above-grade pedestrian crossing described and depicted in the 1994 Easement Agreement may be constructed by Owner so long as the crossing structure maintains a minimum height of eighteen (18) feet between the top of the rails existing as of the date of this Amendment (the "Existing Rails") and the bottom of the crossing structure. ~~The parties agree that the elevation of the top of the existing rails is _____.~~

3. Except as expressly modified herein, the 1994 Easement Agreement shall remain in full force and effect.

4. This Agreement shall bind the successors and assigns of both parties.

RAILROAD RELATED WEBSITES

Railroad Rights of Way Strip Maps

http://rrsearch.aociris.org/

Public or Private Railroad Crossing Federal Railroad Administration

Enter the following into a google or browser search

8.01 – query by location (dot.gov)
Or paste into search engine:
https://safetydata.fra.dot.gov/officeofsafety/publicsite/crossing/xinggryloc.aspx

Text from recorded document; the recorded image PDF with signatures and notarizations is available here:
https://oregonstatebar.s3.us-west-2.amazonaws.com/Seminars/2023/RE23/RE23-1-16.pdf

UIC LAW DEPT.DOC.NO. 1-1420

SPECIAL WARRANTY DEED

UNION PACIFIC LAND RESOURCES CORPORATION, a Nebraska corporation (successor by merger to Union Pacific Land Resources Corporation, a Utah corporation, GRANTOR, conveys and specially warrants to SCHNITZER INVESTMENT CORPORATION, an Oregon corporation, GRANTEE, the following described real property free of encumbrances created or suffered by the GRANTOR except as specifically set forth herein.

> All of Block 240, Couch's Addition, to the City of Portland, County of Multnomah, State of Oregon, as recorded in the Multnomah County records in Book 1, page 47, on January 25, 1865.

EXCEPTING from this grant and RESERVING unto the GRANTOR, its successors and assigns, forever, all minerals and all mineral rights of every kind and character now known to exist or hereafter discovered, including, without limiting the generality of the foregoing, oil and gas rights thereto, together with the sole, exclusive and perpetual right to explore for, remove and dispose of, said minerals by any means or methods suitable to the GRANTOR, its successors and assigns, but without entering upon or using the surface of the lands hereby conveyed, and in such manner as not to damage the surface of said lands or to interfere with the use thereof by the GRANTEE, its successors and assigns.

The true consideration for this conveyance is One Hundred Twenty Thousand Dollars ($120,000.00).

Dated this 21st day of October, 1977.

Text from recorded document; the recorded image PDF with signatures, notarizations, and exhibit is available here:
https://oregonstatebar.s3.us-west-2.amazonaws.com/Seminars/2023/RE23/RE23-1-17.pdf

UNLESS A CHANGE IS REQUESTED, ALL TAX STATEMENTS SHALL BE SENT TO ANT, LLC, 4545 FULLER DRIVE, SUITE 100, IRVING, TEXAS 75038.

After recording, this Deed shall be delivered to: ANT, LLC, 4545 Fuller Drive, Suite 100, Irving, Texas 75038 Attention: Title & Escrow Department.

QUITCLAIM DEED

KNOW ALL MEN BY THESE PRESENTS, That THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, a Delaware corporation, (formerly Burlington Northern Railroad Company), of 2650 Lou Menk Drive, Fort Worth, Texas 76131-2830, ("Grantor"), for the consideration hereinafter stated, in hand paid, conveys and quitclaims, without any covenants of warranty whatsoever and without recourse to the Grantor, its successors and assigns, unto ANT, LLC, a Delaware limited liability company, and its successors and assignees, whose address is 201 Mission Street, Pacific Gateway Building, San Francisco, California 94105, ("Grantee"), all of Grantor's right, title and interest, if any, in real estate and improvements located in the County of Wasco, State of Oregon, as such real property ("Premises") is more particularly described in Exhibit "A", consisting of one (1) page, attached hereto and made a part hereof.

The true and actual consideration paid for this conveyance, stated in terms of dollars is $9,720.00.

TOGETHER with all tenements, hereditaments and appurtenances, if any, on the Premises, and any reversions, remainders, rents, issues or profits on the Premises.

SUBJECT, however, to all valid existing interests of third parties in the Premises, including but not limited to, reservations, rights of way and other encumbrances of record.

EXCEPTING AND RESERVING unto Grantor, its successors, assignees, lessees and/or licensees (hereinafter "Grantor") all coal, oil, gas, casing head gas and all ores and minerals of every kind and nature, and all water, underlying the surface of the Premises, except with no right of entry onto the surface, or above a depth 500 feet below the surface, of the Premises.

ALSO RESERVING unto Grantor a nonexclusive permanent easement to operate, maintain, reconstruct and modify any and all fiber optic lines, communication lines used by Grantor, and facilities related to such fiber optic lines or communication lines, in the location where such lines or facilities exist on the date of delivery of this Deed, including related rights or ingress and egress, as necessary across the Premises for the sole purpose of operating, maintaining and, as necessary, reconstructing such lines in the same location as they exist on January 30, 1998, provided that all activities of Grantor in the exercise of rights under this Paragraph of this Deed shall occur in a manner that minimizes any interference with any activities or improvements then present on the Premises.

THE PROPERTY DESCRIBED IN THIS INSTRUMENT MAY NOT BE WITHIN A FIRE PROTECTION DISTRICT PROTECTING STRUCTURES. THE PROPERTY IS SUBJECT TO LAND USE LAWS AND REGULATIONS, WHICH, IN FARM OR FOREST ZONES, MAY NOT AUTHORIZE CONSTRUCTION OR SITING OF A RESIDENCE AND WHICH LIMIT LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.930 IN ALL ZONES. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY

PLANNING DEPARTMENT TO VERIFY APPROVED USES AND EXISTENCE OF FIRE PROTECTION FOR STRUCTURES.

THIS INSTRUMENT WILL NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNT\' PLANNING DEPARTMENT TO VERIFY APPROVED USES AND TO DETERMINE ANY LIMITS ON LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.930.

TO HAVE AND TO HOLD the same unto Grantee, and its successors and assignees, forever.

Text from recorded document; the recorded image PDF with signatures and notarizations is available here:
https://oregonstatebar.s3.us-west-2.amazonaws.com/Seminars/2023/RE23/RE23-1-18.pdf

PLD 311-0-4 [CLL4/5]
Deschutes County, Oregon

STATEMENT OF CLAIM TO MINERAL INTERESTS

Notice is hereby given that UNION PACIFIC RAILROAD COMPANY, a Utah corporation, whose corporate address is 1416 Dodge Street, Omaha, Nebraska 68179, is the current holder of certain mineral interests located in Deschutes County, Oregon, which were originally acquired in its own name or by the following persons:

Des Chutes Railroad Company, an Oregon corporation, with corporate offices at 1416 Dodge Street, Omaha, Nebraska 68179;

Oregon-Washington Railroad & Navigation Company, an Oregon corporation, whose corporate address is 1416 Dodge Street, Omaha, Nebraska 68179;

Southern Extensions Railway Company, a Washington corporation (current corporate status and address unknown).

This Statement of Claim is filed in satisfaction of the requirements of Oregon Revised Statutes §517.180.

IN WITNESS WHEREOF, Union Pacific Railroad Company has caused this Statement of Claim to be executed this 1st day of October, 1985.

Chapter 2

Real Estate Case Law Update 2023: Selected Cases from the Oregon Supreme Court, Oregon Court of Appeals, and Federal Courts in Oregon, September 2022 to June 2023

Paul Trinchero[1]
Foster Garvey PC
Portland, Oregon

Chelsea Glynn
Foster Garvey PC
Portland, Oregon

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[1] Presented by Paul Trinchero and Chelsea Glynn. Summaries by Justice J. Brooks I, James Garlant, Chelsea Glynn, Mary Ruffin, Thomas Scott, Sally Walker, Paul H. Trinchero, and Jocabeth Zarate, Foster Garvey PC, Portland.

Boundary Dispute

Martucci v Hilton, 326 Or.App. 87 (2023) (unpublished opinion)

Facts: Plaintiff appeals a ruling by the trial court that the plaintiff's predecessor and its neighbor had not established a "boundary by agreement." Plaintiff's predecessor and its neighbor had a letter agreement for an exchange of property, with reference to survey lines determined by a surveyor, which they had marked with paint on the property. The letter agreement said the property "is to become" the property of the other. Given those facts, the trial court found that the transaction contemplated by plaintiff's predecessor and the neighbor was a land conveyance subject to the statute of frauds and that the parties were not merely resolving a dispute by fixing an unknown boundary (as plaintiff claims).

Issues: Was the deal between the plaintiff's predecessor and the neighbor for a land conveyance of a specific property or were those parties actually resolving a dispute by ***fixing an unknown boundary***?

In Oregon, "boundary-by-agreement" is a common-law doctrine with three elements, which requires that there must be an initial uncertainty or dispute as to the true location of the boundary. If the parties are resolving a dispute by mutually fixing an unknown boundary rather than by making a conveyance of land, such resolution of the boundary does not fall within the statute of frauds or other requirements of a land conveyance.

Holding: Affirmed – The trial court did not err in finding that the agreement between the plaintiff's predecessor and the neighbor was a land conveyance and not merely setting a boundary-by-agreement. The parties were in agreement on the true boundary of the property given the marked property boundaries and letter agreement that such marked portion of the property was "to become your property."

Lesson Learned: You cannot get around the statute of frauds or other Oregon land conveyance requirements by claiming you are merely agreeing on new boundaries to property unless there is an actual dispute or uncertainty over a boundary. That "boundary-by-agreement" principle only applies if the parties think they are resolving an unknown boundary.

Ramos v. Potkowski, 322 Or.App. 686 (2022)

Facts: The parties own adjacent parcels in the Marylhurst heights subdivision. Plaintiffs owned Lot 7 ("Plaintiffs' Parcel) – a quadrangle shaped parcel that abutted Lots 12, 6, and 5 ("Defendants' Parcel"). Plaintiffs' predecessor asked Kramer, a neighbor who owned a nearby but unrelated parcel, the location of the boundary between Plaintiffs' Parcel and Defendants' Parcel. Kramer gave Plaintiffs bad information, which, if accurate, would make Plaintiffs' Parcel a triangle. Subsequently, Defendants' predecessor met with Kramer and Plaintiffs' predecessor and discussed the location of the boundary between the two parcels. Although the parties thought they reached a consensus on the location of the boundary based on Kramer's mistaken belief, all walked away with a different understanding of the boundary's location. Based on this consensus, Defendants' predecessor made improvements located on Plaintiffs' Parcel.

Both Defendants' Parcel and Plaintiffs' Parcel changed hands. None of the sellers' disclosure statements included mention of any boundary agreements, boundary disputes, or recent boundary changes. Both set of conveyances to the respective lots reflected the legal description of the 1947 plat which showed Plaintiffs' Parcel with four sides rather than the triangle or irregular shape as the predecessors and Kramer understood. When Plaintiffs considered building an ADU on their property, they contacted the county and subsequently learned that the boundary line was in fact further north than they had originally believed. Plaintiffs filed an ejectment action against

Defendants alleging trespass and right to possession. Defendants raised an affirmative defense based on a boundary-by-agreement theory. The trial court found in favor of Defendants, specifically utilizing Defendants' boundary-by-agreement defense.

Issue: In Oregon, the common law elements of boundary-by-agreement are: (1) there must have been an initial and mutual uncertainty or dispute about the true location of the boundary; (2) there must have been a mutual resolution of the uncertainty or dispute by an express or implied agreement to permanently recognize a particular line as the boundary; and (3) there must be evidence of the agreement by subsequent activities (for example, recording a written agreement or occupying the property up to the border line in the case of an express oral agreement).

Does laboring under a mutual mistake as to the true location of a boundary line establish the location of the boundary under the boundary-by-agreement theory?

Holding: No. A mutual mistake as to the location of a common boundary is not the resolution of a "bona fide uncertainty about the true boundary." Rather the mutual agreement must settle an existing uncertainty, and an attempt to locate the true boundary will not change the boundary described in the deed. An indication that the parties have not come to a boundary-by-agreement is when the parties continue to reference the boundary as described in a deed or plat as the true boundary. Here, where the parties' predecessors relied on a single source of misinformation, the unrelated neighbor, who believed they had located the boundary lines in accordance with the 1947 deed and where the predecessors conveyed the lots to the parties in this action in accordance to what they believed was the 1947 deed, there is no boundary-by-agreement.

Lesson Learned: A mutual mistake as to the location of a boundary is not mutual uncertainty about the true boundary and will not result in a boundary-by-agreement.

Construction and Enforcement of Contracts, Easements, and Covenants

Farnsworth v. Meadowland Ranches, Inc., 321 Or.App. 814 (2022)

Facts: Plaintiffs claim quiet title to their property and want to enjoin Defendants' use of a gravel road that goes through it. Defendants argue that they have an easement over the road from the previous owner of both properties, developer Meadowland Ranches. In the deeds for each subdivided plot on its property, Meadowland reserved an easement of 40 feet around all boundaries for public highway use in common with others. Meadowland also reserved "the sole right to convey" easement rights. However, Meadowland never conveyed any easement rights, recorded a plat with the county, or formally dedicated a road on the property before selling individual plots to the parties. The trial court held that Plaintiffs were owners in fee simple of the property, and that Defendants did not have an easement for the road.

Issue: The overarching issue is whether Defendants have an easement over a road through Plaintiffs' property when the previous owner (Meadowland) of both properties reserved an easement for itself, but did not expressly convey the easement or record a plat or map with the county? Answering that question required the court to decide the following sub issues:

1. Did Meadowland's deed convey an express easement to Defendants?

2. Were Defendants intended third-party beneficiaries of Meadowland's easement?

3. Did Meadowland convey a public easement by implication?

4. Did Meadowland implicitly dedicate the road for public use?

Holding: No. The trial court did not err by holding that Defendants do not have an easement over the road on Plaintiffs' property.

1. No. The original deed gives Meadowland an easement in gross, which is an easement personal to Meadowland that does not run with the land. The language in the deed giving Meadowland "power to dedicate" and reserving it the "sole right" to convey property rights is clear evidence of an easement in gross, which does not transfer to Defendants.

2. No. Defendants' argument that they are intended third-party beneficiaries of Meadowland's easements relies on the existence of an implied or express easement, which they do not demonstrate.

3. No. To prove the existence of an implied public easement, Defendants must demonstrate clear and convincing evidence that Meadowland intended to create a public easement at the time the parcel was severed or conveyed. But, as discussed above, the deed language expressly creates an easement in gross personal to Meadowland. And Defendants have access to alternative routes to access their property, which precludes an implied easement by necessity. Defendants did not identify other factors weighing for an implied easement, so the trial court was not required to find in their favor.

4. No. Common law dedication arises when members of the public rely on a property owner's representations that the land has been opened up for public use. Meadowland reserved an easement in gross for itself for development purposes; it never manifested an intention to dedicate the entire boundary of each subdivided parcel as public roads. Meadowland also never recorded a plat or referenced a map in the deeds, thereby never establishing the road in question as a public road.

Lesson Learned: Where a previous owner has an easement in gross on subdivided plots, the bar for establishing that the subsequent owner of a plot has an express or implied easement is high.

Association of Unit Owners of Cornell Meadows Condominium v. Jensen,
321 Or.App. 623 (2022)

Facts: Defendants own a condominium in Cornell Meadows, which is governed by the condominium association's covenants. One covenant allows the association to levy monthly assessments for upkeep of the buildings and special assessments for major repairs of improvements. If owners do not pay their assessments, the association receives an automatic lien on the property (an association lien). Defendants have not paid regular or special assessments since 2013. The association sued and obtained a personal judgment against Defendants in 2015. But Defendants filed for bankruptcy, discharging personal liability but leaving the association lien undisturbed. The trial court granted summary judgement for the association's foreclosure on the association lien.

Issue: The election of remedies doctrine prevents parties who have already chosen a remedy from pursuing a different one for the same wrong. By way of a 2017 amendment, ORS 100.450 explicitly precludes application of the election of remedies doctrine to association liens. Does this amendment apply retroactively? In other words, can the association foreclose on the association lien after receiving a personal judgment against Defendants in 2015?

Holding: Yes. The Oregon legislature explicitly stated that the statutory amendment precluding application of the election of remedies doctrine to association liens and foreclosures applies retroactively. In its opinion, the court noted that even the pre-amendment statute would preserve foreclosure on the lien as a remedy after personal judgment: the original statute affirms that a party does not waive or foreclose association liens by maintaining a personal judgement suit.

Lesson Learned: Regardless of when they brought the original action, associations that have already received a personal judgement against a homeowner for failure to pay assessments can still bring an action to foreclose on association liens.

Adelsperger v. Elkside Development, LLC, 322 Or.App 809 (2022)

Facts: Elkside Development owned and operated Osprey Point RV in Lakeside. Elkside sold memberships to its campground for nearly 20 years giving membership holders the right to camp for a significant portion of the year in return for an initial fee and annual dues. Elkside sold the property to Barnett Resort in 2017. The memberships were not part of the sale and were not recorded in property records, although Barnett was aware of the memberships prior to purchase.

Barnett soon sent a letter to members indicating that changes were coming and advised staff to stop accepting reservation from members who would not pay the normal campground fees. A month later, Barnett sent a letter to members indicating they would not honor the membership.

The members brought suit against Barnett with three claims: (1) breach of contract, (2) financial elder abuse; and (3) intentional interference with economic relations. The jury found for the members on all three claims and awarded damages of $500,000 for breach of contract and $900,000 for elder abuse that were trebled to $2.7 million pursuant to ORS 124.100(2).

Barnett appealed arguing that it was not bound by the membership contracts because they did not run with the land. Barnett also appealed the elder abuse claims on the grounds that the contracts were not "property" for purposes of the contract. Finally, Barnett appealed the intentional interference with economic relationships on the grounds that there was no improper purpose in its decision not to honor the contracts.

Issues: Did Defendant preserve its appeal that the membership contracts did not run with the land and were therefore not binding on Defendant?

Did Defendant's refusal to honor the membership contracts constitute refusal to transfer "property" belonging to Defendants for purposes of financial elder abuse?

Did Defendant act with an improper purpose or by improper means in refusing to honor the contracts for purposes of financial elder abuse?

Holding: No. Defendant failed to preserve the issue of whether the contracts ran with the land and were binding on Defendant. The Plaintiff presented and the judge accepted evidence that the contracts ran with the land and the pleadings – which did not include that legal theory – conformed to the evidence. The breach of contract judgment was affirmed.

No. ORS 124.110(1)(b) has four elements: (1) ownership or control of the elder's property was acquired by the defendant; (2) the elder requested return of the property; (3) the defendant without good cause continues to hold the property; and (4) the defendant acted in bad faith or knew or should have known of the elder's right to have the property returned. In this case, the financial elder abuse claim failed because the money or property transferred was the membership fees and what was requested to be returned was the benefits of the contract. The money or property acquired by the defendant must be the same money or property that the elder requests to be returned.

No. ORS 124.110(1)(a) applies when a person wrongfully takes or appropriates money or property. "Wrongful" has the same meaning as in intentional interference claims – improper purpose or improper means. There was no improper means as Defendant did not employ intimidation, fraud, conversion, or theft to acquire the member's property. There was no improper purpose because the Defendant's intent was not to injure the members but to seek advancement in its own business purposes.

Lesson Learned: Beware of contracts that grant rights for the use of land that you are purchasing.

Construction/Statute of Limitations

Romero v. Amburn, 323 Or.App. 410 (2022)

Facts: Defendant construction company built a house and sold it to Plaintiff. Nine and a half years later, Plaintiff discovered significant construction defects in the home. Plaintiff sued Defendant alleging a breach of contract, specifically that Defendant failed to deliver to Plaintiff a habitable residence free of material defects and that the Defendant breached the implied warranty of habitability.

Defendant moved for summary judgment, arguing that the breach of contract action was time barred under the six-year statute of limitations for contract actions because the statute began running when the breach occurred – when Plaintiff purchased the home nearly ten years earlier. Plaintiff opposed the motion on the grounds that Plaintiff was unaware of the defect until much more recently, and that the discovery rule tolled the statute of limitations until the time at which Plaintiff discovered the breach.

Issue: ORS 12.080(1) provides that "an action upon a contract or liability, express or implied…shall be commenced within six years." A long line of cases in Oregon has held that it is "established law" that a breach of contract action accrues at the time of the breach (the "Waxman Cases"). However, a relatively recent and parallel line of cases provide that the statute of limitations begins when the injury is discovered: specifically when the plaintiff actually discovers the injury, or when a reasonable person exercising reasonable care should have discovered the injury (the "Rice Cases"). Recent case law has applied both lines of cases within the context of statutes of limitation arising under ORS Title 12.

Is the six- year statute of limitations for actions arising under a contract or liability under ORS 12.080(1) subject to the discovery rule?

Holding: No. While the court recognized a potential conflict between the Waxman Cases and the Rice Cases, ultimately the court sided with decades of case law holding that a breach of contract action begins accruing at the time of the breach, and not when the breach is discovered. The court sidled the Plaintiffs with the burden of proving that the Rice Cases overruled the long line of Waxman Cases and concluded that the Plaintiffs did not meet the burden. The court considered that Rice itself was not a contract action, and that, when read in harmony with the terms of ORS 12.010, ORS 12.080, specifically provides that the statute of limitation commences when the breach accrues. Based on the long line of cases stating that breach of contract actions begin accruing at the breach, the Court reasoned that the statute of limitations here began running at the time of the breach – i.e., at the time the Plaintiff purchased the property from Defendant. The court ultimately found the Rice Cases and the Waxman Cases in congruence with one another but recognized language in Rice that could lend support to reading in the discovery rule to contract actions if the Supreme Court were to take up the issue.

Lessons Learned: Keep an eye on breach of contract actions and statutes of limitations. The Court of Appeals here pretty clearly flagged the issue for the Oregon Supreme Court to reconcile the applicability of the discovery rule with that of contracts. But for now, breach of contract actions are subject to a six-year statute of limitations that begins at the time of the breach, not when the breach is discovered.

Land Conveyance

Freeborn v. Dow/Western Title and Escrow Company, 322 Or.App. 695 (2022) – See Oregon Real Estate & Land Use Digest Vol. 45, No. 2, May 2023 for Summary

Landlord/Tenant

Randall v. Valk**,** 324 Or.App. 251 (2023)

Facts: Tenant appealed a general judgment of restitution of possession of a premises to Landlord on the basis that the trial court erred in denying his motion for judgment on the pleadings and in determining on the merits that Landlord was entitled to possession of the premises. Tenant rented a residence from Landlord pursuant to an oral agreement for a month-to-month tenancy. Landlord filed a residential eviction complaint alleging that Landlord had given Tenant a notice of termination of tenancy pursuant to ORS 90.427, a provision of the Oregon Residential Landlord Tenant Act (ORLTA). Landlord claimed that Tenant remained beyond the permitted time allowed under the notice. In defense, Tenant claimed the notice was invalid as it did not include information required under ORS 90.391 related to resources for veterans. Landlord asserted that, while the veteran information was not *in* the notice itself, it was included as an *attachment* to the notice. The trial court found that Landlord had provided sufficient timely notice under ORS 90.427 and that Landlord provided veteran's information as required by ORS 408.515. On appeal, Tenant contended the trial court erred in granting possession of the premises because the notice of termination did not include the veteran's information required by ORS 408.515. For issues of statutory construction, the court reviews the statutes' text, relevant legislative history, and when necessary, general maxims of statutory construction.

Issue: Did the trial court err in granting possession of the premises to Landlord because the notice of termination did not include the veteran's information required by ORS 408.515 in the complaint rather than as an attachment to the complaint?

Holding: The notice of termination of tenancy was invalid and the judgment was reversed in favor of the Tenant. While statutory provisions were potentially inconsistent, taken in context with other provisions of the original bill, the statute shows intent by the legislature to ensure that veterans be advised of resources available to them. Allowing the veteran's information to be included in a separate document as opposed to in the notice itself potentially runs against the legislature's intent.

Lessons Learned:

1. A notice of termination of residential tenancy that fails to comply with statutory requirements for its contents is invalid; and

2. Residential landlord-tenant law is a highly regulated area and requires careful attention to applicable statutes and expertise.

Hathaway v. B & J Property Investments, Inc. and Better Business Management, Inc., 325 Or.App. 648 (2023)

Facts: Residents of an RV park brought a class action claim against park owners and managers alleging that certain park utility billing practices violated the Oregon Residential Landlord Tenant Act (ORLTA), plus other claims including retaliation after rent was raised in the first months of litigation. [Better Business Management, Inc. ("BBM") managed the park, and B & J Investments, Inc. owned the land.]

Park owner had charged residents a higher rate for utilities than the owner was billed by the utility provider. The actual rates charged to the manager varied from $0.09 to $0.12 kWh, but residents were charged at a flat rate of $0.12/kwh. Owner also charged residents a monthly meter reading fee. Residents' rental agreements say residents are responsible for electricity but does not say how the amounts are calculated or that there are fees for reading the meter.

Eventually landlord stopped charging the $10/mo. meter fee but simultaneously increased monthly rent by $20.

Issues:

1. ***Statute of Limitations:*** Did plaintiffs' utility billing claim allow for application of the discovery rule that tolls the limitation period until a tenant knew or reasonably should have known that they had a cause of action? No, discovery rule does not apply.

ORS 12.125 states that "[a]n action arising under a rental agreement or ORS chapter 90 shall be commenced within one year." On its face, then, nothing in the plain text of ORS 12.125 states explicitly that the legislature intended for that limitations period to begin when the plaintiff discovers or should have discovered the harm, rather than when the facts necessary for the plaintiff to prove their claim have occurred. We have generally stated that, "when the legislature intends to subject a statute of limitations to a discovery rule, it knows how to make its intent to do so clear."

However, precedent establishes that, even when a statute of limitations does not contain a discovery rule on its face, the statute may incorporate a discovery rule by operation of ORS 12.010.

But the placement of the ORLTA statute of limitations in ORS chapter 12 was the result of an organizational decision by Legislative Counsel, and not legislative action adding the statute to and making it a part of ORS chapter 12. We cannot draw any legislative intention from the placement of ORS 12.125 within ORS chapter 12. Legislative Counsel cannot "alter the sense, meaning, effect or substance of any Act."

The legislature did not intend for ORS 12.010 to apply a discovery rule to ORS 12.125, so the one-year limitations period began to run when the relevant billing violations occurred. Certifying a ten-year class was an error.

2. Did the owner impermissibly charge residents for utilities above landlord's costs? No, it was okay.

ORS 90.315(4)(a) and (b) (2011) ensure that a landlord does not upcharge a tenant for utilities beyond the "cost" that the landlord is billed by the provider. Those provisions do not require that a landlord must charge a tenant the exact same kWh rate for electricity that the landlord is itself billed by the utility. Of course, a landlord's use of an inflated kWh rate may lead to tenant bills that exceed the landlord's cost to the provider—in fact, that might be the most likely result of such a practice. But determining whether that is the case would depend on the facts.

In this case, the utility costs were permissible. A landlord can charge residents up to the cost that landlord incurred. "Rate" and "cost" are not the same thing. The kWh rate PGE charged to BBM for resident site electricity was but one component of the overall cost charged.

3. Was the meter reading fee permissible? No, it was not permissible.

BBM's electricity charges to tenants fell under ORS 90.315(4)(b) and could "only include the cost of the utility or service *as billed* to the landlord by the provider." BBM added a meter reading fee into the tenant electricity charges to recoup its own capital and labor expenses, expenses which were not part of the "cost" of electricity "as billed" by PGE.

4. Does the remedy for a tenant under ORS 90.315(4)(e), which allows for recovery of one month's rent or twice the amount wrongfully charged, apply to the same violation repeated every month? No, the remedy does not apply on a per violation basis.

The trial court granted residents a month of free rent for every month in which they were improperly charged for utilities. The appellate court said no. "The plain language of the provision does not specify that it applies on a "per violation" or "per noncompliant billing" basis as the tenant had argued. Instead, the provision provides for the greater of two possible remedies if a tenant establishes that a landlord fails to comply with any of the listed requirements, language which plainly does not distinguish between the number of times a landlord violates the requirements.

5. Did the owner retaliate against residents who brought the claims? The facts support the trial court's summary judgment ruling in the residents' favor.

ORS 90.385 prohibits a landlord from retaliating "by increasing rent" after the tenant has "made any complaint to the landlord that is in good faith and related to the tenancy"; "testified against the landlord in any judicial, administrative, or legislative proceeding"; or "performed or expressed intent to perform any other act for the purpose of asserting, protecting or invoking the protection of any right secured to tenants under any federal, state or local law." The court explained that the tenant must prove that the landlord made the decision to raise rent because of the tenant's complaint. But it doesn't matter if the rent increase is revenue neutral with simultaneous fee restructuring, and a tenant is not required to prove that the tenant's protected activity was the "sole" or "dominant" reason for the landlord's decision.

Holding:

1. The legislature did not intend for ORS 12.010 to apply a discovery rule to ORS 12.125, so the one-year limitations period began to run when the relevant billing violations occurred. Certifying a ten-year class was an error.

2. The utility costs were permissible. Landlord can charge residents up to the cost that landlord incurred. "Rate" and "cost" are not the same thing. A landlord cannot charge residents for more than the *cost* of utilities that landlord is charged by a provider. But that doesn't mean landlord must charge a tenant at the exact same kWh *rate* for electricity that the landlord is itself billed by the utility. The kWh rate PGE charged to BBM for resident site electricity was but one component of the overall cost charged.

3. The meter reading fee was not permissible. This was a surcharge that landlord imposed on residents for utilities, but it was not billed by PGE to landlord.

4. The one-month free rent penalty under ORS 90.315(4)(e) does not apply anew for every month a landlord violates the same provision on an ongoing basis. This should instead be covered by the second prong of the penalty of "twice the amount wrongfully charged" which increases for each month it is wrongfully charged.

5. The trial court's summary judgment ruling in favor of the residents' retaliation claim was not improper. No objectively reasonable jury could conclude that plaintiffs' class-action complaint was not a factor that made a difference in BBM's decision to raise rent.

Lessons Learned:

1. Understand your legislative history and remember that arrangement and numbering actions by the Legislative Counsel do not necessarily reflect the intent of the legislature. The Legislative Counsel can rearrange or renumber sections of statute but cannot amend or change meaning.

2. A rate is just a component of an overall cost.

3. If an RV park landlord wants to pass through costs to a tenant related to utilities, make sure they are the same "as billed" by the utility provided and are specifically called out in the rental agreement.

4. The one-month rent penalty under ORS 90.315(4) does not apply anew for each month that the same violation continues or is repeated (i.e., if a landlord wrongfully overcharges by $40/mo. for 12 months in a row, the tenant doesn't get 12 months free rent as a penalty, only twice the amount of the actual overcharge (as increasing over the months).

5. If a landlord wants to raise rent, make sure it is in no way related to claims brought by a tenant. A tenant's protected activity need only be one of the reasons for the increase, not the sole or dominant reason, for the increase to constitute retaliation.

Ride PDX, LLC v. Tee & B, LLC, 322 Or.App. 165 (2022)

Facts: Parties leased adjacent commercial space in a high rise building in downtown Portland. Defendants, who shared a common wall with Plaintiffs' business, complained to the landlord about noise and reverberations emanating from Plaintiffs' space where they ran a fitness studio. Defendants threatened to sue the landlord for breach of its lease, specifically, a quite enjoyment provision, if the noise disturbances were not addressed. Based on Defendants' threat, the landlord unsuccessfully sought to evict Plaintiffs.

Fresh off this success, Plaintiffs brought suit against Defendants for intentional interference with economic relations alleging that Defendants had tortiously interfered with Plaintiffs' existing business relationship with the landlord. Plaintiffs argued that Defendants acted with an improper purpose on the grounds that its threats to the landlord for lease violations were a pretext to gain rent concessions. Plaintiffs also argued that Defendants lied to the landlord regarding the number of customer complaints and adverse impact on its business in order to get landlord to seek eviction of Plaintiffs.

To establish a claim for intentional interference with economic relations, the plaintiff must prove: (1) the existence of a professional or business relationship; (2) intentional interference with that relationship or advantage; (3) by a third party; (4) accomplished through improper means or for an improper purpose; (5) a causal effect between the interference and the harm to the relationship or prospective advantage; and (6) damages.

Defendants sought summary judgment on the grounds that Plaintiff had failed to establish improper means or an improper purpose. The trial court granted summary judgment.

Issue: Whether Plaintiffs can establish improper purpose based on Defendants' efforts to enforce its contractual rights under the lease?

Whether Plaintiffs can establish improper means by showing that Defendants' misrepresenting to the landlord the adverse impact on its business?

Holding: Plaintiff failed to establish that Defendant interfered with Plaintiffs' economic relationship with the landlord for improper purpose solely by invoking the quite enjoyment clause of Defendants' lease. A party invoking an express contractual right has a legitimate business purpose for doing so even if the intent might be improper.

Plaintiffs did establish an issue of disputed fact as to whether Defendants misrepresented the number of complaints and the adverse impact in order to induce the landlord to seek to evict the Plaintiffs. Such misrepresentation can establish interference with contract by improper means. While a contract may allow a party to invoke certain rights, a contract does not protect a party from engaging in misrepresentations or other improper means to accomplish the interference with a plaintiff's business relationship.

Lessons Learned: Seeking to enforce a valid contract does not automatically insulate a defendant from liability for interference with economic relations for improper means. The societal benefit to be gained from protecting a contractual relationship does not justify an interference with an economic relationship accomplished through misrepresentation.

KKMH Properties, LLC v. Shire, 326 Or.App. 1, (2023)

Facts: In *KKMH Properties, LLC v. Shire*, the landlord filed a forcible entry and detainer (FED) action to regain possession of a residential property from the tenant. The tenant breached the lease by allowing a water leak to continue and keeping 226 uncaged guinea pigs causing extensive damage to the premise. The tenant appealed the judgment that awarded possession to the landlord, arguing that the trial court made errors in denying their motion to dismiss. The tenant claimed that the notice of termination of the tenancy did not include an opportunity to cure the violation of the rental agreement. The court concluded that the trial court did not err in denying the motion to dismiss and affirmed the judgment in favor of the landlord.

The legal context of the case was based on ORS 90.392, which allows a landlord to terminate a rental agreement for cause and take possession of the property, unless the tenant cures the violation within the time specified in the statute. The tenant argued that the notice of termination was invalid because it did not provide an opportunity to cure the violation.

Issue: The issue decided by the court was whether the notice of termination pursuant to ORS 90.392 required an opportunity to cure where the landlord determined the breach of lease was incurable in the time period allowed by the statute.

Holding: The court analyzed the statute and determined that the landlord is responsible for determining whether the violation is curable by the tenant, subject to the court's review. The court clarified that not all violations require notice of an opportunity to cure, and the landlord must initially determine if the violation can be reasonably cured within the minimum notice period. The court also emphasized that the determination should be made in good faith and without considering the tenant's financial ability to make repairs. In this case, the court found that the violation could not be reasonably cured within the required notice period, justifying the absence of an opportunity to cure notice. Therefore, the court upheld the trial court's decision.

Overall, the court's interpretation of the statute affirmed the landlord's discretion to determine if a violation is curable and clarified that the notice of an opportunity to cure is only required if the violation can reasonably be cured within the specified time period.

Lessons Learned: Uncaged guinea pigs can cause a lot more damage than you would expect to be fixed in 14 days. A landlord has the ability in such situations to seek possession without the necessity of offering an opportunity to cure.

Real Estate Conveyance

Myers v. Owners of Record of that Certain Real Property Described as Lot 1, 322 Or.App. 182 (2022)

Facts: Plaintiff owns property with deed provisions that reserve certain areas for an athletic field and parking area. Oregon statute ORS 93.270(1)(b)(B) prohibits land use discrimination that restricts the use of real property "[b]y any home or facility licensed . . . to provide residential care alone or in conjunction with treatment or training or a combination thereof." Under this statute, Plaintiff petitioned the circuit court to remove the deed provisions that reserve parts of her property for athletic fields and parking, arguing that they prevent her from using those areas for building a licensed residential facility. Plaintiff prevailed on this claim in the circuit court.

Issue: Does a provision in a deed that uniformly limits all or nearly all development of the property violate ORS 93.270(1)(b)(B)?

Holding: No. ORS 93.270(1)(b)(B) only prohibits provisions that impose restrictions about or concerning use by licensed residential facilities. This includes restrictions that (1) expressly limit use of the property by a licensed residential facility; and (2) have the effect of preventing use of the property by a licensed residential facility but not other residential uses. The statute does not prohibit general property restrictions that limit in any way the use of the property by a licensed residential facility, like the one at issue or a conservation easement.

Lesson Learned: ORS 93.270(1)(b)(B) only prohibits property restrictions that specifically prevent use for a licensed residential facility but not other residential uses. General restrictions that incidentally make it impossible to use a licensed residential facility on the property do not violate the statute.

Real Estate Partnership

Johnson and Henderson Partnership v. Henderson, 321 Or.App. 134 (2022)

Facts: Plaintiff, a general contractor, and Defendants orally agreed to purchase a vacant lot, build a home, and rent the property. Defendants agreed to contribute land and money, and Plaintiff arranged for the rental unit to be built. The parties operated the property for years, opening a joint bank account with Plaintiff acting as landlord for the rental tenants. In 2017, Defendants attempted to terminate their business relationship with Plaintiff, breaking the rental agreement and putting the property up for sale without Plaintiff's consent. Plaintiff brought suit, and the trial court granted summary judgment to Defendants on the issue of whether a partnership between the parties existed.

Issue: Did Plaintiff demonstrate a genuine dispute of fact as to whether he was in a partnership with Defendants to build and manage a rental property?

Holding: Yes. The trial court erred by granting summary judgment for Defendants that a partnership did not exist. First, the court erred by refusing to consider relevant statements in Plaintiff's declaration establishing partnership because they were "self-serving." Plaintiff also demonstrated genuine issues of fact that he and Defendants:

1. Intended to and did share profits through withdrawals from a joint bank account;

2. Expressed intent to be partners by opening a joint bank account for the property and by Plaintiff representing himself to third parties as a partner;

3. Shared control over the business by the operation of a joint bank account;

4. Agreed verbally to share losses, and shared liability by Plaintiff acting as the property's landlord to renters; and

5. Contributed to the business, with Plaintiff providing approximately $150,000 in labor and materials without repayment.

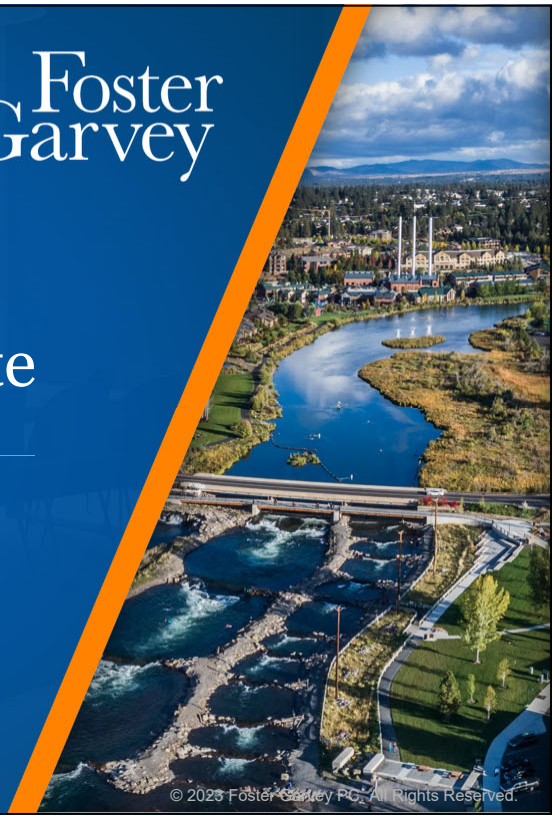
Lesson Learned: Joint control of funds and other conduct between a property owner and contractor or property manager can be enough to defend summary judgment on the issue of partnership. Therefore, important to put agreements in writing.

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Real Estate Case Law Update

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KKMH Properties, LLC v. Shire, 325 Or App 1 (2023)

FACTS

- A residential tenant caused substantial damage to the premises by failing to report a water leak and keeping 277 uncaged guinea pigs.
- The landlord sent a notice terminating the lease for breach of lease covenants but did not include an opportunity for the tenant to cure.
- The landlord filed an FED action, and the tenant sought dismissal for failure to include the 14-day opportunity to cure in the notice, in violation of ORS 90.392.
- The judge awarded possession to the landlord, finding that the landlord was excused from including the cure period because the damage could not be cured in 14 days.

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KKMH Properties, LLC v. Shire, 325 Or App 1 (2023)



RELEVANT LAW

ORS 90.392 provides:

- (4)(a) If the violation described in the notice ***can be cured*** by the tenant by a change in conduct, repairs, payment of money or otherwise, the rental agreement does not terminate if the tenant cures the violation by the designated date. The designated date must be:
  - A. At least 14 days after delivery of the notice; or
  - B. If the violation is conduct that was a separate and distinct act or omission and is not ongoing, no earlier than the date of delivery of the notice as provided in ORS 90.155 (Service or delivery of written notice).

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KKMH Properties, LLC v. Shire, 325 Or App 1 (2023)



HOLDING

- Landlord makes the initial determination of whether the breach can be cured subject to court review.
- Notice need only be given if the breach can be cured by the tenant in the designated amount of time.
- If the notice does not include an opportunity to cure the Landlord must establish in court that it was incurable in the 14 days.

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KKMH Properties, LLC v. Shire, 325 Or App 1 (2023)



LESSONS LEARNED

Landlord may use his or her discretion in determining whether to include a cure period – but bears the burden of justifying it to the court.

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Randall v. Valk, 324 Or App 251 (2023)



FACTS

- The tenant rented a residence on a month-to-month basis pursuant to an oral agreement.
- The landlord gave notice of termination under ORS 90.427.
- Veterans information was included as an attachment to the notice.
- The tenant claimed the notice was invalid as it did not include information required under ORS 90.391 related to resources for veterans.

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Randall v. Valk, 324 Or App 251 (2023)

RELEVANT LAW

- ORS 90.391 provides that the notice of termination "*must include*" the Information to Veterans under ORS 408.515.
- ORS 408.515 requires the following Information to Veterans to be included "*with the document*":
  - A statement that if the recipient is a veteran of the armed forces, assistance may be available from a county veterans' service officer or community action agency; and
  - Either:
    - Contact information for a service officer for the county in which the recipient lives and contact information for a community action agency that serves the area where the recipient lives; or
    - A statement that contact information for a local county veterans' service officer and community action agency may be obtained by calling a 2-1-1 information service.

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Randall v. Valk, 324 Or App 251 (2023)

HOLDING

- The Information to Veterans must be included in the notice of termination.
  - HB 2530 demonstrates the intent that the information to veterans must be in the notice of termination.
  - Legislative intent requires veterans to be advised of available resources (a separate document may defeat the legislative intent).
- A notice of termination with the information to veterans in a separate document is invalid.

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Randall v. Valk, 324 Or App 251 (2023)



LESSONS LEARNED

Residential landlord-tenant law is a highly regulated area and requires careful attention to applicable statutes and expertise.

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Hathaway v. B & J Property Investments, Inc., 325 Or App 648 (2023)



FACTS

- Residents of an RV park brought a class-action claim against park owners and managers alleging that certain park utility billing practices violated ORLTA.
- The park owner charged residents a higher rate for utilities than the owner was billed by the utility provider (actual rates charged to the manager varied from $0.09 to $0.12 kWh, but residents were charged a flat rate of $0.12/kWh).
- The owner also charged residents a monthly meter reading fee.
- Rental agreements said residents are responsible for electricity, but do not specify how the amounts are calculated or that there are fees for reading the meter.
- Eventually, the landlord stopped charging the $10/mo. meter fee but simultaneously increased the monthly rent by $20.

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Hathaway v. B & J Property Investments, Inc., 325 Or App 648 (2023)



RELEVANT LAW

- Under ORS 90.315(4)(a), a landlord may require a tenant to pay utilities that have been billed by the service provider to the landlord for service to the tenant's dwelling unit or common area, but it must be described in the written rental agreement separately and distinctly from rent.
- Under ORS 90.315(4)(c), a utility or service charge may only include the cost of the utility or service as billed to the landlord by the provider, with some exceptions.
- Under ORS 90.315(4)(f), if a landlord fails to comply, the tenant may recover "one month's periodic rent or twice the amount wrongfully charged to the tenant, whichever is greater."

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Hathaway v. B & J Property Investments, Inc., 325 Or. App. 648 (2023)



HOLDING

- ORS 90.315(4) does not require that a landlord must charge a tenant the exact same kWh rate for electricity that the landlord is itself billed by the utility.
- The park owner's meter reading fee to recoup its own capital and labor expenses was not part of the "cost" of electricity "as billed" by the service provider.
- The one-month free rent penalty does not apply every month a landlord violates the same provision on an ongoing basis, but the amount increases each month. The penalty of "twice the amount wrongfully charged" increases for each month it is wrongfully charged.

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Hathaway v. B & J Property Investments, Inc., 325 Or App 648 (2023)

LESSONS LEARNED

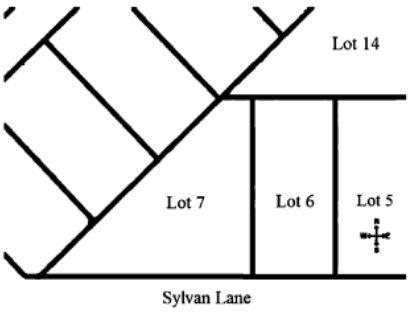
- If an RV park landlord wants to pass through costs to a tenant related to utilities, make sure they are the same "as billed" by the utility provider and are specifically called out in the rental agreement.
- The one-month rent penalty under ORS 90.315(4) does not apply anew for each month that the same violation continues or is repeated.
- If a landlord wants to raise rent, make sure it is in no way related to claims brought by a tenant. A tenant's protected activity need only be one of the reasons for the increase, not the sole or dominant reason, for the increase to constitute retaliation.

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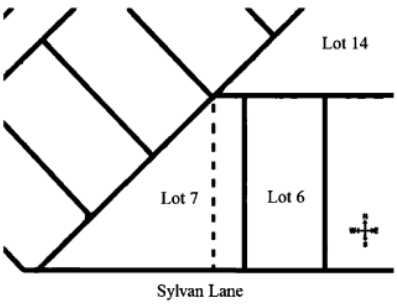
Ramos v. Patowski, 322 Or App 686

FACTS

- Plaintiff owns Lot 7, and Defendant owns Lots 14, 6 & 5:



- Kramer (the helpful neighbor) told Plaintiff's predecessor that the actual property line between Plaintiff's Parcel and Defendant's Parcel was on the dotted line:

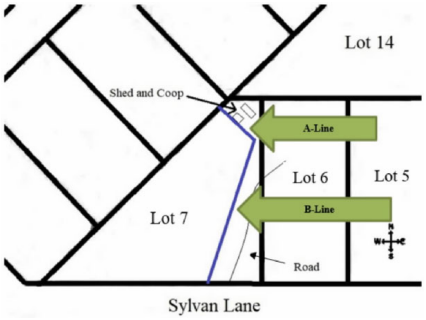


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Ramos v. Patowski, 322 Or App 686

FACTS
(CONTINUED)

- Kramer met with Plaintiff's predecessor and Defendant's predecessor and told him his story. Defendant's predecessor came away believing the property line was not straight and made improvements based on this belief.



- The parcels were conveyed to Plaintiff and Defendant without any seller's disclosures of a boundary agreement or dispute.
- Plaintiff discovered the true location of the property in the process of getting an ADU approved.
- Plaintiff filed an ejectment action for the removal of Defendant's improvements.
- The trial court found that Defendant had established a boundary by agreement based on meetings with Kramer and Plaintiff and Defendant's predecessors.
- Plaintiff appealed, arguing that the elements of a boundary by agreement were not established.

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Ramos v. Patowski, 322 Or App 686

FACTS
(CONTINUED)

Elements of a Boundary by Agreement:

- Plaintiff and Defendant must have an initial and mutual uncertainty or dispute about the location of the boundary.
- There must be a mutual resolution of the uncertainty or dispute by an express or implicit agreement to permanently recognize a particular line as a boundary.
- There must be evidence of the agreement by subsequent activities (e.g., recording a written agreement or occupying the property up to the agreed property line).

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Ramos v. Patowski, 322 Or App 686

HOLDING

- There was no boundary by agreement because a mutual mistake as to the location of a boundary is not the resolution of a "bona fide uncertainty about the true boundary."
- Both parties continued to rely on their deeds to describe the boundary, and their unfortunate reliance on the misinformation by their neighbor did not create a mutual uncertainty or dispute about the boundary line.

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Ramos v. Patowski, 322 Or App 686

LESSONS LEARNED

When in doubt about the location of a boundary, don't call your neighbor – call a surveyor.

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Martucci v. Hilton, 326 Or App 87 (2023) (Unpublished Opinion)



FACTS

- Plaintiff's predecessor and their neighbor had a letter agreement for an exchange of property, with reference to survey lines determined by a surveyor, which they had marked with paint on the property.
- The letter agreement stated that the property "is to become" the property of the other.
- The trial court found that the transaction contemplated by plaintiff's predecessor and the neighbor was a land conveyance subject to the statute of frauds, and that the parties were not merely resolving a dispute by fixing an unknown boundary.
- Plaintiff appealed, arguing that the parties had a boundary-by-agreement.

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Martucci v. Hilton, 326 Or App 87 (2023) (Unpublished Opinion)



RELEVANT LAW

Boundary-by-agreement:

- The line between coterminous property owners must be "disputed, indefinite, or uncertain." *Kincaid v. Peterson et al*, 135 Or 619 (1931).
- The owners must come to an agreement as to the location of the line. The agreement may be either explicit or implied. *Ross v. Delorenzo et al*, 65 Or. App. 586 (1983).
- The parties must witness their agreement by their subsequent actions. *Ross v. Delorenzo et al*, 65 Or. App. 586 (1983).

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Martucci v. Hilton, 326 Or App 87 (2023) (Unpublished Opinion)



HOLDING

- The parties were in agreement on the true boundary of the property given the marked property boundaries and letter agreement that such a marked portion of the property was "to become your property."
- The transaction contemplated by plaintiff's predecessor and the neighbor was a land conveyance subject to the statute of frauds.

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Martucci v. Hilton, 326 Or App 87 (2023) (Unpublished Opinion)



LESSONS LEARNED

- A boundary line agreement is a legal remedy to fix a boundary that is uncertain, indeterminate, or in dispute and can save property owners legal fees.
- The Boundary Line Agreement (BLA) does not violate the Statute of Frauds, as it interprets, rather than alters, the property deed description and, therefore, does not affect a conveyance or transfer of real property.

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Romero v. Amburn, 323 Or App 410 (2022), rev. denied 371 Or 106 (2023)

FACTS

- A contractor built a house and sold it to the plaintiff.
- Nine years later, the plaintiff discovered defects in construction and sued the contractor for breach of contract.
- The trial court granted summary judgment, finding that the breach of contract occurred when the home was built, and the claim was barred by the 6-year statute of limitations for contracts.
- The plaintiff appealed, arguing that the discovery rule applied to breach of contract.

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Romero v. Amburn, 323 Or App 410 (2022), rev. denied 371 Or 106 (2023)

RELEVANT LAW

- ORS 12.010 provides that an action must be commenced within the applicable statute of limitation "after the cause of action shall have accrued, except where a different limitation is prescribed by statute."
- ORS 12.080(1) provides that "an action upon a contract of liability, express or implied . . . shall be commenced within 6 years."
  - *Waxman v. Waxman & Associates*, 224 Or App 499 (2008) – the Court of Appeals held that the discovery rule did not apply to an action for breach of contract because it accrues at the time of the breach.
- The plaintiff argued that *Waxman* was implicitly overruled by the Oregon Supreme Court in *Rice v. Rabb*, 354 Or 721 (2014), contending that the reasoning under *Rice* that the discovery rule applies to ORS 12.080(4) and ORS 12.010 applies equally to a claim under ORS 12.080(1) and ORS 12.010.
  - The Oregon Supreme Court's ruling in *Rice* construed ORS 12.080(4) – an action for taking, detaining, or injuring personal property – and determined that it accrued for purposes of ORS 12.010 when the plaintiff discovered that the tort had been committed.
- The Court of Appeals acknowledged tension between the two lines of cases.

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Romero v. Amburn, 323 Or App 410 (2022), rev. denied 371 Or 106 (2023)



HOLDING

- A claim for breach of contract accrues at the time of the breach, and the discovery rule does not apply.
- The Oregon Supreme Court's ruling in *Rice* construed ORS 12.080(4) and ORS 12.010 is not irreconcilable with the *Waxman* line of cases construing ORS 12.080(1) and ORS 12.010. The Court of Appeals was not convinced that *Rice* intended to overrule *Waxman* and affirmed the judgment in favor of the defendant.

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Romero v. Amburn, 323 Or App 410 (2022), rev. denied 371 Or 106 (2023)



LESSONS LEARNED

- The Oregon Supreme Court denied the petition for review, leaving the present rule in place.
- A cause of action for breach of contract accrues 6 years after the breach – not discovery.
- It will likely take a legislative change to resolve the tension between the *Waxman* line and the *Rice* line of cases.

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Farnsworth v. Meadowland Ranches, Inc., 321 Or App 814 (2022)



FACTS

- Developer Meadowland Ranches bought a large parcel of land outside Burns in the 1960s and partitioned it over the next 20 years until it dissolved.
- The developer never recorded any plats for the subdivision or partitions.
- The developer reserved a 40' wide roadway easement around the boundary of every partitioned parcel to itself with the power to dedicate roads.
- The developer never dedicated any roads.

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Farnsworth v. Meadowland Ranches, Inc., 321 Or App 814 (2022)



FACTS
(CONTINUED)

- Plaintiff and Defendant own adjacent parcels (20 or 40 acres) partitioned by Meadowland.
- Defendant used the gravel road on Plaintiff's parcel as an alternative (more convenient) access to their property.
- Plaintiff filed a quiet title action claiming Defendant has no rights in the road on the Plaintiff's parcel.
- Defendant argued that it had a right to use the road based on the Developer's reserved easement.
- After a bench trial, the trial court quieted title in Plaintiff, finding neither the Defendant nor the public had easement rights in the gravel road.

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Farnsworth v. Meadowland Ranches, Inc., 321 Or App 814 (2022)



HOLDINGS

- The Developer's easement was an easement in gross personal to the Developer rather than an appurtenant easement because the Developer reserved the "power to dedicate."
  - An easement in gross does not run with the land and can be transferred separately from the land.
- Defendant was not a third-party beneficiary to the deed to Plaintiff's predecessor.
- Defendant failed to prove the elements of an implied easement because of the express language of the deed and the fact that Defendant had alternative access to their property.
- The Developer failed to meet the burden of proving that Defendant implicitly dedicated the road to the public because such an intention was not "clearly and unequivocally manifested by his acts."

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Farnsworth v. Meadowland Ranches, Inc., 321 Or App 814 (2022)



LESSONS LEARNED

- It is dangerous to buy a partitioned property that is not associated with a recorded plat.
- When in doubt about access, get a survey and ensure you have a recorded easement.

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Myers v. Owners of Record of that Certain Real Property Described as Lot 1, 322 Or. App. 182 (2022)



FACTS

- Myers owned property in Sunriver.
- The property is subject to:
  - Deed restriction reserving property for open space and other parts for athletic fields and parking.
  - 2 declarations that limit allowed uses of property to certain commercial uses.
- Myers intended to use it for a facility licensed to provide residential care.
- Myers petitioned the court to remove the provision that is in violation of ORS 93.270 from the title.

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Myers v. Owners of Record of that Certain Real Property Described as Lot 1, 322 Or. App. 182 (2022)



RELEVANT LAW

- ORS 93.270(1)(b)(B) prohibits conveying fee title or recording a declaration from restricting the use of real property "[b]y any home or facility licensed... to provide residential care alone or in conjunction with treatment or training or a combination thereof."
- Restriction on Use and Enjoyment vs. Land Use.
- **Legislative Intent:** prevent licensed residential facilities from being treated differently than other kinds of housing without significantly impairing private land use planning.

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Myers v. Owners of Record of that Certain Real Property Described as Lot 1, 322 Or. App. 182 (2022)

HOLDING

- ORS 93.270(1)(b)(B) only prohibits provisions that impose restrictions about or concerning use by licensed residential facilities.
  1. expressly limit the use of the property by a licensed residential facility; and
  2. have the effect of preventing the use of the property by a licensed residential facility but not other residential uses.
- The statute does not prohibit general property restrictions that limit the use and enjoyment of the property by a licensed residential facility.
- After March 16, 2018, ORS 93.272(1) allowed an owner to file a petition to remove prohibited restrictions from the title.

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Association of Unit Owners of Cornell Meadows Condominium v. Jensen, 321 Or. App 623 (2022)

FACTS

- Defendants owned a condominium in Cornell Meadows.
- Defendants did not pay any special or regular assessments between 2013 and 2015.
- The Association brought an action and obtained a personal judgment against defendants for unpaid assessments.
- Defendants filed for bankruptcy, and the judgment was discharged.
- The Association brought an action to foreclose on the statutory lien for unpaid assessments.
- Defendants challenged based on the election of remedies doctrine, arguing that once the Association chose to obtain a personal judgment, it could not also seek to foreclose on the lien.
- The trial court ruled in favor of the Association and foreclosed on the lien. Defendants appealed.

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Association of Unit Owners of Cornell Meadows Condominium v. Jensen, 321 Or. App 623 (2022)

RELEVANT LAW

- The election of remedies doctrine provides that a party "having chosen one remedy, [that party is] barred from pursuing a different and inconsistent remedy for the same wrong." *McAlliser v. Charter First Mortgage, Inc.*, 279 Or 279, 286 (1977).
- ORS 100.450(1) "Whenever an association of unit owners levies an assessment against a unit, the association of unit owners shall have a lien upon the individual unit and the undivided interest in the common elements appertaining to such unit for any unpaid assessments."
- ORS 100.450(4)(c) "An action to recover a money judgment for unpaid assessments may be maintained without foreclosing or waiving the lien securing the claim for unpaid assessments. A judgment entered on the action does not extinguish the lien. * * *"

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Association of Unit Owners of Cornell Meadows Condominium v. Jensen, 321 Or. App 623 (2022)

HOLDINGS

- The election of remedies does not apply because the statute expressly allows an association to obtain a money judgment for unpaid assessments without extinguishing the lien or waiving its right to foreclose on it.
- The fact that ORS 100.450 was amended by the legislature after the judgment was obtained to add "a judgment entered on the action does not extinguish the lien" did not affect the holding because:
  - The legislature provided the amendment was retroactive.
  - The lien was preserved under the statute even without the amendments.
  - Legislative history indicated that the changes were a clarification rather than a change in the law.

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Association of Unit Owners of Cornell Meadows Condominium v. Jensen, 321 Or. App 623 (2022)



LESSONS LEARNED

Condominium associations hold all the power with respect to assessments.

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Freeborn v. Dow, 322 Or. App. 695 (2022)



FACTS

- Plaintiffs were sellers who owned a property consisting of 2 tracts: Tract A (residential) and Tract B (pastureland).
- Tract A & B were not separate legal lots.
- Plaintiffs made an agreement with the defendant:
  - to sell the land for $400,000.
  - to convey title to all 125.53 acres at closing.
  - Plaintiffs would retain possession of Tract A during the partition process.
  - Defendant would convey title of Tract A back to Plaintiffs upon the formation of the newly formed legal lot.

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Freeborn v. Dow, 322 Or. App. 695 (2022)



FACTS
(CONTINUED)

- Plaintiffs delivered a warranty deed to Defendant at closing and continued to reside on Tract A.
- Plaintiffs engaged a surveying firm, environmental consultants, and attorneys to prepare materials for the partition application but did not partition.
- Defendant sold both Tract A & B to a 3rd party.
- The buyer served an eviction action on Plaintiffs.
- Plaintiffs filed suit, alleging breach of contract and elder abuse.
- Defendants filed for summary judgment arguing merger and that the deed supersedes the contract.
- Plaintiffs asserted that the doctrine of merger does not apply because the deed itself conveyed different and more property than the earlier agreement required.

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Freeborn v. Dow, 322 Or. App. 695 (2022)



RELEVANT
LAW

- Under the doctrine of merger, the deed merges the previous agreement and supersedes the contract.
- Under common law, a deed of conveyance is not the complete expression of the agreement, and instead is merely the execution of a performance that was provided for in such an agreement.
- ORS 93.850(2)(c)(B) warrants that the property conveyed by a deed is free from encumbrances except those specifically disclosed.

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Freeborn v. Dow, 322 Or. App. 695 (2022)



HOLDING

- The doctrine of merger does not categorically apply when the deed constitutes only part performance of a preexisting contract.
- Outstanding performance of terms of a purchase and sale agreement is not discharged by delivery of a deed unless the deed purports to execute such provisions.
- ORS 93.850(2)(c)(b)'s warranty is limited to the scope of the covenants of the grantor but not every provision of the PSA.

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Freeborn v. Dow, 322 Or. App. 695 (2022)



LESSONS LEARNED

- Structure the sale so that the conveyance is contingent on land use approvals with the right to terminate the sale if approvals are not obtained.
- Obtain title insurance.

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Ride PDX, LLC v. Tee & B, LLC,
322 Or. App 165 (2022), adhered to on reconsideration 656 Or. App 739 (2023).



FACTS

- Defendant leased commercial property to operate Growler Guys.
- Plaintiff leased the adjacent space to operate an indoor cycling studio.
- Defendant complained to the Landlord that Plaintiff was disturbing its quiet enjoyment of the premises based on loud music and vibrations.
- Defendant threatened to sue the Landlord, claiming that its customers were complaining about the noise, and Defendant had lost business as a result.
- Under threat of legal action by Defendant, the Landlord filed an action to evict Plaintiff and lost.

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Ride PDX, LLC v. Tee & B, LLC,
322 Or. App 165 (2022), adhered to on reconsideration 656 Or. App 739 (2023).



FACTS
(CONTINUED)

- Fresh off its victory over the Landlord, Plaintiff filed an action for intentional interference with economic relations against Defendant for souring its relationship with the Landlord.
- The trial court dismissed Plaintiff's claims, finding that it was not improper for Defendant to seek to enforce its contractual rights against the Landlord.

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Ride PDX, LLC v. Tee & B, LLC,
322 Or. App 165 (2022), adhered to on reconsideration 656 Or. App 739 (2023).

ELEMENTS OF INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS

1. The existence of a professional or business relationship (including a contractual relationship);
2. Intentional interference with that relationship or advantage;
3. By a third party;
4. Accomplished through improper means or for an improper purpose;
5. A causal effect between the interference and the harm to the relationship or prospective advantage; and
6. Damages

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Ride PDX, LLC v. Tee & B, LLC,
322 Or. App 165 (2022), adhered to on reconsideration 656 Or. App 739 (2023).

ISSUES

- Plaintiff alleged that Defendant's interference was accomplished by improper means:
  - Defendant's threats of legal action against the Landlord were merely a pretext to gain rent concessions.
  - Defendant misrepresented that its customers were complaining about the noise, that Defendant had lost business as a result of the noise, and that Defendant had no noise problems before Plaintiff moved in.
- **Issue 1:** Can Defendant's attempt to exercise its contractual right against the Landlord constitute improper means to support a claim for intentional interference with the contractual relationship between Plaintiff and the Landlord?
- **Issue 2:** Can Defendant's alleged misrepresentations to the Landlord regarding the timing and effect of the noise from Plaintiff's indoor cycling class constitute improper means?

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Ride PDX, LLC v. Tee & B, LLC,
322 Or App 165 (2022), adhered to on reconsideration 656 Or. App 739 (2023).



HOLDINGS

- **Issue 1:** No. The defendant's exercise of an express contractual right cannot establish improper means regardless of motive or purpose.
- **Issue 2:** Yes. The defendant's alleged misrepresentations to the Landlord regarding customer complaints (there was only evidence of one) and the impact of business from the noise (there likely was not any impact) could constitute improper means.
- The Court of Appeals reversed and remanded the case on issue 2.

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Ride PDX, LLC v. Tee & B, LLC,
322 Or. App 165 (2022), adhered to on reconsideration 656 Or App 739 (2023).



LESSONS LEARNED

- You do not interfere with your neighboring tenant's lease by exercising your own lease rights... unless you lie to the landlord to do so.

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Johnson and Henderson Partnership v. The Henderson Living Trust, 321 Or App 134 (2022)

FACTS

- Plaintiff, a general contractor, and Defendants orally agreed to purchase a vacant lot, build a home, and rent the property.
- Defendants contributed land, and Plaintiff built the structure.
- The parties jointly operated the property for years:
  - Joint bank account
  - Plaintiff acted as landlord to rental tenants
  - Split profits
- Defendants attempted to terminate their business relationship with Plaintiff and sell the property.

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Johnson and Henderson Partnership v. The Henderson Living Trust, 321 Or App 134 (2022)

RELEVANT LAW

ORS 67.055 Creation of Partnership

Factors:

- Right to share profits
- Expression of intent to be partners in business
- Right to control
- Sharing of losses
- Contribution of money or property

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Johnson and Henderson Partnership v. The Henderson Living Trust, 321 Or. App. 134 (2022)

HOLDINGS

Plaintiff created a genuine issue of material fact as to whether a partnership was created:

- Intent to and did share profits through withdrawals from a joint bank account.
- Expressed intent to be partners by opening a joint bank account for the property and by Plaintiff representing himself to third parties as a partner.
- Shared control over the business by the operation of a joint bank account.
- Agreed verbally to share losses and shared liability by Plaintiff acting as the property's landlord to renters.
- Contributed to the business, with Plaintiff providing approximately $150,000 in labor and materials without repayment.

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Johnson and Henderson Partnership v. The Henderson Living Trust, 321 Or App 134 (2022)

LESSONS LEARNED

Joint control of funds and other conduct between a property owner and contractor or property manager can be enough to defend summary judgment on the issue of partnership. Therefore, it is important to put agreements in writing.

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Adelsperger v. Elkside Development LLC, 322 Or App 809 (2022)

FACTS

- Elkside Development owned and operated Osprey Point RV in Lakeside.
- For 20 years, Elkside sold memberships that allowed members to camp with no cost beyond the initial fee and annual payments.
- Barnett bought Osprey Point RV in 2017 and stopped honoring contracts.
- Members sued Barnett for breach of contract and financial elder abuse.
- The jury awarded $500k for breach of contract and $900k for elder abuse (which was trebled to $2.7 million).

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Adelsperger v. Elkside Development LLC, 322 Or. App 809 (2022)

FACTS
(CONTINUED)

- Elkside never recorded membership agreements and did not seek to comply with the statute regarding campground memberships.
- Barnett was aware of membership contracts prior to purchase but did not agree to buy or take assignment of them.
- During the trial, the trial court held that membership contracts could be enforceable against the buyer if they run with the land, and that the pleadings (which did not include this theory) would be conformed to the evidence presented at trial.
- The jury was allowed to decide whether contracts were binding on Barnett.

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Adelsperger v. Elkside Development LLC, 322 Or. App 809 (2022)

ISSUES

1. Did the defendant preserve its appeal that the membership contracts did not run with the land and were therefore not binding on the defendant?
2. Did the defendant's refusal to honor the membership contracts constitute a refusal to transfer "property" belonging to the defendant for purposes of financial elder abuse?
3. Did the defendant act with an improper purpose or by improper means in refusing to honor the contracts for purposes of financial elder abuse?

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Adelsperger v. Elkside Development LLC, 322 Or. App 809 (2022)

HOLDINGS

1. No. The defendant failed to preserve the issue of whether the contracts ran with the land and were binding on the defendant. The judgment for breach of contract was affirmed.
2. No. The defendants failed to establish financial elder abuse, and the judgment was reversed.
   - ORS 124.110(1)(b) has four elements: (1) ownership or control of the elder's property was acquired by the defendant; (2) the elder requested the return of the property; (3) the defendant, without good cause, continues to hold the property; and (4) the defendant acted in bad faith or knew or should have known of the elder's right to have the property returned.
   - In this case, the financial elder abuse claim failed because the money or property transferred was the membership fees, and what was requested to be returned was the benefits of the contract. The money or property acquired by the defendant must be the same money or property that the elder requests to be returned.
3. No. Financial elder abuse under ORS 124.110(1)(a) applies when a person wrongfully takes or appropriates money or property. "Wrongful" has the same meaning as in intentional interference claims - improper purpose or improper means. There were no improper means as the defendant did not employ intimidation, fraud, conversion, or theft to acquire the member's property. There was no improper purpose because the defendant's intent was not to injure the members but to seek to advance its own business purposes.

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Adelsperger v. Elkside Development LLC, 322 Or App 809 (2022)

LESSONS LEARNED

Beware of contracts that grant rights for the use of land that you are purchasing.

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Thank you.



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Chapter 3

Land Use Case Law Updates: May 2022 to May 2023

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Tadei v. City of Astoria, __ Or LUBA __ (LUBA No 2021-105, May 3, 2022)

LUBA affirmed the city's approval of a conditional use permit for an accessory building for a church. The (*pro se*?) petition for review lacked any assignments of error, failed to address any of the 25 pages of findings and interpretations made by the city, and did not explain why the decision should be reversed or remanded.

Note: LUBA subsequently awarded intervenors $27,965 in attorney fees for responding to the record objections, preparing the brief and conducting oral argument. *Tadei v. Astoria*, __ Or LUBA __ (Order, LUBA No 2021-105, Sep 6, 2022).

LUBA found that "no reasonable lawyer would conclude that any of the legal points asserted on appeal possessed legal merit" because the petition could not possibly provide a rational, reasonable or honest basis for reversal or remand. Petitioner tried to point to LUBA's attempts to understand what petitioner was arguing. But LUBA said that LUBA trying to make out what petitioner meant is not the same as petitioner having made the arguments. LUBA did conclude that requiring the services of two very experienced attorneys to the tune of $53,617 was unreasonable without explaining why two such experienced attorneys were necessary.

1st John 2:17 LLC v. City of Boardman, __ Or LUBA __ (Order, LUBA No 2021-086, May 6, 2022)

LUBA denied petitioner's motion for a stay based on a failure to show "irreparable injury." Evidence showing that a construction detour would cause the petitioner to choose to close for four days, at a revenue loss of $8,000, is not an injury that is substantial, unreasonable, incapable of being compensated by damages, or more than merely probable.

Oregon Department of Fish and Wildlife v. Crook County, __ Or LUBA __ (LUBA No 2020-114, May 9, 2022)

On remand from the Court of Appeals, LUBA remanded the county's approval of a modification to a conditional use permit to develop a solar facility on EFU lands zoned to increase its size.

The court concluded the LUBA wrongly interpreted the statute requiring an applicant to develop a mitigation plan to address impacts to significant fish and wildlife habitat consistent with ODFW rules. Court explained that the definition of "mitigation plan" in ODFW rule indicates that "specificity and definiteness" are required for a mitigation plan to be consistent with the rule's mitigation policy. And that no net loss standard calls for "reliable" no net loss mitigation in existing habitat quality or quantity, a schedule of performance measures, and cannot allow for mitigation measures that fail to accommodate impact on habitat for full life of energy facility.

LUBA held, on remand, that plan was specific and definite enough for the county to conclude no net loss of habitat quantity, but it was not specific and definite enough to conclude no net loss of habitat quality. Option 1 had no detail regarding location of replacement habitat. Option 2's cash payment option did not demonstrate that no net loss would occur.

LUBA held that the mitigation plan was too vague and not "reliable" absent any example instrument that evidenced reliability, or any performance measures located in the plan.

Columbia Riverkeeper v. Columbia County, __ Or LUBA __ (LUBA No 2021-097, May 9, 2022)

LUBA remanded the county's approval of Goal 3 exception to allow an 837-acre industrial park expansion along the Columbia River.

Prior appeals had narrowed the scope of remand to address the exception compatibility standard. On remand, the Port submitted a compatibility report that evaluated potential impacts from the five types of industrial uses proposed on adjacent uses. The county approved the proposed uses as compatible in reliance on compatibility report and conditions of approval.

Statute (ORS 197.732 (2)(c)(D)) and rule (OAR 660-004-0020) both require finding that proposed uses are compatible with adjacent uses but do not define "adjacent." The county evaluated all contiguous parcels plus 2,000 feet. Petitioners argued that in addition to adjacent uses, that the rule requires compatibility with "surrounding" natural resources and practices that are not limited to adjacent lands. The county argued that interpretation would exceed LCDC's delegated authority; the rule should be read to require consideration of compatibility with nonadjacent natural resources or practices only if those resources or uses impact adjacent land uses. LUBA held the rule is in addition to the requirement that the use be compatible with adjacent uses. The county erred in not identifying surrounding area and or any natural resources or practices that occur in that area.

LUBA held that the findings were also inadequate in that they did not identify specific characteristics of adjacent uses and their vulnerabilities to impacts of proposed industrial uses. The county cannot defer findings of compliance with exception criteria to subsequent permit proceeding in adopting a goal exception. Instead, it instead must consider the "likely characteristics of the uses allowed under the goal exception, the characteristics or vulnerabilities of uses in the adjoining area and natural resources in the surrounding area, and the likely adverse impacts of proposed uses on those adjoining uses and natural resources, along with any specific identified mitigation or other conditions necessary to ensure compatibility."

Conte v. City of Eugene, __ Or LUBA __ (LUBA No 2021-092, May 9, 2022)

LUBA affirmed city amendment to code to implement accessory dwelling (ADU) statute (ORS 197.312(5)), on remand from *Home Builders Association of Lane Cty. v. Eugene*, __ Or LUBA __ (LUBA No 2020-015, Nov 24, 2020), *affirmed, Kamps-Hughes v. Eugene*, 305 Or App 224 (2020).

Home Builders moved to strike petitioner's four reply briefs as violating LUBA briefing word limit, arguing that it should not be able to add new arguments in reply to their response briefs. Their brief was only one sentence adopting the city and other intervenors' briefs. LUBA denied the motion. A petitioner is entitled to file separate briefs replying to each response, even if those response briefs are substantively identical, and may to address some of the arguments in one reply brief and to address the remaining arguments in others.

Petitioner argued the city's findings were inadequate. The city incorporated its findings from prior remanded ordinances. LUBA said that when a local government changes course on how to amend its land use code to implement state law on remand from LUBA and the Court of Appeals, it doesn't have to adopt findings explaining why it is changing course and how that change is consistent with its comprehensive plan.

Petitioner argued that code amendments were not "clear and objective" for purposes of ORS 197.307 (4). LUBA disagreed, stating that "complicated does not equate to ambiguous" and interpreted the provisions that petitioners argued were incompatible.

Botts Marsh LLC v. City of Wheeler, __ Or LUBA __ (LUBA No 2022-002, May 11, 2022)

LUBA remanded the city council's limited land use decision denying design review application for fish processing/storage/retail sales building on property zoned Industrial and Water-Related Commercial.

LUBA rejected the petitioner's argument of bias by the planning commissioner, as any bias by the commissioner was cured by the de novo city council hearing.

Petitioner argued that the city's creation of justifications for denial after the council meeting gave petitioner no opportunity to respond and was therefore a procedural error prejudicing substantial rights. But LUBA held that there is no requirement that findings reflect decisionmaker's deliberations and that a counselor's erroneous legal interpretations do not provide a basis for appeal if they are not adopted within the final decision.

However, LUBA agreed that the city's findings were inadequate to inform petitioner why the proposal failed to satisfy the applicable criteria, what would satisfy the design review criteria, and explain why it chose not to rely on petitioner's evidence. Namely, the city failed to explain: why the covered area at the primary entrance to the building fails to qualify as the "courtyard/plaza," why the proposed sidewalk is "insufficient" to provide a direct pedestrian connection to the building, why the proposed materials to be used in construction are not "compatible with the natural elements and applicable city ordinances," why the application fails to "avoid monotony," what the applicant must do to take "into account" the project's impact on views, and whether and why various non-mandatory code provisions were seemingly being interpreted as mandatory by the city.

Petitioner also argued that the city's denial, along with two prior city decisions denying CUPs on the same property, amounted to a moratorium and that the view requirement amounted to a regulatory taking of a view easement over petitioner's property. LUBA disagreed, holding that a denial for land use approval is not a moratorium and that the petitioner's arguments regarding takings were premature.

In sum, LUBA held that the city must adopt findings on remand that are sufficient to inform petitioner of the nature and types of changes in the proposal that will be necessary to obtain approval.

Note: After remand, subsequently appealed to LUBA at *Botts Marsh v. Wheeler*, __ Or LUBA __ (LUBA No 2022-079, Jan 4, 2023) (summarized below), *reversed in part*, *Botts Marsh v. Wheeler*, 326 Or App 215 (2023) (not summarized).

Kulongoski v. City of Portland, __ Or LUBA __ (LUBA No 2021-098, May 16, 2022)

LUBA affirmed the city's design review commission's approval, on remand from *Kulongoski v. Portland*, __ Or LUBA __ (LUBA No 2021-004, July 8, 2021), of a two-story addition to existing home and modifications to side yard setbacks.

First, LUBA granted a motion to strike an illustration from petitioner's brief. The illustration was not in the record but was created by petitioners to emphasize their argument. LUBA explained that this was not like other allowable graphical representations of numerical evidence already in the record. Petitioners should just use the record.

Petitioners argued that the findings didn't explain how the applicant's proposal "creates" views from the river and greenway. LUBA said that the city did consider specific design features. To the extent

that the petitioner was instead arguing that to "create" new views required demolishing existing parts of structures, LUBA rejected that interpretation.

Briggs v. Lincoln County, __ Or LUBA __ (Order, LUBA No 2021-118/2022-030, May 17, 2022)

LUBA denied two motions challenging a county ballot measure that restricts short term rental properties.

Motion to Dismiss: Both petitioner and the county believed LUBA had jurisdiction. But the intervenor-respondents sought dismissal of the case, based on the ballot saying that the measure was "not a land use decision." However, LUBA may elect to review the matter anyway if it finds "a clear connection between the ordinance and the comprehensive plan." LUBA said yes: the measure's findings and purpose statement add references to county zoning districts, plan, and zoning ordinance. LUBA has jurisdiction.

Motion to Stay: LUBA held that while petitioners had demonstrated a colorable claim of error, the record lacked evidence sufficient to support a claim of an irreparable injury. Without evidence of actual costs, the injuries are not adequately specified. Without evidence that specific enforcement actions from the county will definitely occur before the decision on appeal, the injury is not sufficiently probable.

1000 Friends of Oregon v. Josephine County, __ Or LUBA __ (LUBA No 2021-116, June 2, 2022)

LUBA remanded the county commissioners' approval of amendments to a comprehensive plan redesignating 63 acres from woodlot resource to residential zoning and allowing for five-acre minimum lots.

Goal 4: County argued that based on information from a forestry productivity analysis, the property should not be forest land and therefore no Goal 4 exception was needed. LUBA explained the DLCD "data hierarchy analysis" rule by which governing bodies identify forest land. The county had failed to determine whether first priority NRCS data was available for four acres on 88-acre property, failed to demonstrate that the second-priority data from Oregon Department of Revenue site-map was inaccurate, and improperly dismissed third-priority data from USFS Plant Association Guide without evidence that the data was incorrect or unavailable. Because the analysis was inadequate, the board of commissioners misconstrued the law and made a decision not supported by substantial evidence.

Goal 14. Per above, the county had argued that property was non-resource land. But it reasoned that no Goal 14 exception was needed because a 5-acre minimum lot size was per se consistent because it exceeds the OAR 660-004-0040(2)(c) two-acre minimum and no urban services were planned. LUBA found the rule was inapplicable. It only applies to rural-residential areas within Goal 3 or 4 exception areas. If Goal 4 is not applicable, then this cannot be Goal 4 exception lands. A five-acre minimum does not ensure compliance with Goal 14. Moreover, findings in the record that planned unit developments are a possible future use, which may allow for deviations from the minimum lot sizes, is additional evidence that the use is an urban use and that a Goal 14 exception is required.

Kretzer v. City of Shady Cove, __ Or LUBA __ (LUBA No 2022-005, June 6, 2022)

LUBA affirmed the city council's denial of an "after the fact" floodplain development permit and riparian permits for a pedestrian bridge and vegetation removal. Petitioner had built a bridge to cross a branch of the Rogue River to reach an island on his property. Based on a complaint, the city notified him that he needed the floodplain development permit.

While the application was pending, the petitioner hired a crew to prune vegetation on the island. A neighbor, who was also a member of city council, called the sheriff to investigate, who explained that the petitioner also needed the riparian vegetation permit. He applied for that as well. The neighbor's spouse submitted letters in opposition to the proposed permits. After two public hearings, the city council denied the permits.

Petitioner moved to take evidence of the sheriff's report to support its bias argument. Because the city did not respond to the motion or file a response brief, there were no "disputed" factual allegations and, on that basis, LUBA denied the motion.

On the matter of bias, LUBA concluded that petitioner did not meet their burden of showing that the city council member had "so prejudged the matter before them as to be incapable of" weighing the merits.

LUBA found that there was no prejudice to substantial rights for "commingled" findings regarding the two separate petitions and, moreover, petitioner did not object below to those findings, so this procedural argument was not preserved.

Petitioner made a variety of arguments that the record did not contain substantial evidence to support the city's findings that the application failed code requirements. Reviewing the evidence, LUBA disagreed.

Silbowitz v. Jackson County, __ Or LUBA __ (LUBA No 2022-018, June 6, 2022)

LUBA transferred to circuit court this appeal of a hearing's officer's approval of a development permit for a claim under a DLCD order under Ballot Measure 49 (2007) (M49).

A M49 determination is not a land use decision. ORS 195.318 (1). Whether the hearings officer applied land division criteria in county zoning ordinance to application did not matter: Sections 6 and 11 of M49 gave the applicant the authority to establish the dwelling, so LUBA doesn't have jurisdiction.

Schultens Family Land v. City of The Dalles, __ Or LUBA __ (LUBA No 2022-021, June 7, 2022)

LUBA dismissed an appeal of a city ordinance constituting a plan amendment that would amend code to allow shelter housing in commercial zones.

The city argued that the petitioners lacked standing for their failure to appear at the public hearing under ORS 197.830(2). However, ORS 197.620(2) allows appeals by persons who did not appear under certain circumstances.

First, under paragraph (a) of ORS 197.620(2), petitioners argued that the city failed to submit all required materials to DLCD. However, paragraph (a) also requires petitioners to establish that this failure prejudiced their substantial rights–they did not.

Under paragraph (c) of ORS 197.620(2), petitioners also argued the decision was significantly different from the text of the proposed ordinance sent to DLCD. Unlike paragraph (a), petitioners did not need to show that their rights were substantially prejudiced. However, petitioner did not point to any difference between the text submitted to DLCD and the adopted decision. So, there is no basis for review.

Gould v. Deschutes County, __ Or LUBA __ (LUBA No 2021-112, June 9, 2022)

LUBA affirmed county hearings officer's approval, on remand from *Gould v. Deschutes Cty.,* 79 Or LUBA 561 (2019) (*Gould VIII*), of a tentative plan, site plan review, and modification for phased development of Thornburgh Destination Resort.

Destination resorts are subject to a three-stage county process: conditional use permit approval, Final Master Plan (FMP), and a land division or site plan review. Thornburg is in the third stage. The county must find that the site plan complies with county code and FMP. Code requires that any negative impacts on fish and wildlife resources be completely mitigated. FMP provides for phased development and includes approval of a fish and wildlife mitigation plan (FWMP). The FWMP has two components: #1 addresses terrestrial wildlife and #2 addresses off-site fish habitat and requires the applicant to secure water rights for mitigation.

Prior site design approval had a condition of approval that required Thornburgh to either show that water in FMWP had been secured from one of two sources or demonstrate that a proposed alternate source was acceptable to ODFW to provide the same mitigation without modifying the FMWP. In *Gould VIII*, LUBA remanded because that condition impermissibly allowed modification of FWMP without providing opportunity for further public input on whether alternative sources would be of the same quality/quantity to satisfy the "no net loss" standard. On remand, the hearings officer approved on remand site design review, but without the controversial alternative condition. Thornburgh established on remand that it secured water from the ranch, so the condition was no longer relevant because no alternate source was being proposed.

Petitioner argued that elimination of condition violated the FWMP because Thornburg had not documented that ranch water was legally protected for instream use and physically available for mitigation. LUBA held the FWMP didn't require those steps to be met at the tentative plan stage, just "in advance of water use." "Paper water" at this stage is sufficient.

Procedure: Opponents don't have unlimited right to require the county to reopen the record to provide rebuttal evidence on remand.

Note: Affirmed in *Gould v. Deschutes Cty.*, 322 Or App 571 (2022) (Mem. Op.), *rev. den.*, 370 Or 827 (2023) (not summarized).

Gould v. Deschutes County, __ Or LUBA __ (LUBA No 2022-007, June 9, 2022)

LUBA remanded the county's approval of a conditional use permit for a 2000-sq. ft. personal use airport on EFU land.

Code requires that an airport be sited on lands "least suitable" for agriculture. LUBA concluded that the hearings officer, in simply finding that the entire site was generally unsuitable, misconstrued the standard. The code instead requires a finding that the proposed airport site was the worst place on the subject property for agriculture. The hearings officer's code interpretation is not entitled to

deferential review under ORS 197.829(1), even though the board of commissioners declined to review the decision.

LUBA also remanded the decision for the hearings officer to consider whether the proposed airport is "compatible" with golden eagles on surrounding properties as required by code. Applicant's ability to obtain a US Fish and Wildlife Service "take" permit is not an adequate substitute. There's nothing compatible about allowing wildlife to be taken.

LUBA also found the evidence to be inadequate for the county to conclude the noise generated by the airport would be "compatible" with surrounding properties.

Note: Reversed in part in *Gould v. Deschutes Cty*, 322 Or App 340 (2022) (not summarized), finding that deference to the interpretation was appropriate where the commissioner's had previously endorsed the interpretation. The county's interpretation that it did not need to determine the "least" suitable lands where all were generally unsuitable was plausible. Subsequent LUBA decision at *Gould v. Deschutes Cty.*, __ Or LUBA __ (LUBA No 2022-007, Feb 24, 2023) (not summarized).

Joy v. City of Ashland, __ Or LUBA __ (LUBA No 2022-001, June 13, 2022)

LUBA affirmed city's approval of conditional use permit and site design review for wireless communication facility (WCF) on Southern Oregon University's campus. Applicant proposed WCF to replace existing light pole with new light pole at same height and wireless communications equipment above, adding about 20 feet to total of 95 feet. City approved only an 85-foot tower.

Petitioners argued that the site analysis was conducted for a 95-foot WCF, not an 85-foot facility, so there was no substantial evidence that the 85-foot version would comply. LUBA said that's not relevant. Alternative site analysis explained that collocation was not possible at any height in the area.

Petitioners argued that findings were inadequate because they did not address their argument that because of federal Middle Class Tax Relief and Job Creation Act of 2012, petitioners would not have a further opportunity to participate in the application. LUBA held that the city did address the issue, by acknowledging the federal law's impact on subsequent review. But, in finding that it did not relate to any approval criteria of the pending application, there was nothing for the city to apply.

Finally, petitioners argued that findings were inadequate with regard to alleged adverse impacts on livability and "other relevant factors." LUBA held that the city did adequately address all alleged impacts.

Gould v. Deschutes County, __ Or LUBA __ (LUBA No 2022-011, June 16, 2022)

LUBA affirmed county hearings officer's approval of modifications to conceptual and Final Master Plans (FMP) of Thornburgh Destination Resort to reflect overnight lodging ratio and length of rental requirement amendments to county code to implement SB 911 (chapter 812, Or Laws 2003), increasing the residential single family (RSF) to overnight lodging units (OLU) ratio from 2:1 to 2.5:1 and decreasing weekly rental requirement from 45 weeks to 38 weeks for eastern Oregon. The hearings officer modified the plans to maintain 950 RSFs and decrease the OLUs from 450 to 380 to meet the required ratio.

Petitioner argued changes were "substantial changes" under the FMP condition and code provisions and that therefore their approval required a new application. Petitioner first argued that changes could be interpreted to allow more single-family dwellings than allowed under the current FMP

unless a new condition of approval was added. LUBA disagreed: the FMP's 950 RSF maximum did not change. Petitioner also argued reduction in the number and availability of OLUs was a substantial change. LUBA said the modifications do nothing to change elements of the destination resort or to create significant additional impacts on surrounding properties.

Petitioner finally argued that the county failed to make findings required under ORS 197.455 that the resort was now within 24 air miles of a city with population now over 100,000 (Bend) and therefore ineligible as a destination resort. LUBA disagreed. ORS 197.455's limitations on resort siting apply at time county *adopts maps* identifying eligible lands and not at the time of site plan review.

Gould v. Deschutes County, __ Or LUBA __ (LUBA No 2021-060, June 16, 2022)

For lack of jurisdiction, LUBA transferred the petitioner's appeal of the county's land use compatibility statement (LUCS) to the Oregon Water Resources Department for the Thornburgh Destination Resort while various components of the resort were under appeal. In the LUCS, the county stated that the resort's proposed temporary changes to water appropriation are compatible with county's final local approval of site plans and that specific permits were forthcoming.

LUBA held that the LUCS was outside its jurisdiction for exclusion for decisions of a local government that proposed state agency action subject to state agency planning responsibilities is compatible with plan and land use regulations. ORS 197.015 (10)(b)(H). Whether the LUCS contains a sufficiently detailed explanation of the county's conclusion, whether OWRD may want more information, or even whether the transfer may be incompatible with the master plan, does not vest LUBA with jurisdiction.

Christian Futures Inc. v. Lane County, __ Or LUBA __ (LUBA No 2021-099, June 23, 2022)

LUBA affirmed two decisions by the hearings officer that denied applicant's request to verify two lawfully established units of land on the subject property.

In 1886, the county established a county road that ran through the middle of the petitioner's 10-acre property. Applicants argued that the county had a long-standing policy that when a public road divides land, it creates two "lawfully created" units of land, despite those properties sharing an owner and regardless of the county's interest in the road: easement or fee.

LUBA, quoting extensively from the hearings officer's opinion, agreed that this "roads divide land" policy had been codified in the county code's definition of "divide" which separated tracts that were not *contiguous* and "contiguous" to exclude lands divided by a road. But more recent amendments to the code mirrors ORS 92.010(3)(a) and removed any relationship between the definition of "contiguous" and the definition of "lawfully established unit of land." The county could have chosen to continue its "roads divide land" policy, but did not do so.

1000 Friends of Oregon v. Clackamas County, 320 Or App 444 (2022)

The Court of Appeals affirmed LUBA's decision in *1000 Friends of Oregon v. Clackamas Cty.*, __ Or LUBA __ (LUBA No 2021-003, Jan 24, 2022), to remand the county's code amendments that redefined "dwelling unit" to allow for short-term rentals throughout the county, including on farm and forest land. LUBA had held that non-farm, short-term rental use of dwellings on EFU lands are not authorized under ORS 215.283 and the same principal applied for forest land.

The county argued that LUBA erred in concluding that state law must explicitly allow dwellings that are otherwise legally authorized in resource zones to be used as short-term rentals. Under the

county's view, once lawfully established, a dwelling on farm or forest lands may be used for any residential purpose, and a short-term rental is part of that bundle. However, the court agreed with LUBA that a "residence" is a "home" and that a home is occupied by a group of people sharing a household, generally long-term, not different groups of strangers on transitory basis. The short-term rental for compensation use is distinguishable from the use of a dwelling as a home.

ORS 215.203 (1) and 215.283 delineate the exclusive exceptions to uses allowed on EFU lands. Because they are not expressly allowed, short-term uses are not allowed in dwellings on EFU lands. ORS 215.705 to 215.757 and OAR 660-006-0025 provide analogous prohibition for these uses for forest dwellings.

Windlinx Ranch Trust v. Deschutes County, __ Or LUBA __ (LUBA No 2022-022, July 7, 2022)

LUBA remanded an approval by the hearings officer of applicant's forest template dwelling.

LUBA disagreed with the petitioner's claims that the applicant failed to present substantial evidence of requisite soil capacity. And the petitioner failed to raise arguments relating to whether the parcel on which the dwelling would be sited was lawfully created in its current configuration before the statutory deadline of January 1, 1993, so that argument was waived.

However, LUBA remanded based on the hearings officer's inadequate findings as to whether several of the adjacent parcels necessary to qualify for the template dwelling were lawfully created under ORS 215.010(1)(a).

Note 1: This decision applies the 2017 version of the forest template dwelling statute, ORS 215.750, before the 2019 amendments.

Note 2: The decision was affirmed. *Windlinx Ranch Trust v. Deschutes Cty.*, 323 Or App 290 (2022) (Mem. Op.) and *Windlinx Ranch Trust v. Deschutes Cty.*, 323 Or App 319 (2022) (Mem. Op.). The court held that the authoritative legal effect of deeds or easements can only be had through circuit court, not LUBA or a hearings officer. Even if wrong on a legal interpretation of the documents, the hearings officer's determination of facts relating to access based on those documents was subject to "substantial evidence" review by LUBA.

Schaefer v. Marion County, __ Or LUBA __ (LUBA No 2020-108, July 7, 2022)

On remand from *Schaefer v. Marion Cty.*, 318 Or App 617 (2022), LUBA remanded the county's approval of a comprehensive plan and zoning map amendment and conditional use permit authorizing various airport-related uses on a property next to the Aurora State Airport. The appellate court had ruled that LUBA had mistakenly interpreted a provision of the Transportation Planning Rule (OAR 660-012-0065(3)(n)) and mistakenly rejected the petitioner's contention that the proposed uses would increase the intensity of uses and facilities that were approved by the airport's previous Goal 3 and 14 exceptions. As a result, LUBA returned analyzed the county's alternative findings justifying the exception to Goals 3 and 14.

LUBA disagreed with petitioners that OAR 660-012-0060 (5)—stating that the presence of a transportation facility is not a basis for an exception on rural lands—precluded the County from relying on OAR 660-004-0022 to approve a Goal 3 exception. OAR 660-004-0022 provides specific reasons that a goal-exception-authorized use could be appropriate, including "special features or qualities that necessitate its location on or near the proposed exception site." Petitioner's reading of

OAR 660-012-0060 (5) would negate this provision and is not the appropriate reading of these administrative rules.

However, LUBA agreed with the petitioner's objection regarding the county's evaluation, under OAR 660-004-0020(2)(b)(B), whether areas not requiring a new exception cannot reasonably accommodate the proposed use. The county's findings on this matter were limited to whether alternative sites at nearby airports were available for sale and did not consider sites that might be available for lease. This impermissibly limited the required analysis. Additionally, the petitioner identified alternative sites in the vicinity of McNary Field in Salem. Under OAR 660-004-0020(2)(b)(C), the county is required to consider and make findings as to their suitability.

LUBA also agreed with the petitioners that findings were inadequate related to the OAR 660-004-0020(2)(d) requirement that the proposed uses be compatible with adjacent uses or that negative impacts be mitigated with respect to impacts to agricultural activities from increased traffic. The inadequacy was in failing to address the specific concerns regarding farm vehicle use and roadway crossings raised during the local proceedings.

LUBA also sustained petitioner's Goal 14 objection, finding that the county erred in limiting the analysis of alternative urban sites for the proposed facility to Marion County. Nothing in the text of OAR 660-014-0040(3)(a) supported the county's interpretation that it need only consider areas over which the county has planning authority. LUBA again required the county to consider sites available for lease as well as for-sale sites.

Finally, LUBA found the county's findings to be deficient regarding whether a new exception for the remainder of the airport property covered by the 2004 exception was necessary because of the proposed expansion. LUBA remanded the decision on that basis as well.

Recht v. City of Depoe Bay, __ Or LUBA __ (LUBA No 2022-023, July 13, 2022)

LUBA remanded the city council's approval of variances allowing the development of townhouses on lands zoned for retail commercial. One variance would have allowed the petitioner to avoid both removing rock outcropping and installing pedestrian amenities. LUBA found that the city's approval of that variance based on it being cost-prohibitive were inadequate and conclusory because they failed to identify the relevant approval standards or to set out facts supporting the approval. Nor did the city address or consider whether removal of less than all of the rocks would be an option.

LUBA also remanded the city's conclusion that ODOT's slope easement would prohibit pedestrian amenities within that area. Because petitioner put on evidence that other ODOT-encumbered areas had such amenities, the city's findings were inadequate to reach that conclusion. The city's findings that the rock cropping and slope easement created conditions unique to the property was also undermined by neighboring properties similarly situated that had complied. LUBA remanded on that basis as well.

LUBA also remanded based on the inadequacy of the city's findings regarding how the variance was "necessary for the preservation of a property right of the applicant." The city's argument was essentially that applicant had a "property right" to develop in the same manner as adjacent properties developed prior to the city's 2019 change in the zoning regulations requiring the removal of the rock outcroppings to develop pedestrian amenities. LUBA disagreed, concluding that the new regulation reflected the city's desire for future development and that past development was not relevant. If the city wanted to apply the former standards in that area, the appropriate method is to amend the zoning code.

Finally, LUBA also remanded for the city to address petitioner's arguments that the city's findings were inadequate in justifying variances to code requirements relating to building orientation and parking-lot design standards.

Sherman v. Deschutes County, __ Or LUBA __ (LUBA No 2022-027, July 15, 2022)

LUBA affirmed a county hearings officer's approval of a wireless communication facility on EFU land with a Goal-5 landscape management (LM) overlay that protected a scenic view corridor along Highway 20. The 150-foot tower would have a 50x50 foot footprint and would be within 80 feet of the highway and within the highway right-of-way.

LUBA interpreted ORS 215.283 (1)(i) which allows outright on EFU lands, the "reconstruction or modification of public roads and highways, *including* the placement of utility facilities overhead and in the subsurface of public roads and highways along the public right of way …". LUBA determined that the installation of utility facilities did not need to occur in conjunction with other reconstruction or development of the highway. And that the facility did not need to be directly above or below the road surface itself.

LUBA also agreed with the hearings officer's interpretation of the city code's LM overlay requirements that apply to "any new structure or substantial exterior alteration of a structure *requiring a building permit* or any agricultural structure." The hearings officer concluded that "requiring a building permit" applied to new structures as well as alterations. And because the tower is not required to comply with the Oregon Structural Code, the LM zone is inapplicable.

Old Hazeldell Quarry v. Lane County, __ Or LUBA __ (LUBA No 2021-102, July 18, 2022)

LUBA remanded the board of commissioner's decision denying petitioner's application to amend its comprehensive plan to add 46 acres to its significant aggregate resources inventory, to redesignate 107 acres for quarry and mining operations, and to approve a site plan for a quarry on the 183-acre property.

Prior county approvals of the proposal had previously been remanded under *Save TV Butte v. Lane Cty.*, 11 Or LUBA 22 (2018) for failing to evaluate mining conflicts on an inventoried Big Game Range and under *Save TV Butte v. Lane Cty.*, __ Or LUBA __ (LUBA No 2019-002, Oct 16, 2019), for failure to provide required notices under 197.610 (6).

LUBA disagreed with petitioner's argument that the county's decision was tainted based on ex parte communications, because communications between decision makers (and not a party) are not ex parte. LUBA also disagreed that the decision makers were biased to an extent that the petitioner's right to impartiality was violated. LUBA reasoned that commissioners are expected to have and develop views of community interest and that commissioner's dislike of petitioner's experts or attorney is not "clear and unmistakable evidence" of bias.

Note: The substance of the case, relating to economic, social, environmental and energy (ESEE) consequences of mining were found insufficient by LUBA. That was subsequently reversed by *Old Hazeldell Quarry v. Lane Cty.*, 323 Or App 120 (2022) (Mem. Op.), finding LUBA misapplied its standard of review regarding substantial evidence by misunderstanding the context of the evidence. On remand at *Old Hazeldell Quarry v. Lane Cty.*, __ Or LUBA __ (LUBA No 2021-102, Feb 21, 2023).

Sikora v. Lane County, __ Or LUBA __ (LUBA No 2022-006, July 27, 2022)

LUBA affirmed the county hearings officer's denial of petitioner's request for a legal lot verification. Petitioner had argued that a 1963 deed effected a property line adjustment establishing the lot and that establishment was not subject to the 1962 Subdivision Ordinance. LUBA stated that the burden of proof was with the petitioner. LUBA declined to shift the burden of proof based on OEC 311 (1)(x)--the presumption that the "law has been obeyed"--or because there was no evidence that the deed did *not* effect a property line adjustment.

LUBA also rejected petitioner's argument that the 1962 Subdivision Ordinance did not apply because the 1963 deed was an exempted "exchange of land between abutting properties" in that the petitioner's predecessor exchanged money for land. LUBA held that the hearings officer property interpreted "exchange of land" to apply only to circumstances where land was exchanged for other land.

Monroe v. City of Corvallis, __ Or LUBA __ (LUBA No 2022-036, Aug 2, 2022)

For lack of jurisdiction, LUBA dismissed the petitioner's appeal of a city council decision affirming a city manager decision that upheld city planner's issuance of a land use compatibility statement (LUCS) to a fiber company to fulfill a Department of Environmental Quality requirement for air quality permits.

The "LUCS exclusion" in ORS 197.015(10)(b)(H) applies if the LUCS approves an action that was: (1) authorized in a prior decision; (2) does not require review (outright permitted use); or (3) will be required to undergo future land use review. However, to determine whether one of the three situations applies, LUBA often must review the assignments of error to determine whether it is true that no review is required. Essentially, LUBA must decide the case to see whether it has jurisdiction or not. If the local government was right, then LUBA dismisses the appeal for lack of jurisdiction or presumably if the local government was wrong then LUBA would find it had jurisdiction and a reversal or remand would be *fait accompli*. *McPhillips Farm v. Yamhill Cty.,* 256 Or App 402 (2013).

Here, LUBA agreed with the city, until there is an application for an expansion of use, requiring a conditional use permit, there is no need for a land use decision and therefore nothing for LUBA to review regarding existing operations.

Phillips v. City of Corvallis, __ Or LUBA __ (LUBA No 2022-019, Aug 2, 2022)

For lack of jurisdiction, LUBA dismissed the petitioner's appeal of a city planner's issuance of land use compatibility statement (LUCS) to a fiber company to fulfill a DEQ requirement for air quality permits. This involves the same applicant and same LUCS as in *Monroe v. Corvallis*, __ Or LUBA __ (LUBA No 2022-036, Aug 2, 2022) (summarized above), dismissed on the same day.

Here, petitioners only discovered the LUCS nine months after it was issued and appealed directly to LUBA. Because there was no hearing, this was timely under ORS 197.830(3). However, because the petitioner did not file a local appeal (as was done by the *Monroe* petitioners), they did not exhaust their remedies. LUBA explained that generally, when a petitioner is appealing a decision to LUBA that could have been appealed locally, but the time for a local appeal has long run because petitioners never received notice, a petitioner does not have to appeal locally unless the local government chooses to allow an appeal after the local deadline. LUBA cites two local provisions that

could allow an appeal. Even though those provisions required the local appeal to be filed within 12 days of the decision, because the petitioner did not do so, remedies were not exhausted.

And, for good measure, LUBA says that this LUCS falls within the ORS 197.015(10)(b)(H) exclusion anyways as determined in *Monroe*. So, that is a second reason to dismiss.

Briggs v. Lincoln County, __ Or LUBA __ (LUBA No 2021-118, Aug 8, 2022)

LUBA reversed the citizen-drafted county ballot measure restricting short term rentals (STRs) in low-density residential zones. The ballot measure would make STRs unlawful in certain residential zones, require those existing uses to be licensed and phased out after five years, and would not allow the permit to be transferred with the sale of the property.

LUBA agreed with petitioners that the use of dwellings as STRs prior to adoptions of the ballot measure were nonconforming uses. The ballot measure itself said that the "use … shall become nonconforming" on the effective date. Therefore, sunsetting the STRs permits after five years and making them non-transferable violated ORS 215.130 (5), which does not allow a county to simply outlaw an existing nonconforming use. Unlike the facts in *Briggs v. Lincoln Cty*., (LUBA No 2021-113, Feb 10, 2022), simply calling this a business licensing regime did not make it so.

Because compliance with the ballot measure would foreclose compliance with ORS 215.130, the ballot measure is preempted.

As the local regulations were prohibited as a matter of law, LUBA reversed the decision. In a footnote, LUBA noted that it does not have the authority to affirm or reverse or remand a decision in part. It's all or nothing, which here means the entire ballot measure is invalidated.

Hendrickson v. Lane County, __ Or LUBA __ (LUBA No 2021-117, Aug 18, 2022)

This case involves a motion for attorney fees after LUBA ordered the county to approve a temporary hardship dwelling that the hearings officer denied. LUBA noted that preparing the motion for attorney fees and costs is recoverable time. However, time spent seeking reconsideration below is not. LUBA found that the attorney's hours and rate were reasonable, particularly in taking into consideration that the hardship dwelling case was taken pro bono on appeal to LUBA.

Nelson v. City of Hillsboro, __ Or LUBA __ (LUBA No 2022-035, Aug 19, 2022)

LUBA affirmed the planning commission's approval of an application to turn a bank into a brew pub and pizza joint.

LUBA disagreed with the petitioner's theory that LUBA could correct the figure referenced in code that petitioner believed should have shown an alley or that LUBA could reinterpret the code to include the alley.

LUBA also agreed with the city that it did not need to apply code only applicable to "new" buildings to this application for an "alteration" that would enclose the existing drive-through canopy.

Towey v. City of Hood River, 321 Or App 414 (2022)

The Court of Appeals affirmed LUBA's dismissal of an appeal relating to middle housing (but never reaching the merits) in *Towey v. Hood River*, __ Or LUBA __ (LUBA No 2021-057, Mar 21, 2022).

At LUBA, the petitioners had filed an "unopposed" motion to extend the deadline to file their petition for review. However, OAR 661-010-0067(4) provides that the time can only be extended with the written consent of all parties. Although the city and intervenor-petitioner (Crowley) later consented, the intervenor-respondent (Thrive Hood River) did not. Without their consent, LUBA dismissed the appeal as untimely, even though Crowley had filed a timely intervenor-petitioner brief.

The court agreed that LUBA's interpretation of its (ed: could not be clearer) rule and rulemaking authority was plausible: an intervenor-petitioner is not a petitioner and an intervenor-petitioner's brief is not a petition for review. It has long been LUBA's rule that if you do not file your own notice of appeal, as an intervenor you are piggy backing on the actual petitioner. If the petitioner falls off a cliff, they take you with them. The Court of Appeals agrees.

East Park v. City of Salem, __ Or LUBA __ (LUBA No 2022-050, Aug 30, 2022)

LUBA reversed the city council's denial of a conditional use permit for multifamily housing. The city argued that the apartments were not for "needed housing" so "clear and objective" standards under ORS 197.307 (4) did not apply. LUBA explained (and in its response the city concedes) that the 2017 amendments to the statute required clear and objective requirements for all housing and not just needed housing. *Warren v. Washington Cty*, 296 Or App 595 (2019).

The city was left arguing that the standards actually were clear and objective. Those standards included that "the proposed use will be *reasonably* compatible with and have *minimal impact* on the livability or appropriate development of surrounding property." LUBA said no (of course not): these are clearly subjective, value-laden judgments and may not be applied.

The city alternatively argued that the developer actually had an alternative "clear and objective" path so the city was free to apply subjective standards under ORS 197.307 (6). Developers purported "clear and objective" path would have been to request a zone change to a zoning where this housing type would be permitted outright rather than proceed with the conditional use standards in the current zoning. LUBA explained that that is not how it works: the *city must offer* the developer a clear and objective path if it wants to also offer an alternative subjective path.

Because the conditional use permit criteria were the sole basis for the denial of the permit, LUBA reversed and ordered the city to approve the application.

Note: Petitioner's was subsequently awarded $47,384 in attorney fees and costs. *East Park v. Salem*, __ Or LUBA __ (Order, LUBA No 2022-050, Dec 6, 2022).

Hurst v. City of Rogue River, __ Or LUBA __ (LUBA No 2021-115, Sep 1, 2022)

LUBA remanded the city's revocation of a conditional use permit (CUP) granted in 2016. The CUP allowed the convenience store to obtain a warehouse. The city asserted concerns about weeds, maintenance of the riparian area, grease interceptors and noise. The planning commission revoked the CUP. On appeal to the city council and after three hearings, the council affirmed the revocation.

LUBA disagreed with petitioner's theory that the city was required to use nuisance provisions in the code before using the CUP revocation process.

In revoking a CUP under the city code, the city, as applicant, carries the burden of proof. The city cannot require the property owner to demonstrate compliance with the conditions of approval. Further, the code may impose a heightened burden of proof for a CUP revocation.

When conditions of approval are required to be met before the use may begin (instead of ongoing "operating" conditions) the city cannot later challenge the conditions of approval that it had already signed-off on, even if it now appears the condition was insufficient to ensure compliance with a standard. That is a collateral attack on the prior decision.

LUBA does not consider legal theories or interpretations raised for the first time in a response brief that were not adopted by the challenged decision.

In enforcement proceedings, and on appeal with a hearing that allows for additional evidence, if the standard requires evaluation of the site condition at the time the decision is made, the findings must address whether the record shows the condition was corrected *at the time of the hearing*. For an appeal providing a hearing, the relevant time is the latter proceeding, not the initial proceeding.

What matters are the adopted conditions of approval or specifically incorporated materials (here a "letter of intent") and not statements that others claim were made during a prior land use proceeding.

The city cannot, after-the-fact, narrow broad language in a CUP such as "consistent with the declared use" and "associated with the existing business on the parcel" to claim that a use is not operating consistent with those phrases.

1st John 2:17, LLC v. City of Boardman, __ Or LUBA __ (LUBA No 2021-086, Sep 2, 2022)

LUBA transferred to circuit court this appeal of a construction contract for an interchange loop road. The contract concerned a series of roads collectively identified in the transportation system plan. Following approval of the contract, the city approved a zoning permit for the contract. (Those are the subject of other LUBA appeals (LUBA Nos 2022-037 (not summarized) and 2022-062 (summarized above)).

Petitioner maintained that LUBA had jurisdiction because the contract was inconsistent with the city's land use regulations. LUBA agreed that the transportation facility exception (ORS 197.015(10)(b)(D)) claimed by the city was not an applicable exception removing jurisdiction. However, LUBA concluded that it lacked jurisdiction for a different reason: the contract does not actually concern the "application" of a land use regulation and the city did not apply, and is not required to apply, provisions of the city's zoning code or comprehensive plan. Instead, the city is just choosing who will build the road. Therefore, there is no land use decision in the first place.

Gould v. Deschutes County, __ Or LUBA __ (LUBA No 2022-025, Sep 9, 2022)

LUBA affirmed the hearings officer's approval of a subdivision tentative plan as part of the Phase A-2 of the Thornburg resort as complying with code and the 2008 Final Master Plan (FMP).

Preservation: LUBA starts with a summary of what is sufficient to preserve an issue and that LUBA will decline to review as unraised as issue not "raised below with sufficient specificity as to prevent 'unfair surprise' on appeal. It also explained the purpose of preservation and the rule (OAR 661-010-0030(4)(d)) requiring preservation statements. Here, the petition alleged a single assignment of error with 12 subparts. Its preservation section then referred to 600 pages of the 2000+ page record. LUBA concluded that the inadequate notice of preservation was in most instances a technical violation that did not prejudice their substantial rights. However, intervenors alleged that two particular issues had not been raised and, because petitioner's reply brief did not cite more specifically where they were preserved or argue that they were not required to be preserved, LUBA declined to address those two issues.

Water rights: LUBA rejected petitioners' argument (made in three other *Gould* cases) that the petitioner had demonstrated that as a matter of law the water right could not be used for mitigation purposes. That issue will be resolved by a pending contested case proceeding challenging a water right. LUBA also rejected petitioners' argument that its evidence–that intervenor is now seeking additional water rights–contradicts the county's conclusion that the water rights are sufficient to satisfy the condition.

Wildlife Mitigation Plan: LUBA rejected petitioners' (previously rejected) argument regarding when the demonstration of compliance with the wildlife management plan must be made. "Wet" water is not required to meet mitigation requirements until the applicant begins pumping. Regarding petitioners' argument that construction activity for the phase triggered the water-flow demonstration requirement, LUBA found that petition for review fails to challenge the hearings officer's findings.

Other issues: LUBA rejected a new challenge to a finding first made in the reply brief and petitioners' undeveloped argument that it explained in the reply brief. Other arguments were denied as derivative of earlier arguments or as not directed to decisions made as part of the decision on appeal.

Note: Affirmed in *Gould v. Deschutes Cty.*, 323 Or App 528 (2022) (Mem. Op.) (not summarized).

Fern Hollow Farms v. Linn County, 321 Or App 783 (2022)

The Court of Appeals reversed and remanded the circuit court's order granting summary judgment in favor of the county in response to petitioner's writ of review. The writ of review sought to challenge the county's denial of an application to partition land under a 2010 DLCD order approving petitioner's Measure 49 (2007) (M49) claim.

The county's denial was based on provisions of code requiring that the divided property be a lawfully created unit of land as made in a 2014 determination that was not appealed and became final. The county reasoned that the DLCD's M49 authorization did not implicitly or explicitly determine whether the subject property was lawfully created. Further, the county argued that the purpose of M49 was to provide relief to property owners whose land was restricted after their acquisition. Petitioners could not have partitioned their land when they acquired it in 1981.

In reversing, the court explained that M49 final order supersedes any county regulation, whenever enacted. And the county was required to challenge the lawfulness of the initial DLCD approval order (phase one). The county and the applicant's neighbors were given notice of, and had an opportunity to provide comments on, the preliminary order. The county could have sought judicial review of the order. That final order includes the right to a home site approval, which includes the right to subdivide the property.

M49 and the specific M49 order provide the sole criteria for approving those subdivisions. During the development permit portion (phase two), the county may not add requirements or consider whether the claimant had a lawful unit of land at the time of acquisition. The cases cited by the county to the contrary all involved phase-one decisions.

The court disagreed with the county that the M49 order reserved the decision of the lawfulness of the property to the county at phase two, either under the order's language that the order is "not a determination of the current legal status of [the number of] lots, parcels or dwellings" or the M49's language allowing the county to apply standards "reasonably necessary to avoid or abate a nuisance."

The Court remanded to the county for a determination as to whether the proposal was consistent with M49 and the M49 order.

1000 Friends of Oregon v. Linn County, __ Or LUBA __ (LUBA Nos 2022-003/004, Sep 26, 2022)

On remand from *1000 Friends of Oregon v. Linn Cty.*, __ Or LUBA __ (LUBA Nos 2019-103/104, Feb 9, 2021), after a trip to the court of appeals, *1000 Friends of Oregon v. Linn Cty.*, 306 Or App 432 (2020), LUBA again remanded the county's plan amendment and zone change of 108-acre parcel from farm/forest to non-resource lands.

Petition deficiencies: Petitioner mailed the petition for review on the deadline that lacked the required index, table of authorities, summary of the argument, and certificate of service. The next day, they filed a "corrected and amended" petition that addressed those issues, but still failed to demonstrate that the issues were preserved or set forth separate assignments of error. LUBA agreed that the deficient filing was intended to avoid dismissal. However, because LUBA's rules allow a petitioner to correct deficiencies within a short timeframe, and petitioner already did so and the corrected petition did not amend the substance of the initial petition, they could do so without LUBA's permission. And LUBA found that the remaining failures were technical and did not prejudice their opponents. Further, because petitioner identified the preservation issues in the reply brief, LUBA could ascertain where in the record petitioner's issues were preserved.

Scope: LUBA agreed that the county properly applied a limited scope in response to LUBA's remand.

Preservation/waiver: LUBA also found that petitioner had failed to preserve its argument concerning the conditions of approval regarding a wildlife management plan in the county hearings that were the subject to the 2019 LUBA appeal. Therefore, it could not revive the argument in this appeal. LUBA also found that petitioner either waived or failed to fully develop its arguments regarding impact on "sensitive fish or habitat." Petitioner also failed to preserve its argument that serial petitions could allow future applicants to avoid the conditions of approval.

Condition of approval: LUBA remanded to the county to explain how dwelling density is calculated in big game habitat areas. The county must also reconcile how the "maximum of 10 dwellings in the peripheral habitat" condition of approval would actually limit densities to those prescribed by the plan. There were 90 acres of identified habitat, and the plan allows for a maximum of one dwelling per 10 acres, but 10 units would be one per nine acres. LUBA also remanded for findings that address the mechanism by which the conditions of approval would be applied to future applications.

Zamudio, dissenting: LUBA should have dismissed the petition, because petitioner bears the burden of establishing error and demonstrating that the assignment was preserved. LUBA reviews assignments of error, not decisions. If those assignments of error are not specified, the record not cited, and a summary of arguments not provided, the intervenor-respondent is being burdened and prejudiced. LUBA should have exercised its discretion to dismiss.

Note: Affirmed at *1000 Friends of Oregon v. Linn Cty.*, 324 Or App 559 (2023) (Mem. Op.) in which the court was not persuaded to find that LUBA majority had abused its discretion in excusing petitioner's technical violations of its rules.

Gould v. Deschutes County, 322 Or App 11 (2022)

The Court of Appeals affirmed LUBA's order, in *Gould v. Deschutes Cty.*, __ Or LUBA __ (LUBA No 2022-013, Jun 1, 2022), that had affirmed the county's approval of a site plan application for 80 lodging units as part of Phase A-1 of the Thornburgh Destination Resort. The issues raised on appeal concern compliance with two Fish and Wildlife Management Plan (FMP) conditions relating to water rights and "mitigation" of harm to fish and a water rights permit that was on appeal.

Petitioner's challenges either were not preserved, and thus are not considered in the decision, or have been resolved in earlier litigation involving LUBA orders affirmed on judicial review and are thus "law of the case" and not subject to challenge. After a detailed summary of the positions presented to LUBA and LUBA's resolution of those issues, the court walks through the various arguments made about the two FMP conditions, explaining that all of the grounds for petitioner's arguments have already been resolved adversely in prior decision-making, thereby precluding them from using those arguments on appeal in this round of litigation. Those previously resolved matters involved what, in fact, was or was not required by the conditions both substantively and procedurally.

Oregon Coast Alliance v. Tillamook County, __ Or LUBA __ (LUBA No 2021-104, Sep 30, 2022)

LUBA remanded the county commissioner's adoption of a post-acknowledgement plan amendment (PAPA) that would allow for a protective beachfront structure for 11 developed and four vacant oceanfront lots in the Watesco unincorporated community.

Evidence: DLCD, as intervenor, sought to have judicial notice taken of a DLCD guidebook or its provisions. DLCD stated that it explained Goal 18. LUBA stated that while it can take notice of certain government publications, statewide land use policy must be adopted by LCDC as an administrative rule or a goal. Since it cannot be used for the purposes for which DLCD wants to introduce it, the guidebook cannot come in.

Goal 18: Implementation requirement 5 of Goal 18 restricts protective beachfront structures on properties unless development existed on or before January 1, 1977. LUBA disagreed with applicants that certain lots were "developed" by that date by virtue of being part of a subdivision with road access and septic availability. Under Goal 18, "development" requires "provision of utilities" to the lots, not simply that water could be available. There is not substantial evidence showing that utilities were actually provided to the properties on the key date. Therefore, all of the properties will require a Goal exception.

Catch all exception: In the alternative, the county approved the Goal-18 exception for all lots, based on a "catch-all" reasons exception under ORS 197.732(2)(c)(A) and OAR 660-004-0022(1).

LUBA rejected petitioners' arguments that interpreted the catch-all rule to require that a catch-all reasons exception be "grounded in a legal obligation in conjunction with a locational factor that the local government would be unable to meet absent an exception for the proposed use" (ed: whatever that means).

LUBA agreed with petitioners that residential zoning and the risk of residential property loss are themselves insufficient to justify an exception. Allowing such an exception would essentially amount to allowing a county to implement its preferred policy to Goal 18.

LUBA held that the county could not count the proportion of residential properties (90%) in the subregion *eligible* for protection in order to conclude that significant hardening has already taken place and there is insufficient beach left to protect. Many of the lots are not yet armored and would need to apply and meet applicable permit requirements. Thus, a commitment to extensive armoring in the area is not (yet) a foregone conclusion.

LUBA sided with the county on its reliance on expert evidence that the two jetties and rapid loss of beachfront in the area have so altered the normal processes as to allow for an exception. However, such evidence is inadequate with respect to the vacant lots and fails to explain why an exception is appropriate for those properties.

Demonstrated need exception: As a second alternative, the county adopted findings supporting a "demonstrated need" reasons exception in OAR 660-004-0022(1)(a) and (b). The city argued the protections were necessary to protect residential development, facilities and to avoid natural hazard risks. However, LUBA generally found that the goals do not impose a legal obligation that allowed for the exception. Goals 10, 11, 14, requiring certain designations of land, could be met elsewhere. Goals 7 and 18 do not impose any requirements that would be at risk if the county did not approve the beach protections.

1st John 2:17, LLC v. City of Boardman, __ Or LUBA __ (LUBA No 2022-029, Oct 13, 2022)

LUBA affirmed the city's approval of a zoning permit for a portion of a 230-kV transmission line that would cross over a portion of petitioner's property over which the applicant had commenced a condemnation action for an easement, and its motion for an advanced occupancy under ORS 35.275 had been granted. Despite no recorded deed listing the applicant as owner, under those facts, LUBA agreed with the city that the applicant/condemner is a "record owner" of the property within the meaning of the city's development code and may therefore initiate a land use application over the property.

Petitioner also argued that this is not an application for a "private utility" allowed under the relevant code because it serves the public in general rather than a specific individuals or groups. LUBA disagreed, it is private because it is owned by a private cooperative entity, rather than a governmental entity.

Husk v. City of Bend, __ Or LUBA __ (LUBA No 2022-052, Oct 21, 2022)

LUBA remanded the city's approval of a residential subdivision. The property owner proposed to build 26 single detached residences, one per subdivision lot, and the city analyzed the proposal accordingly.

However, under the 2019 middle housing law (ORS 197.758) and implementation in the city's development code, up to four dwelling units on each of the lots to be created. LUBA determined that if there were 104 dwelling units, that would require additional public facilities improvements related to fire access and potentially to water and sewer facilities. Additionally, the potential for 104 dwelling units may require an additional transportation analysis based on the number of trips generated by that many units. LUBA remanded the city's decision for the city to consider this issue.

Postscript: LCDC amended OAR 660-046-0205 to allow a city to conduct a new analysis of public facilities impact if, after a developer proposed a fixed number of dwelling units that is less than the maximum allowed under a city's middle housing code, an applicant subsequently proposes units in excess of that proposal.

Zimmerlee v. Crook County, __ Or LUBA __ (LUBA No 2022-071, Oct 24, 2022)

LUBA dismissed this petition challenging the county's approval of a conditional use permit to engage in aggregate mining. The dismissal was based on the petitioner's filing of the notice of intent to appeal two days after the deadline 21 days after the decision became final. LUBA rejected petitioner's arguments that the handwritten date on the final decision was capable of misinterpretation, that the notice of decision did not include the decision date, and that the decision was emailed to petitioner who had notified the county that they preferred paper mail.

1000 Friends of Oregon v. Columbia County, __ Or LUBA __ (LUBA No 2022-039, Oct 27, 2022)

LUBA reversed the county's approval of a conditional use permit for a rail facility in an agricultural zoning district.

The facility consisted of a series of up to ten parallel tracks totaling approximately 25k linear feet. The county had found that the proposed facility was a railroad "branchline." OAR 660-012-0065 (3)(j) makes this allowed on EFU lands without a Goal 3 exception, subject only to the farm impacts test in ORS 215.296. LUBA looked first for a definition of "branchline" in state law or the rules. Finding none, it then turned to dictionary definitions, and also discussions of the term in other Oregon court decisions. Both tended, but not definitively, to describe a branchline as something less substantial than what was proposed in the application. LUBA also turned to the rulemaking history for OAR 660-012-0065 but did not find any guidance.

Finally, LUBA turned to ODOT's Oregon Rail Plan and its glossary of definitions. Because the document was issued in 2001, LUBA hesitated to apply those definitions to 1995-adopted rule, stating "we have historically understood context to include relevant information that existed at the time of enactment." However, in *Schaefer v. Oregon Aviation Board*, 312 Or App 339 (2021), the Oregon Court of Appeals endorsed the use of a 2017 Federal Aviation Association document to interpret another term in OAR 660-012-0065. So, LUBA decided to consider the 2001 ODOT Oregon Rail Plan and determined that the proposed facility met the plan's definition of a "rail yard" rather than a "branchline."

As a result, the proposed facility was not allowed without taking a Goal 3 exception. Since the County's legal error would result in a significantly different application and analysis of the exception, LUBA reversed rather than remand the County's decision.

1st John 2:17, LLC v. City of Boardman, __ Or LUBA __ (LUBA No 2022-062, Oct 27, 2022)

LUBA remanded the city planning commission's approval of its own plans for intersection and street improvements and the construction of a new "neighborhood collector" subject to the Port of Morrow Interchange Area Management Plan.

LUBA held that the city's explanation was inadequate when it classified the collector road as a "neighborhood collector," rather than a "minor collector" without identifying criteria regarding how the interpretation would be made. On remand, the city may also need to address compliance with "minor collector" criteria or determine that it does not apply.

LUBA also rejected the city's argument that it could defer implementing the full standards regarding required lateral improvements (sidewalks, bike lanes, access cuts, etc.) until the property adjacent to the roadway was developed. LUBA said that the requirement that the infrastructure "shall be installed" meant that those improvements must be developed at the same time as the roadway, even if code did not say so specifically. Further, the city's interpretation would not address the portion of the roadways adjacent to already-developed properties or property that is never developed and is therefore inconsistent with the purpose of the code.

Dooley v. Wasco County, __ Or LUBA __ (LUBA No 2022-045, Oct 31, 2022)

LUBA reversed the county's approval of a Goal 4 "irrevocably committed" exception and a comprehensive plan map amendment from forest to forest-farm zoning. Previously, LUBA had

remanded this decision under *Dooley v. Wasco Cty.*, __ LUBA __ (LUBA No 2019-065, Jan 14, 2020), having agreed with petitioner's arguments that: (1) the county incorrectly focused on alleged conflicts only from conducting *commercial* forestry on the property with nearby residential uses, but ignored whether operations that are smaller in scale would create similar conflicts that render forest use of the property impracticable; (2) the findings did not establish that forest use of the property is impracticable or explain why trees could not be planted on the property; and (3) the finding that spraying would conflict with residential uses is not a basis to find that resource use of the subject property is impracticable.

LUBA considered remanding the matter based on the county's failure to make any findings beyond simply incorporating the entirety of the record with no attempt to identify the standards applied or the facts found by the county where the record conflicts. However, because the record showed there were existing adjacent forest uses, LUBA agreed with petitioner that no additional findings on remand would allow the applicant to show that the subject property is irrevocably committed to non-forest use or that forest use on the property is impracticable. On that basis, LUBA reversed the entire decision.

Marick v. City of Lake Oswego, __ Or LUBA __ (LUBA Nos 2022-016/017/028/040/043, Nov 1, 2022)

LUBA affirmed decisions made by the city in approving a nonconforming dwelling in a residential zone. The applicant had been approved for a residential infill design permit that would allow applicant to demolish and replace portions of a 1937 dwelling but would retain other walls that were nonconforming as within the current five-foot setbacks. During demolition, it was discovered that all of the walls had deteriorated and needed to be demolished. The planning manager approved removal of the walls as "maintenance" and a revised building plan was approved.

Petitioner objected, arguing that if the building was fully demolished, the replacement must comply with code rather than use the nonconforming footprint of the demolished building. The city manager rejected the petitioner's attempts to file a local appeal. Petitioner filed seven appeals to various city decisions; five were consolidated within this appeal.

LUBA agreed with the city's interpretation of code provisions that allow for the "maintenance," "restoration," or "reconstruction" of the damaged portions of the walls to allow for the replacement of those unsafe structures. A city is allowed to determine which of its decisions require discretionary review under code and which are exempt. Here, code exempts reconstruction of a nonconforming dwelling.

LUBA also held that, to the extent that the footing is actually not where it appears on the approved plans but is instead on petitioner's property, that is a trespassing or enforcement issue that is not before LUBA.

Note 1: On appeal, *Marick v. Lake Oswego*, 324 Or App 178 (2023) (Mem. Op.) (not summarized), the court agreed that LUBA was not required to take evidence on or resolve the enforcement issue. Nonconformity of the permit by the applicant does not invalidate the city's permit decision.

Note 2: On the same day, in *Marick v. Lake Oswego*, __ Or LUBA __ (LUBA Nos 2022-031/032, Nov 1, 2022) (not summarized), LUBA transferred the remaining two claims to the circuit court for lack of jurisdiction under the ministerial exception in ORS 197.015(10)(b)(B). That decision was also affirmed on appeal, *Marick v. Lake Oswego*, 324 Or App 181 (2023) (Mem. Op.).

House v. City of Bend, __ Or LUBA __ (LUBA No 2022-044, Nov 9, 2022)

LUBA granted transferred to circuit court this appeal of a city's denial of petitioner's access permit for driveway access onto a minor arterial. The city engineer's initial email cited city development code as reason permit would be denied. However, LUBA determined that this was not a land use decision, and therefore LUBA lacked jurisdiction, because the city development code was not actually applied or required to be applied.

Botts Marsh LLC v. City of Wheeler, LUBA __ (LUBA Nos 2022-063/064, Nov 9, 2022)

LUBA affirmed city council's denial, following LUBA's remand in *Oregon Coast Alliance v. Wheeler,* __ Or LUBA __ (LUBA Nos 2020-064/065, Mar 9, 2021) (*OCA*), of petitioner's application for a conditional use permit for a hotel and mixed use commercial building.

The city's denial was based on a requirement that "the use will not create traffic congestion on nearby streets." In *OCA*, LUBA had remanded because petitioner's traffic study did not address whether the use would "create traffic congestion." On remand, the applicant submitted no new evidence regarding traffic congestion. City council concluded that the applicant failed to carry its burden of proof on this matter.

Petitioner argued that the city council's decision was not supported by substantial evidence, because there was no contrary evidence. LUBA disagreed that petitioner established that the evidence in the record demonstrates that the standard is satisfied as a matter of law or that no reasonable person would reach the conclusion that the city council reached.

Red Grapes LLC v. Clackamas County, __ Or LUBA __ (LUBA No 2022-069, Nov 18, 2022)

LUBA reversed the hearings officer's approval, following LUBA's remand in *Red Grapes, LCC v. Clackamas Cty.*, __ Or LUBA __ (LUBA Nos 2021-103/106, Mar 30, 2022), of a new chiropractic clinic and massage therapy clinic on rural residential/farm-forest property outside of the UGB. The applicant proposed constructing the clinic to replace a dilapidated former dwelling and proposed it as a "home occupation." County code required a home occupation to be operated in a dwelling or an accessory building normally associated with the primary uses allowed in the zone. LUBA agreed with the county's consideration of the size of the clinic compared to dwelling, duration and frequency of occupation and use compared to dwelling and associated improvements.

However, LUBA interpreted the code's requirement that the function of the accessory building or use be "clearly incidental" to mean that an objective observer should be able to discern that the functional relationship of the clinic building to the dwelling was subordinate. The location of the clinic building out of sight of the dwelling and along a main road weighed against this factor. And the fact that the clinic is designed to look like a house does not indicate a relationship to the dwelling, let alone a subordinate one. The clinic's separate access and separate improvements further make the clinic independent from, and not subordinate to, the dwelling. And although the hearings officer may weigh multiple competing factors, the misconstruing of "subordinate" and "clearly incidental" was sufficient to sustain the assignment of error.

LUBA also disagreed with the county's logic that the clinic's building was a type of building "normally associated with the primary uses allowed in the zone" because under the permit, the building could be only be used as a home occupation and home occupations are uses normally associated with primary residential uses, and therefore any structure useable for a home occupation may be

approved as an accessory building, so long as the structure can be converted to serve another accessory use that's permitted in the zone. LUBA explained that it is not the use, it is the building itself that must be "normally associated" with residential dwellings. And nothing in the county's code allows a new structure designed to look like a house to be an accessory structure, except a guest house or ADU. However, the clinic building wouldn't meet the standards for either of those types of buildings. And because there is no other provision of code that would allow a building of this size in the zone for any use, the county may not use ORS 215.448 (3) allowance for home occupations to smuggle in approvals of other building types.

Because the applicant would have to make more than insignificant changes to the application or a new application altogether, LUBA reversed the county instead of remanding.

Delmonico v. Washington County, __ Or LUBA __ (LUBA No 2022-072, Nov 21, 2022)

LUBA affirmed the hearings officer's approval of a 15-lot residential subdivision on property with mapped significant natural resources (SNR). Petitioner argued that the decision did not comply with county standards governing alteration of terrain and vegetation in SNR. The SNR map had a dark blue line on the subject property that roughly indicated water areas and wetlands and fish and wildlife habitat. The applicant's consultant did a field verification and mapped its own delineation of the water feature on the property. Petitioner argued that the protected area isn't determined by a field verification, but by transposing the blue line on the SNR map to a location on the ground, even if the location on the ground isn't the actual location of the water feature. LUBA disagreed: the county code allowed on-site delineation of the imprecisely mapped feature.

Also, LUBA will not review assignments of error included only within a footnote!

Backer v. City of Salem, __ Or LUBA __ (LUBA No 2022-053, Dec 1, 2022)

LUBA affirmed a city council decision approving a 138-lot phased subdivision. The applicant originally proposed to remove 17 of 28 significant trees. The planning administrator approved the plan, but the city council decided to take up review following a public hearing. At the hearing, an opponent proposed a design alternative that shifted the road through subdivision to avoid most of the trees. After the city voted to tentatively deny the application, the applicant again amended the application to reduce the number of lots and remove only six significant trees. The city approved that version.

Tree standards: The city interpreted its code requirement that there be "no reasonable design alternatives" that would preserve significant trees to mean that those trees may be removed only if there were no alternative design that would not require adjustments or exceptions to applicable standards and that would be practically feasible. The opponent's proposal would create 13 fewer lots, resulting in less density than allowed by the zone and would require excessive grading. LUBA deferred to the city's interpretation under *Siporen*. LUBA agreed that nothing in the code required an applicant to propose multiple design alternatives, to prove that no reasonable design alternative exists, or to prove that no other decision could have been adopted.

The intervenor-applicant's alternative theory–that the tree criteria is impermissibly not a "clear and objective" standard–was moot, but otherwise would not have been properly before LUBA as a contingent cross-petition for review.

Traffic standards: LUBA disagreed with the petitioner's arguments that the record was insufficient to show mitigation of impacts to the transportation system.

Note: Affirmed in *Backer v. Salem*, 325 Or App. 809 (2023) (Mem. Op.) (summarized below).

Bend Research v. Deschutes County, __ Or LUBA __ (LUBA No 2022-049, Dec 1, 2022)

LUBA transferred to circuit court this appeal of a hearings officer's issuance of a land use compatibility statement (LUCS) for the extension of private sewer lines to serve the unincorporated community of Tumalo. ORS 197.015(10)(b)(H) excludes most, if not all, LUCS from the definition of land use decisions. However, to determine whether the exclusion applies usually requires addressing the merits of the appeal.

Here, the petitioner provided no basis to challenge the hearings officer's categorization of the extension as a minor utility facility.

LUBA found that "raise it or waive it" generally does not apply to arguments regarding jurisdiction. So, in interpreting whether a LUCS is not "compatible with the comprehensive plan" under ORS 197.015(10)(b)(H), LUBA may review arguments that would ordinarily be considered waived. However, here the petitioners did not meet their burden of proof on that point.

Botts Marsh LLC v. City of Wheeler, __ Or LUBA __ (LUBA No 2022-079, Jan 4, 2023)

LUBA again remanded a city council limited land use decision, following its earlier remand in *Botts Marsh v. Wheeler*, __ Or LUBA __ (LUBA No 2022-002, May 11, 2022) (*Botts I*) (summarized above), denying a design review application for a fish processing and retail sales business—a use permitted outright in the zone.

In *Botts I*, LUBA explained that the city needed to inform the applicant what steps are necessary to obtain approval. On remand, the city declined requests to meet with the applicant or to reopen the record. Instead, the city adopted findings and a decision with new interpretations of code.

LUBA found that because it was not raised in *Botts Marsh I*, petitioner may not challenge the code as unconstitutionally vague so as to amount to an arbitrary taking.

LUBA also disagreed with the petitioner that the city violated the "goal post" rule under ORS 227.178 by changing the applicable criteria after the application. When evaluating design review under vague standards, it's often the case that the interpretations of those standards will come into existence in the course of reviewing the application.

LUBA agreed, however, that the city had not helped petitioner understand or meet the subjective approval standards. LUBA significantly re-explained *Commonwealth Properties*, 35 Or App 397 (1991): when the considerations involved are complex and are inextricably intertwined with the broadly worded policies, at some point the decision maker must specify how those policies will be applicable to the project through definitive standards. The city is required to do so "sufficiently in advance of its final decision so as to grant the applicant a meaningful opportunity to address the standard." *Dobaj v. Beaverton*, 1 Or LUBA 237 (1980). Here, the city only articulated the standards in its final decision, but had failed to grant petitioner a meaningful opportunity (or any opportunity) to address the standards before the final decision.

Having remanded again so that the petitioner can have an opportunity to meet the city's newly discovered standards, LUBA took an opportunity to look at the city's interpretations to develop those

standards, upholding some as plausible and finding others unsupported. Generally, the city may not convert aspirational design review standards (i.e., "the building should be…") into mandatory criteria.

Note: Substantially affirmed in relevant parts in *Botts Marsh v. Wheeler*, 326 Or App 215 (2023) (not summarized), except the Court of Appeals disagreed with LUBA's conclusion that the city's interpretation of its "primary entrance street tree" code was not plausible.

Gould v. Deschutes County, __ Or LUBA __ (LUBA No 2021-062, Jan 5, 2023)

For lack of jurisdiction, LUBA transferred to circuit court this appeal of a land use compatibility statement (LUCS) issued by a county planner to meet an Oregon Water Resources Department (OWRD) requirement that concluded that a proposed permit to use groundwater to serve a partially approved destination resort on EFU lands is compatible with the county's land use regulations.

ORS 197.015(10)(b)(H) excludes from LUBA's jurisdiction decisions that fall within one or more of the three categories described in subparagraph (H). Resolving the jurisdictional question under ORS 197.015(10)(b)(H) requires LUBA to determine whether the county correctly characterized the associated land use and correctly assigned it to one or more of the three subparagraph (H) exclusions, and that limited jurisdictional review may overlap with the likely merits of the appeal.

Petitioner argues that the new water permit may conflict with a condition in a prior approval, and therefore the LUCS fails to convey that there may be a future land use decision.

LUBA noted that it rejected a similar argument in *Gould v. Deschutes Cty.*, __ Or LUBA __ (LUBA No 2021-060, June 16, 2022). LUBA held that any failure to precisely identify which of the several destination resort approvals are final, and which are on appeal, does not necessarily mean that OWRD is unable to perform its coordination responsibilities.

Gould v. Deschutes County, __ Or LUBA __ (LUBA No 2021-066, Jan 5, 2023)

For lack of jurisdiction, LUBA transferred to the circuit court this appeal of a land use compatibility statement (LUCS) issued by a county planner to meet an Oregon Water Resources Department requirement, concluding that a proposed limited license to use groundwater to serve a partially approved destination resort on EFU lands is compatible with the county's land use regulations.

Petitioner argues that, to the extent water from this limited license is intended to replace the now-expired groundwater permit that was in place at the time of the county's prior approvals, the temporary use of groundwater cannot substitute for a permanent groundwater permit and that this may require a substantial change to the approved plans.

Petitioner also contends that prior land use approvals were predicated on the use of certain wells and water sources, and that changing water sources or permits could require a modification of those approvals, which is not reflected in the LUCS.

LUBA disagreed: nothing suggests that water sources and permits for the destination resort could not potentially change following approval. In any case, as explained in the companion appeals, the jurisdictional question turns on whether the LUCS decision correctly identifies the land uses associated with the state agency action and correctly aligns those land uses with one or more of the three 197.015(10)(b)(H) exclusions. Beyond that, any alleged errors go to the circuit court.

Gould v. Deschutes County, __ Or LUBA __ (LUBA No 2021-109, Jan 5, 2023)

LUBA dismissed, for lack of jurisdiction, an appeal of a LUCS issued by a county planner to meet an Oregon Water Resources Department concluding that a proposed water rights transfer of groundwater to serve a partially approved destination resort on EFU lands is compatible with the county's land use regulations.

Petitioner contends that the exclusions to LUBA jurisdiction in ORS 197.015(10)(b)(H) do not apply because the county should have recognized that the water rights transfer would modify the water source and rights that formed much of the predicate for prior approvals. LUBA (again) held that the summary description of associated land uses described in the LUCS application and acknowledged in the LUCS decision is sufficient to advise OWRD that the destination resort still requires future land use reviews, potentially including modification to approved plans. The city is not required to speculate what future land use approvals will be sought or needed unless the proposed state agency action in some way makes it apparent that specific land use approval will be needed in response.

Gould v. Deschutes County, __ Or LUBA __ (LUBA No 2022-012, Jan 5, 2023)

LUBA again dismissed, for lack of jurisdiction, petitioner’s appeals of a LUCS issued by a county planner. The planner concluded that a proposed limited license to use groundwater to serve a partially approved destination resort on EFU lands is compatible with the county's land use regulations. LUBA said that the issues are the same as in the other three cases and adopts by reference the basis for rejecting the claims.

Petitioner indicated in its reply that it would file a motion to transfer if it lost on jurisdiction, but it did not. Therefore, the case was dismissed.

Vanderberg v. City of Albany, __ Or LUBA __ (LUBA No 2022-082, Jan 5, 2023)

LUBA affirmed the city’s vacation of a right-of-way by ordinance. Pro se petitioner argued that the vacation will make the street private and, therefore, parking and trespassing issues will be harder to resolve. LUBA found the city made adequate findings regarding the applicable public interest criteria.

Woodburn Petroleum v. City of Woodburn, __ Or LUBA __ (LUBA No 2022-077, Jan 9, 2023)

LUBA affirmed city council's denial of petitioners' consolidated applications for a conditional use permit (CUP), design review, a street exception, and a phasing plan for development of a gas station, a convenience store/office, and a commercial office building on commercial property.

Petitioners argued that the city council erred by applying the CUP criteria to elements of the development proposal other than the gas station. However, because the staff report to the planning commission, which approved the application, applied CUP criteria to other project components other than the gas station, petitioner’s failure to object meant that the issue was not preserved.

Petitioners argued that the city erred in considering the whole conditional use site in evaluating whether the use was "compatible with the surrounding properties,” as opposed to just the land under the gas station element. LUBA held that it is a plausible interpretation by the city council that impacts be determined based on the whole property.

Petitioners also argued that the code compatibility requirement that required evaluation of the "suitability of the size, shape, location and topography of the site for the proposed use" did not allow the city to consider the surrounding area, just the site itself. LUBA again deferred to the city's interpretation in light of the code's greater purpose to ensure compatibility with the area.

Petitioners argued that the purpose section of the CUP code requires the city impose conditions rather than reject the petition. LUBA disagreed: it is the applicant's burden to demonstrate compliance with approval standards. *Wilson v. Washington Cty*, 63 Or LUBA 314 (2011).

LUBA also disagreed with petitioner's arguments that the record lacked substantial evidence relating to site suitability or traffic in support of the city denial. LUBA found the sited evidence adequate.

Finally, petitioners argued that the city was required to address the phasing plan, street exception, and design review applications, even if it denied the CUP. However, because the petitioners structured their application so that it was all one project and did not preserve the argument, or submit alternative plans that would allow consideration of the other applications if the CUP was denied, the city was not required to adopt findings addressing the remaining applications.

Oregon Coast Alliance v. Clatsop County, __ Or LUBA __ (LUBA No 2022-076, Jan 10, 2023)

LUBA affirmed the county's approval, on remand from *Oregon Coast Alliance v. Clatsop Cty.*, __ Or LUBA __ (LUBA No 2021-085, Apr 18, 2021) (*Smith I*), of a conditional use permit to construct an access road within an unimproved public right-of-way. In *Smith I*, the city was required to make more adequate findings to demonstrate the suitability of the site with respect to wetlands. Without reopening the record, the board of commissioners adopted subsequent findings and reapproved.

Interpretation: Petitioners argued that the board misinterpreted "natural hazards," "natural resource values," and "other features" as used in code. Under deferential ORS 197.829(9) (*Siporen*) review, LUBA upheld the county's interpretation that these terms primarily included mapped Goal resources and did not require a separate assessment of the site's physical characteristics. Petitioner also argued that the requirement to define the suitability characteristic "natural and physical features" should be interpreted to require the county to evaluate wetlands and seasonal flooding, including those not on a Goal 5 inventory. LUBA found that the city made an implied interpretation and gave deference to that interpretation.

Procedure: Petitioners argued that the commissioners erred in expanding the scope of the findings to include interpretations beyond the scope of the remand without letting petitioner submit new evidence on that topic. LUBA noted that proposed findings were public before the hearing on remand, so petitioners had an opportunity to object to the scope. The issue was waived because no objection was made. Regardless, there would be no error because petitioners did not identify any legal source of the alleged right to introduce additional evidence on remand to meet an expanded scope. Local governments have considerable discretion in determining procedures on remand, including not reopening the record. Moreover, LUBA disagreed that the commissioners actually expanded the scope of remand or that petitioners could demonstrate a prejudice to a substantive right by interpreting its standards.

Substantial evidence: Petitioners argued that the commissioner's finding that *no* seasonal flooding would occur was not supported by substantial evidence. The finding was instead that the record does not show that flooding made the site unsuitable. Petitioner did not contest that point, so LUBA affirmed.

Coopman v. City of Eugene, __ Or LUBA __ (LUBA No 2022-056, Jan 27, 2023)

LUBA affirmed the city's legislative adoption of amendments to the city code and plan (collectively, the middle housing amendments (MHA)) to implement ORS 197.758 (House Bill 2001 (2019)). Important because it describes when goal compliance is required when enacting legislative amendments, i.e. the “sequencing” issue.

Goal 11: Petitioners argued that Goal 11, OAR 660-046-0010 (3) and local code were not complied with because the city did not evaluate and formally plan for the increased demand on existing public facilities that may result from increased density due to the development of middle housing. Therefore, petitioners believed that the city was required to amend the Public Facility and Services Plan before adopting the MHAs. LUBA disagreed: the city is not required to evaluate the adequacy of its infrastructure prior to or concurrently with adopting the MHA. Code requirement to "coordinate" does not impose a specific sequence for planning infrastructure and the city’s interpretation of the use of the term was reasonable.

Goal 15: Petitioners argued that MHA amendments are inadequate because (1) they do not address whether the MHA will result in an intensification of uses that is incompatible with the Willamette Greenway; (2) they allow intensification of housing in the Greenway without reviewing the potential impacts; and (3) such required review would not be “clear and objective” in violation of ORS 197.307(4). LUBA held that the city was not required to comply with Goal 15 in adopting the MHA because the MHA does not amend the city’s implementation of Goal 15 through the city's Greenway permit program or allow any specific development within the Greenway. Any violation of ORS 197.307(4) by the implementation of the Greenway development standards is not under review.

Clear and objective: Petitioners argued MHA includes standards that are not clear and objective, in violation of ORS 197.307(4), in the definitions of "dwelling unit size" "and "income-qualified middle housing." The city used an elaborate formula to allow reduced minimum lot areas for dwelling units that are "less than 900 square feet." LUBA upheld the standards and explained that whether a standard “requires some interpretation in its application” does not make that term unclear or subjective. LUBA also explained that “area median income” is a term of art referring to HUD income calculations and that not specifying the term of the income restriction did not make interpretation “unclear.”

Note: Reversed in part in *Coopman v. Eugene*, 327 Or App 6 (2023) (not summarized) with respect to city’s addressing of Goal 11. Whether or not city had to amend its Public Facility and Services Plan, it must consider and explain how the ordinance is consistent with Goal 11.

Community Participation Organization 4M v. City of Tigard, __ Or LUBA __ (LUBA No 2022-055, Feb 1, 2023)

LUBA affirmed a city council’s approval of an annexation of three properties and a site development application for an assisted living/memory care facility.

Petitioners argued there was a procedural error in not providing 20-days prior notice of a planning commission hearing that was continued after technical errors. Whether 20 days applied to continuation or whether a de novo hearing would moot any earlier error was of no consequence because petitioners could not show any prejudice to their substantial rights caused by the alleged error.

Petitioners argued that the city erred in approving site design review without requiring a connector street be extended through the site. The city determined that a connector street was not required

because the rough proportionality requirement (*Nollan/Dolan)* would not be met by requiring street connection given the impacts of development. Designating the street as private as opposed to public would not resolve the issue. A local government can decide to simply not apply a standard that violates the rough proportionality standard; it is not required to pay to condemn land to meet the standard. And the city cannot ignore the rough proportionality standard under ORS 197.307 (4) simply because it is not clear and objective.

Central Oregon Landwatch v. Deschutes County, __ Or LUBA __ (LUBA No 2022-087, Feb 3, 2023)

LUBA remanded a hearings officer's declaratory ruling that development of a guest ranch, which was granted a conditional use permit (CUP) in 2002, had subsequently been "initiated." Under code, the permit would be void unless the use was "initiated" within two years. The county approved several extensions, with the last one ending in 2007. By that time, some infrastructure and cabins for guest ranches were partially constructed. From 2009 to 2021, development was discontinued. The new owner acquired the property in 2021.

Petitioner first argued that the new owner lacked standing to request a declaratory ruling, because under county code only the permit holder can request it. LUBA held under the code's plain text, the owner of the property and the permit holder can request a declaratory ruling.

Petitioner next argued that the request was untimely because the CUP was void after the last extension ended in 2007 and no request for proof of initiation of use was offered before then. LUBA found nothing in the code requiring that the declaratory ruling must be requested before the permit would expire.

However, LUBA remanded for consideration of petitioner's alternative argument that, since 2007, the development was discontinued and subsequent state and local regulations regarding guest ranches had changed since then, making any guest ranch a nonconforming use. The hearings officer did not address the applicability of ORS 215.130, which would apply to a nonconforming use that had been abandoned.

Note: Reversed in part at *Central Oregon Land Watch v. Deschutes Cty.*, 326 Or App 439 (2023) (not summarized), holding that the ORS 215.130 and abandonment issues were outside the scope of the decision on appeal.

Claus v. City of Sherwood, __ Or LUBA __ (LUBA No 2022-074, Feb 9, 2023)

LUBA affirmed the city council's approval of major modification of site plan to allow the applicant to remove existing development and to develop self-storage building in a light industrial (LI) zone.

In 1995, the property was subject to a planned unit development overlay (PUD) that allowed commercial warehousing. That zone code was amended in 1997 to outlaw such usage. In 2012, the city approved an application to subdivide the subject property into five lots to develop commercial uses in the future pursuant to former code provision and subject to a 2010 development agreement and 1995 PUD decision. In 2022, applicant was finally to present a site plan.

Petitioners argued that the city misconstrued the statute (ORS 92.040 (2)) that freezes the "local government laws" in effect at the time of the application for a subdivision, in that it should only apply to the code itself and not the development agreement or subdivision agreement. Accordingly, petitioners claimed that because commercial storage and mini warehousing were not allowed in the

LI zone at the time of the applicant's 2022 petition or 2012 subdivision, the city cannot now allow self-storage on the property.

LUBA agreed with the city. The plain language of ORS 92.040 (2) isn't limited to any particular kind of local government law, and it applies to any local government laws that implement the comprehensive plan that were in effect at time of subdivision application. Legislative intent reinforced that interpretation. Because the city had not established a period for vesting shorter than 10 years, under ORS 92.040 (3), the 2012 subdivision decision vested for the default period of 10 years.

Note: Related case under Claus v. City of Sherwood, __ Or LUBA __ (LUBA No 2022-080, Mar 9, 2023) (summarized below)

Johnson v. Lane County, __ Or LUBA __ (LUBA Nos 2022-066/067, Feb 13, 2023)

LUBA reversed the county's revocation of a 2012 legal lot verification (LLV) for three additional lot and seven subsequent series of lot line adjustments and two forest template dwelling applications. The planning director discovered that the deeds relied upon for the LLV were forged and issued notice of revocation of the verification and all subsequent approvals as allowed by code. On local appeal, the hearings officer affirmed. On appeal, petitioner argued that revocation was an impermissible attack on the final 2012 decision.

Finality: LUBA explains that land use law generally favors finality and quick decisions. LUBA found respondent's use of ORS 197.830(6) (statute of ultimate repose of 10 years for land use decisions) was not directly applicable. However, the county's theory, that it could proceed because ORCP 71 C allows collateral attack on judgments based on fraud, was also inapplicable. A land use decision is not a civil proceeding, so LUBA is not required to apply all judicial review principles in the same way as a court would. Also, the county's attempt to characterize this as a direct attack rather than a collateral one has no bearing. Other cases involving revocations were also inapplicable.

Ultimately, LUBA found no authority for local governments to adopt local provisions that would allow them to take actions inconsistent with the legislative policy of finality in land use decisions. Whether the county's error in approving the 2012 LLV was based on mistake or fraud was immaterial.

Ryan, concurring: Although no party brought it up and it is not necessary to reach the conclusion, as applied this revocation ordinance is a "retroactive ordinance" prohibited by ORS 92.285, 215.110(6) and *Church v. Grant Cty.,* 39 Or LUBA 646 (2000).

Note: Postscript, the Oregon Legislature gave the county a limited opportunity for county to validate the lots only for the "innocent purchasers" and to revoke the lots of the forger in Enrolled House Bill 3362 (2023) (not yet signed into law by Governor as of July 21, 2023).

Graser-Lindsay v. Clackamas County, __ Or LUBA __ (LUBA No 2022-033, Feb 13, 2023)

LUBA affirmed the county commissioners' approval of zoning map amendments to remove 56 acres of rural residential/farm & forest property from a 1990 historic overlay zone designation.

ORS 197.772 and OAR 660-023-0200(9) authorize local governments to remove historic resources from inventory under certain circumstances, including where the resource no longer qualifies for recognition. Pro se petitioner argues that this should only apply where the resource's disqualification was caused by a natural disaster but not disqualification due to the owner's neglect or deliberate action. LUBA holds that it cannot insert those omitted words into the code.

Petitioner's arguments regarding substantial evidence fail as LUBA points to evidence in the record supporting the county's conclusion.

1000 Friends of Oregon v. Marion County, __ Or LUBA __ (LUBA Nos 2022-085/086, Feb 16, 2023)

LUBA remanded the county's amendments to its code to allow an applicant to obtain a conditional use permit for a home occupation on resource (farm or forest) zones, to host events with up to 750 people.

Petitioners argued that an "event business" authorized by the amended code is not a "home occupation" within the meaning of the statute. ORS 215.283 (2)(i) and 215.488. Petitioners further took issue with the nature of event businesses and their scale.

LUBA held that although allowable nonfarm uses should be interpreted narrowly, nothing in the text of statute limits the type of "home occupation" to something that can only be carried out within a residential dwelling, and in fact it explicitly allows the use in "other buildings normally associated with uses permitted in the zone." Instead, the allowable occupation is any work that a person engages in to earn a living. The uses are limited only by explicit ORS 215.448 standards: the property must contain a dwelling and the home occupation must be operated by a resident.

Also, LUBA held that explicit agritourism allowed uses on ORS 215.283(4) do not constrain other allowances under the earlier-enacted "home occupation" exception. Under ORS 215.283(6), it explicitly does not displace alternative theories under which tourism uses could be allowed on farm lands.

However, LUBA agreed with petitioners that the county failed to adequately explain how hosting events with up to 750 people could realistically comply with the statutory five-employee limit in 215.448. Although legislative land use decisions need not be supported by findings, the decision and record must be sufficient to demonstrate applicable criteria were applied and required considerations were considered. Goal 2 also requires that legislative land use decisions be supported by an adequate factual base, equivalent to substantial evidence review. The county contended that an applicant would still have to satisfy the five-employee limit to obtain approval of a particular use, so a facial challenge to the statute should be inapplicable. LUBA disagreed, stating that the record needed to at least demonstrate some evidence that five employees could manage an event with up to 750 attendees to explain how that maximum is consistent with the statute.

Poppleton v. Wallowa County, __ Or LUBA __ (LUBA No 2022-096, Feb 17, 2023)

LUBA remanded the county commissioner's approval, on appeal from the planning commission's rejection, of a conditional use permit on timber land for a home occupation for a bed (yurt?) and breakfast.

Waiver: LUBA disagreed with the county's argument that the issue was unpreserved. There is no waiver where the *applicant* raised the issue of compliance with standards in notice of appeal to the board of commissioners and the board then made findings after the record was closed. It does not matter that the applicant raised the issue rather than the petitioner personally. The petitioner is not required to anticipate the inadequacy of the commissioners' findings.

Substantial evidence: LUBA found inadequate the county's purported findings that evidence in the record supports its conclusion that the proposal complies with all "structural and life-saving regulations." The county must show which facts were relied upon and how those facts lead to

conclusions that standards are satisfied. The county's findings were similarly inadequate to explain how the proposed use would not create a fire risk.

Medella Bison Ranch v. Jackson County, __ Or LUBA __ (LUBA No 2022-020, Feb 23, 2023)

LUBA affirmed the hearings officer's $33,000 fine imposed on a citation against petitioner for willfully failing to obtain necessary approval for a tenant's 33 greenhouses growing cannabis on EFU property.

Buildings "customarily provided in conjunction with farm use" are allowed outright and not subject to additional local criteria under ORS 215.283(1). The county reviews such uses under a Type 1 review through non-discretionary staff review that applies no other criteria. Petitioner argued Type 1 review is impermissible and that the code made the process optional. LUBA disagreed: the county review process was not an additional local "criteria" because it was not a substantive standard on which a decision may be based. And the discretion as to whether to require the approval was with the county, not the applicant.

Although the county committed procedural error by failing to list all provisions of the county code "involved" in the citation as required by the code, petitioner's substantial rights were not prejudiced because petitioner did not explain what would have been different had the county referred to all provisions.

Cerelli v. City of Manzanita, __ Or LUBA __ (LUBA No 2022-073, Feb 27, 2023)

LUBA remanded city council's denial of an application to establish a 34-unit hotel on residential/recreation land.

Exhaustion: ORS 197.825 (2)(a) and *Miles v. Florence*, 190 Or App 500 (2003) relate to complying with code requirements to identify issues within appeals to local appellate bodies. Raising an issue for the first time in testimony during city council proceedings is insufficient to preserve the issue for purposes of exhaustion waiver where code required the notice of appeal from the planning commission hearing to include "the specific grounds relied upon for review."

Statutory waiver: AKA "raise it or waive it" in ORS 197.797 (1) prohibits the petitioner from raising an objection to a city's interpretation of code first made in the planning commission staff reports but not argued to the planning commission during the evidentiary hearing.

120-day deadline: In order to meet the 120-day deadline under ORS 227.178, a city may expedite its local review process as long as in doing so they do not take procedural short-cuts that prejudice a party's substantial rights. *Wal-Mart v. Central Point*, 49 Or LUBA 472 (2005). The applicant has no automatic right extend the deadline under ORS 227.178 (5).

Procedure: Because the council's review of the planning commission's decision was not de novo, it was not an evidentiary hearing required to comply with ORS 197.797 and therefore no 20-day hearing notice was required. Given the applicant's choice not to seek de novo review and the city's separate adoption of reasons for its decision, the council's decision to uphold the planning commission's denial is not a pro forma denial made in bad faith.

Limited land use decision: However, LUBA remanded the matter because the applicant's proposed hotel was an allowed use in the zone, and therefore should have been processed as a limited land use decision under ORS 197.015(12). Under ORS 197.195(1), the city erred in using comprehensive

plan provisions as basis for decision because those provisions were not incorporated into its land use regulations.

On remand, LUBA also asks the city to clarify whether hotel units are being treated as residential units and whether the city is applying density standards.

Claus v. City of Sherwood, __ Or LUBA __ (LUBA No 2022-080, Mar 9, 2023)

LUBA affirmed the city council's approval of various applications to develop a self-storage building and hotel subject to a Planned Unit Development (PUD) overlay first approved in 1995.

Relevant facts and holdings regarding ORS 92.040 (2) and (3) were previously decided for Parcel 1 in *Claus v. Sherwood*, __ Or LUBA __ (LUBA No 2022-074, Feb 9, 2023) (summarized above). This decision reiterates those conclusions for Parcel 2 and addresses two other issues:

The applicant's proposed site plan made two different elections of applicable uses for different portions of Parcel 2: a self-storage building and a hotel. Each was an allowed use in 1995, but would not be allowed currently but for ORS 92.040, the 1995 PUD, and the 2012 subdivision and development agreement as discussed in *Claus I*. LUBA rejected petitioners' arguments that an applicant must make one single, binding election for the entire property. The text does not support such an interpretation, and LUBA quoted legislative history favoring flexibility for developers in support.

LUBA also rejected the petitioner's argument that the decision included inadequately inconsistent findings, finding no conflict as both documents indicated that the applicant elected to apply the current use standards to the hotel.

Landwatch Lane County v. Lane County, __ Or LUBA __ (LUBA No 2022-095, Mar 10, 2023)

LUBA affirmed the county's approval of an application for a legal lot verification in Lane County of a 10.02-acre EFU property. Applicants contend that the subject property was lawfully created in 1995. The dispute concerned whether or not it was legally distinct from Tax Lot 1301, which is immediately adjacent to TL 1300.

The parent parcel of the subject properties was sold in 1994. This transaction was partially seller-financed and secured by a trust deed encumbering only part of the parent. The buyer defaulted, and the trustee proceeded with a nonjudicial foreclosure of encumbered property. This resulted in (1) the seller owning most of the parent; and (2) the buyer retaining ownership of a small portion of the parent. Subsequent property line adjustments resulted in TL 1300 and TL 1301 becoming roughly equal in size.

The planning director denied a legal lot verification, which was reversed by a hearings officer.

The issue before LUBA was *not* whether the non-judicial foreclosure of the encumbered portion resulted in two lawfully created lots. Both county code and state law exclude land divisions resulting from lien foreclosures from the definition of "partitioning land." ORS 215.263(7).

Instead, petitioner's sole argument against the county's decision was that TL 1300 was created by the 1994 warranty deed (rather than the non-judicial foreclosure) and not in compliance with the applicable land use laws. LUBA rejected this argument as a result of petitioner misapprehending the legal significance of the two deeds and the non-judicial foreclosure. The 1994 warranty deed conveyed from seller to buyer the entire parent parcel and therefore could not have caused the division. The division occurred by operation of the trustee's deed from the non-judicial foreclosure.

Because the only argument was based on the operation of the warranty deed, LUBA denied the assignment of error and affirmed.

Schaefer v. Marion County, __ Or LUBA __ (LUBA No 2020-108, Mar 14, 2023)

On a second remand from the court of appeals, *Schaefer v. Marion Cty.,* 323 Or App 390 (2022), LUBA reversed Marion County's approval of various land use applications, including exceptions to Goal 3 and 14, to allow airport-related uses on EFU land adjacent to Aurora State Airport.

The Court of Appeals held that OAR 660-012-0060(5) prohibits a Goal 3 "reasons" exception under OAR 660-004-0022(1)(b) for commercial uses that is based solely on the land's access to the airport, because the airport is a "transportation facility". Because LUBA had not previously decided, the court left it up to LUBA to determine whether 660-012-0060(5) also prohibits a Goal 3 exception for industrial uses under OAR 660-004-0022(3)(a) and (c). LUBA recognized—given the logic of the court's decision—that the rule must also prohibit that exception, and reversed.

Haystack Rock LLC v. City of Cannon Beach, __ Or LUBA __ (LUBA No 2022-041, Mar 16, 2023)

LUBA remanded the city's approval of a development permit for a residence on a vacant lot and vehicular access via an undeveloped right-of-way.

LUBA first rejected the city's motion to dismiss for lack of jurisdiction under the "building permit" exception in ORS 197.015 (10)(b)(B). Upon considering the text, context, and legislative history, LUBA interpreted "building permit" to mean "a decision approving or denying specifications for the construction or alteration of a structure that is regulated under the state building code," which much approve or deny specifications for the construction or alteration of a structure. This approval was not a "building permit" because it approved matters beyond those covered by the building code, including the existence of the dwelling, access, grading, tree removal, and compliance with setbacks. LUBA noted that decisions on those matters did not apply provisions of code which cover building permits.

The notice and de novo hearing rights at ORS 227.175(10)(a)(A) apply to decisions that fall within the definition of a "statutory permit." A statutory permit requires a "discretionary approval of a proposed development of land." ORS 227.160(2). Petitioner argued that the city's approval of the driveway placement within a right-of-way requires the exercise of discretion. In particular, code requires consideration of public safety, adequate access for public use of the street right-of-way, effect to the appearance of the area, and effect on drainage or erosion of the adjacent property. LUBA agreed this required the exercise of discretion.

The city also generally agreed, but argued that its decision did not approve any development within a right-of-way, only on the applicant's property, so that code was inapplicable. The city decision would allow the development to meet the requirement that each lot have access to a street through two alternative methods: (1) the extension of a street into the right-of-way, or (2) a private driveway via an easement on the undeveloped right-of-way. The city reasoned that the subsequent permit for the access would be subject to the discretionary approval. LUBA disagreed, finding that although the decision contemplated the need for a future application and approval for a right-of-way permit, the city's decision already conditionally approved tree removal and development of vehicular access without explaining why the discretionary criteria were not involved in the decision under review. Because the petitioner did not learn of the decision during the decision's de novo appeal period, the lack of notice substantially affected petitioner's rights, necessitating that the decision be remanded.

Beath v. Douglas County, __ Or LUBA __ (LUBA No 2022-060, Mar 22, 2023)

LUBA remanded a county commissioners' approval of a mining site on a portion of a 553-acre property with various zoning designations and overlays. A portion of the proposed mining site contains significant wetlands listed on the county's Goal 5 inventory.

Goal 5 establishes a multi-step process for a local government to approve mining of mineral and aggregate resource sites. Under OAR 660-023-0180, the county may only approve mining and aggregate resource sites that have been added to the county's inventory of mineral resource sites. For that to occur first requires finding that it is a significant resource site. After it is included on the inventory as significant, a local government must then identify and attempt to mitigate any conflicts with uses on surrounding land. For any conflicts that cannot be minimized, the local government must perform an economic, environmental, social, and energy (ESEE) evaluation weighing the consequences of allowing, limiting, or not allowing mining on the site. For mineral and aggregate resources, the administrative rules set out several technical indicators that an applicant must demonstrate.

Petitioners first argued that the applicant's final submission to the planning commission (which should have been a final argument) included new evidence. LUBA rejected this argument because petitioners did not allege or describe how their substantial rights were prejudiced by the consideration of that new evidence.

To determine whether a mineral resource site is significant (such that it may be added to the local government's resource list), the applicant must submit "information regarding the quantity, quality, and location of the resource." OAR 660-023-0180(3). This information must be sufficient to establish one of several qualitative indicators, such an estimate of the available resource based on "[a] representative set of samples."

To satisfy these requirements, the applicant identified the entire 49-acre parcel as the mining site (rather than specifying where mining would take place within that site) and submitted a single gravel sample taken from the site. LUBA found this failed to meet the standards in OAR 660-023-0180 (3):

Location. To inventory the aggregate resources the applicant must identify where on the mining site those resources are located. It is not sufficient to submit a proposed site layout that shows where various extraction processes will occur.

Quality. A single sample does not satisfy the requirement for a "representative set of samples." The term "set of samples" requires more than one sample. It likewise is not representative, particularly in the absence of information regarding the location of the aggregate on the site.

LUBA likewise held that the county's consideration of conflicts with surrounding uses was deficient. The rule requires, at a minimum, an evaluation of conflicts within 1,500 feet of the proposed impact area. LUBA found a residence and farm that were likely within that impact area but not considered. LUBA also found that the potential conflicts identified by the county were incomplete: in evaluating dust and noise, they did not consider all sources from the proposed site. The county's findings also did not address potential surface and groundwater contamination. Finally, the county's reliance on the impact of mining operations on agriculture elsewhere in the County was not site-specific as required by OAR 660-023-0180(5)(b)(E).

After identifying potential conflicts, the county must find they could each be minimized before approving mining on the site under the ESEE analysis. The deficiencies in the county's identification

of conflicts prevented LUBA from evaluating the county's conclusion that conflicts would be minimized or petitioners' challenge to the County's ESEE analysis.

Syrah v. Jackson County, __ Or LUBA __ (LUBA No 2022-108, Mar 20, 2023)

LUBA transferred to the circuit court this appeal of a decision to approve a property-line adjustment and farm use dwelling. Based upon the circuit court's prior order of writ of mandamus, the circuit court maintains exclusive jurisdiction over all decisions and appeals regarding the application. ORS 215.429(2).

Haugen v. City of Scappoose, __ Or LUBA __ (Order, LUBA No 2023-001, Mar 29, 2023)

LUBA denied petitioner 's objection to the inclusion in the record of an email from a city attorney to a city planning director the day after the city council's final hearing on the matter. Petitioner argued that it was not placed before the final decision maker during the course of proceedings before the final decision maker.

LUBA allowed the inclusion of the document, because under *Montgomery v. Dunes City*, 59 Or LUBA 519, 520 (2009), the city code may define the scope of the record and the city's code provides that the record shall include all correspondence relating to the record.

Friends of Yamhill County v. Yamhill County, 325 Or App 282 (2023)

The Court of Appeals reversed LUBA's order in *Friends of Yamhill Cty. v. Yamhill Cty,* __ Or LUBA __ (LUBA No 2022-081, Dec 27, 2022) (not summarized), upholding the county's approval of the conditional use permit for the development of an 8,200 square foot "farm dwelling" for a bed and breakfast. The dwelling would include an innkeeper's suite and nine guest suites, each with their own bathroom, kitchen, common area and fitness room. LUBA had held that so long as the structure could be used as a residence, it qualified as a "dwelling" for purposes of ORS 215.448.

The court found that the structure is not a "dwelling" under ORS 215, finding that the proper inquiry is not whether a proposed structure *could* be used as a dwelling or whether it contains someone's residence, but whether the structure is *primarily* dedicated as a dwelling for the use of a farm family. The entire structure must be a dwelling, not merely a portion of it. The structure's design and applicable building code standards, which included places of public accommodation standards, are relevant to determine the nature of the structure. This development does not comply.

Moreover, code defined "dwelling" as "a building containing one dwelling unit designed for and occupied by one family only." The county's interpretation of this definition to allow the proposed use was not plausible and thus not entitled to deference.

Luther v. City of Albany, __ Or LUBA __ (LUBA No 2022-107, Apr 7, 2023)

LUBA dismissed, for want of jurisdiction, petitioner's challenge to the city's interpretation of a code provision requiring petitioner to install a backflow device on a well located on their property. The city's interpretation rejected the petitioner's arguments made during a regular city council meeting. City council denied relief.

In asserting that LUBA had jurisdiction, petitioner argued that the code provision implements the city's comprehensive plan which "provides a framework for making better decisions about the uses

of land and its resources" and Goal 6, so it "concerns the application of a comprehensive plan provision."

LUBA disagreed, holding that general statements in plan aren't enough to demonstrate the municipal code provision implements the comprehensive plan. The plan "must contain provisions intended as standards or criteria for making the appealed decision."

LUBA also held that the decision was not a "significant impacts" land use decision. Significant impacts "must create an actual, qualitatively or quantitatively significant impact on present or future land uses." This means that: (1) petitioner must identify the non-land-use standards that petitioner believes apply to the decision; and (2) those standards must have some direct bearing on petitioner's use of their land. While petitioner met the former, they didn't establish that the application of that standard would have any bearing on petitioner's use of their land.

Phillips v. Polk County, __ Or LUBA __ (LUBA No 2023-014, Apr 13, 2023)

For lack of jurisdiction, LUBA dismissed an appeal of a county board of commissioners' vacation of an unimproved right-of-way between petitioner's and applicant's land.

LUBA held the fact that a road vacation touches on land use in the surrounding area does not mean that the provisions of the county's comprehensive plan apply as approval standards. *Billington v. Polk Cty.*, 299 Or 471 (1985). Petitioner failed to develop an argument that the county was required to apply plan goals.

LUBA also held the decision was not a "significant impacts" land use decision under *Pendleton v. Kerns*, 294 Or 126 (1982). Petitioner argued that the vacation will require petitioner to construct new access, take land out of farm production, and to reevaluate future lot line adjustments and location of future residence. LUBA found those impacts were speculative and their relationship to the vacation application was not sufficiently explained.

Central Oregon Landwatch v. Deschutes County, __ Or LUBA __ (LUBA No 2023-008, Apr 24, 2023)

LUBA remanded a county board of commissioners' approval of a plan amendment redesignating and rezoning a 19-acre property from EFU to rural industrial (RI). The property was also within a Landscape Management (LM) zone that applies Goal 5 and identifies all land within ¼ mile of Highway 97 as a scenic resource. Applicants did not request removal of the LM zone.

Petitioner argued that the county erred in finding consistency with Goal 14, because the RI zone doesn't permit urban uses and findings applied universally to any application relying on RI zone provisions and that any analysis had to be site-specific. LUBA disagreed, holding that the county was entitled to rely on the acknowledged RI zone to ensure compliance with Goal 14, citing *Central Oregon Landwatch v. Deschutes Cty.*, __ Or LUBA __ (LUBA No 2022-075, Dec 6, 2022) *aff'd*, 324 Or App 655 (2023).

Petitioner next argued that the county erred in finding consistency with Goal 3. The applicant introduced scientific evidence showing 53% of land was unsuitable for farming and that canal and infrastructure areas on the property were unsuitable. Petitioner argued that this conclusion was not supported by substantial evidence because the NRCS map for the property showed agricultural soils, the scientist should have tested the soil underneath the existing infrastructure. LUBA disagreed, holding that the county reasonably relied on the site-specific soil survey in determining that the property was unsuitable.

Petitioner then argued the land was agricultural land because the land's current use of the canal is for water impoundment and therefore qualifies as a farm use rendering the land suitable for a farm use under ORS 215.203(2)(a). LUBA disagreed, stating that whether the property *is* employed as farm use doesn't answer whether the land *is suitable* for being used to obtain a profit through farm use. The commissioners addressed the correct argument, and petitioner's disagreement provided no basis for reversal or remand.

However, LUBA agreed with petitioner's argument that the decision violated Goal 5 by allowing uses on the portion of property included within the inventory without first evaluating whether the newly allowed uses would conflict with the scenic resource protections. The county and applicant argued that because the LM zone does not prohibit construction outright and the PAPA did not remove the property from the LM zone, the Goal 5 resource protections would remain and could be reviewed during site plan approval prior to construction. LUBA held that the county misconstrued applicable law and needed to apply Goal 5 under OAR 660-023-0250 (3) in addressing whether new allowable uses in changing from EFU to RI zoning would conflict with protected Goal 5 resources.

Shaw v. Jackson County, __ Or LUBA __ (LUBA No 2023-010, Apr 24, 2023)

LUBA affirmed the county's approval of a home occupation use for short-term lodging in existing living space above the garage of the applicant's home on property zoned rural residential (RR).

Petitioner, a neighbor, argued that the RR zone does not allow for short-term rentals because the county code defines "visitor accommodations" as commercial uses. Further, the code made no express allowance for short-term rentals in the RR zone, only large and small destination resorts and guest ranches, while prohibiting hotels and motels.

LUBA disagreed, finding that because the applicant lived on the property this use could fit within the code's allowance for home occupations. "Home occupation" does not describe any particular use or activity as long as the uses are accessory to the primary residential use. Therefore, the county may allow a broad range of home occupations and may impose limits on those uses. *1000 Friends of Oregon v. Marion Cty.*, __ Or LUBA __ (LUBA Nos 2022-085/086, Feb 16, 2023) (summarized above); ORS 215.448 (2).

LUBA also disagreed with petitioner's procedural argument that the county erred in reviewing the home occupation application as a Type 1 review instead of Type 3. LUBA found that this home occupation was not a more intensive "home business" and therefore was not required to be reviewed under Type 3 review which would require a notice and a hearing.

Lenhardt v. City of Newberg, __ Or LUBA __ (Order, LUBA Nos 2023-021/023, Apr 28, 2023)

LUBA denied the intervenor's motion to dismiss for lack of jurisdiction under ORS 197.015 (10)(b)(A) ("ministerial exclusion") and (B) ("building permit exclusion"). LUBA found that the code provision that required the city to categorize a proposal to determine the type of procedure required, itself required the city to exercise legal judgment and evaluation, rendering the decision a land use decision.

Backer v. City of Salem, 325 Or App 809 (2023) (Mem. Op.)

The Court of Appeals sustained LUBA's decision to affirm, in *Backer v. Salem*, __ Or LUBA __ (LUBA No 2022-053, Dec 1, 2022) (summarized above), a city planning commissioner's approval of a tentative subdivision plan.

The court largely did not consider petitioners' arguments on appeal because they were different from the arguments made in their petition to LUBA. Before LUBA, petitioners argued that the applicant had not met its burden of proof. Now they were arguing that the city's interpretation was legally incorrect. Because petitioners did not challenge the city's interpretation of the phrase "reasonable design alternative" before LUBA, their argument was not preserved.

The court also rejected petitioners' argument that the city had improperly shifted the burden to the applicant's opponents to propose reasonable design alternatives. LUBA held, and the court agreed, that the city had not done so because of the new alternative plan in applicant's revised application.

The court also rejected two substantial evidence challenges, finding that LUBA did not err in applying its standard of review.

Rogue Advocates v. City of Ashland, __ Or LUBA __ (LUBA No 2023-007, May 9, 2023)

LUBA remanded the city council's approval, following LUBA's prior reversal of the city's approval in *Rogue Advocates v. Ashland*, __ Or LUBA __ (LUBA No 2021-009, May 12, 2021) (*Casita I*), of annexation, street design standard exceptions, a subdivision "outline plan," site design and tree removal for two parcels within the UGB.

In *Casita I*, LUBA interpreted code requirements only to allow exceptions to street design standards when new development is proposed and not in order to meet the requirements for annexation. In response, the city amended its code (1) to require annexation applications be filed jointly with planning applications for the annexed property and (2) to make exceptions to street design standards available to annexation applications.

The development proposed by applicants included sidewalks, some length of which would not meet the applicable street design standards. Applicants again had sought an exception for approval of those sub-standard sidewalks. Again, the city granted it.

Outline Plan: Petitioners first challenged the city's approval of the "outline plan" whose applicable approval criteria required that the development "comply with the *street* standards." Petitioners argued that the different language of "street *design* standards" in the exception-process provision prohibited the approval of an exception. LUBA accepted the city's interpretation—that the request for an exception allowed the application to meet this requirement and that the terms were interchangeable—as a permissible interpretation and gave it deference. *Siporen*; ORS 197.829(1).

The approval criteria for an "outline plan" also specified requirements for on-street parking. The city again found that the applicant's street design exception would suffice. At LUBA, the city agreed that street design exceptions do not allow parking approval. The city instead argued that subsequent legislation mooted the applicability of its on-street parking criteria. Neither party provided LUBA a citation to or the text of the legislation that the city called the "Oregon's Equitable Communities and Climate Friendly Act of 2023" (ed: which is not a thing), but they agreed that the decision was made before the purported effective date of the purported Act, so mootness did not apply. LUBA rejected the city's alternative argument that the on-street parking requirement can be satisfied by spaces on "association-owned land," because the argument was not made within the city council's findings, but an argument made for the first time in its response brief.

Highway Improvements: LUBA agreed with the city that when the code requires compliance with external standards, the city is not required to individually list and deem satisfied each individual standard. ODOT's submission of a letter stating that its requirements would be exceeded constituted

substantial evidence. And the council's conditions of approval requiring ODOT approval before final approval was sufficient to assure requirements will be met.

The applicant proposed a number of public improvements along the highway, which the city then included as conditions of approval. Petitioner argued that the city's decision did not address *Nollan/Dolan* requirements of having an "essential nexus" between those conditions and their public purpose. LUBA held the doctrine does not apply to improvements proposed by an applicant that are incorporated into the city's approval.

LUBA upheld the city's approval of highway improvements over other objections by petitioners, holding that the city's findings were sufficiently supported by evidence, notwithstanding the petitioner's contrary arguments or understandings of the findings or evidence, again, particularly considering ODOT's expertise and ongoing permit oversight and approval for highway improvements.

Affordable unit requirements: The municipal code provides two alternate methods to comply with the affordable units requirement of annexation: provide the units directly or provide sufficient land and infrastructure to a city or nonprofit developer. As a condition of approval, the city required applicants to elect between the two options in its final plan submittal: build the 37 affordable units or dedicate two improved building pads with facilities as illustrated. Because the city found that both options were feasible and would comply with the requirement, LUBA concluded the decision did not impermissibly defer a feasibility determination to a future, non-public process.

The affordable units requirement for annexation sets the minimum area for studios at 350 square feet and for one-bedroom apartments at 500 square feet. Applicants proposed market rate 250 square foot studios and 499 square foot one-bedroom units throughout the development and the affordable unit would be "similar in proportion." The city decided that the application complied because the proposed configurations of units was "comparable" or "similar" to those required by the municipal code. LUBA held that insufficient when the code requires that the units "shall" comply with the listed minimums and no code provision or condition of approval required future compliance at the final plan approval stage.

Icon Construction & Development v. City of Oregon City, __ Or LUBA __ (LUBA No 2022-100, May 19, 2023)

LUBA remanded the city commission's denial of an application for a general development permit, and various variances and adjustments. The applicant sought approval of a "master plan" for 476 residential lots on 92 acres to be completed over six phases.

The planning commission held six hearings on the matter and approved the application. Neighbors filed a local appeal. The commission held a single "on the record" hearing limited to argument only and subsequently denied the application.

ORS 197.522: LUBA agreed with the applicant that the city had committed procedural error by not allowing the petitioner to propose amendments to its application or conditions of approval under ORS 197.522(3) prior to the city's final denial of an application for needed housing. LUBA rejected each arguments that ORS 197.522 was not applicable. First, the city argued that this was not an application for the "development of housing" because it was only the first stage of a multi-part process and that no housing will result from this decision alone. However, ORS 197.522 only requires that the application be "an approval necessary" for needed housing.

Implicitly, LUBA appears to agree that ORS 197.522 does not apply where the applicant elects the "discretionary approval" path under ORS 197.307 (6). And the city argued that the applicant had

chosen such a path although a "clear and objective path" under ORS 197.307 (4) was available under the county's "future urban" zoning standards. LUBA pointed out that even if that were a clear and objective path, the law requires *the city* to provide a clear and objective approval path, and the county's zoning was not intended to be the final zoning under which urban-density housing would be built.

LUBA also rejected the city's argument that the applicant's request for a variance obviates the requirement that the city only apply clear and objective criteria to the entire application. The applicant pointed out that the code had conflicting standards that could not be applied consistently in this case without some sort of variance. LUBA concluded that it did not matter because the city never reached the merits of the variance, therefore the city was required to apply only clear and objective criteria because the code only provided one path for approval.

Finding that ORS 197.522 was applicable, LUBA turned to what ORS 197.522 (as amended in 2015) required of the city. LUBA concluded that the statute means exactly what it says: when the applicant requested an opportunity to amend the application or propose conditions of approval, the city was required to give notice of the reasons for denial and allow the applicant an opportunity to offer an amendment or to propose conditions "prior to making a final decision on the application." LUBA found that the failure to do so was a procedural error that prejudiced the rights of the applicant.

Clear and objective path: Petitioner argued that the city commission erred by not addressing certain objections made by the petitioner to planning commission related to the needed housing statute. The city commission had refused to hear the applicant's "needed housing" arguments, arguing that it was not within a notice of appeal (ed: because why would the applicant appeal the planning commission's approval?). LUBA concluded that the city's interpretation of its code to limit the issues heard by the city commission on appeal was plausible and therefore was not in error.

However, LUBA did not agree with the city that the applicant had waived that argument before LUBA by failing to exhaust administrative appeals in failing to appeal the planning commission's approval. Under *Miles v. Florence*, 190 Or App 500 (2003), waiver applies only to issues that could have been filed in the local appeal. Because there was no need for the prevailing applicant to appeal the planning commission's approval, and the applicant had preserved the issue at the planning commission level, waiver was inapplicable and the issue preserved for appeal. On the merits, LUBA found that the city did not apply clear and objective standards, and the city had conceded as much.

As to petitioner's other objections, LUBA noted that because on remand the city may only apply clear and objective standards, there was no need to resolve them.

Chapter 4

Presentation Slides: Water Rights for Real Estate Attorneys

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Dunn Carney LLP
Portland, Oregon

Water Rights for Real Estate Attorneys

Best Practices for Managing Water Rights in Real Estate Transactions



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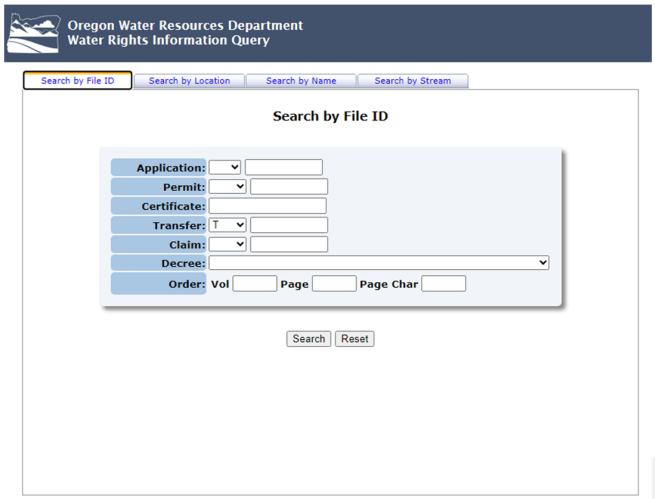
Oregon State Bar Real Estate & Land Use Section

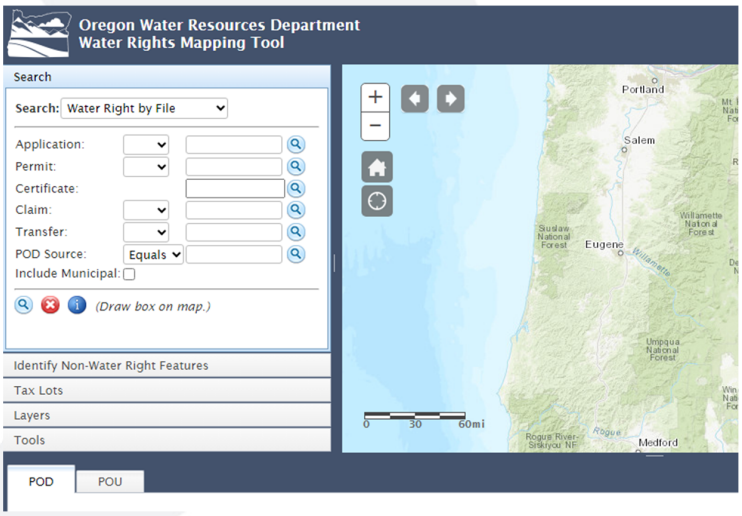
The Right to Use Water

- Usufruct Right – The right to use water, not the right to particular molecules of water
  - Source; Priority; Point of Diversion; Place of Use; Season of Use; Rate & Duty
- Defeasible Right – Subject to State regulation & capable of loss (nonuse, waste, violation)
- Applications/Permits = Personal Property
- Certificates/Vested Rights = Real Property (appurtenance of real property)
  - Constitutionally protected, see *Klamath Irrigation District v. US*, 348 Or 15 (2010)
- Exempt uses of water:
  - ORS 537.141 (surface water); ORS 537.545 (groundwater) – **What about springs?**
  - Priority dates & capable of regulation by priority

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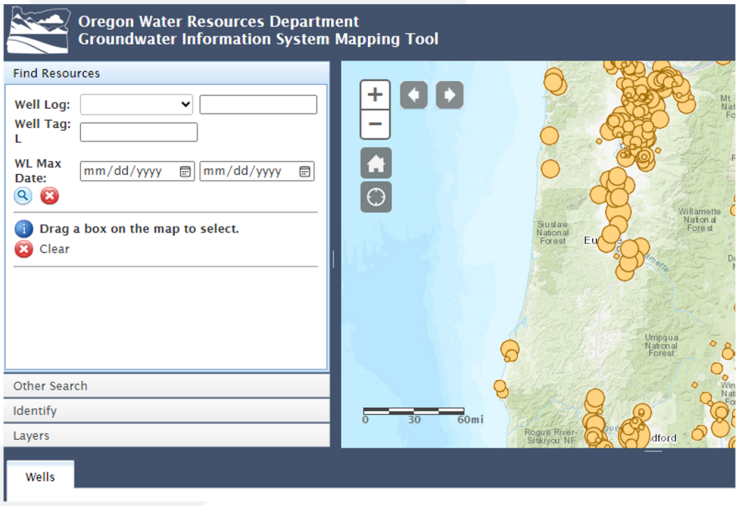
Researching Water Rights





Researching Water Rights (Groundwater/Wells)





Letter of Intent (LOI)

- Outline the terms of the proposed property transaction
- Does the property include associated water rights?
- Does the buyer intend to purchase the associated water rights, or will the seller reserve the rights from the transaction?
    - Default in Oregon: Water rights transfer with real property unless expressly reserved (appurtenances to real property)
- Is the property being subdivided so that water rights will be split or shared between different owners?
    - Issues may arise when multiple landowners share development or reporting responsibilities
    - Well sharing agreements

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Purchase & Sale Agreement (PSA)

- The purpose of the PSA is to give the buyer the exclusive opportunity to purchase the property, allow for due diligence, define the parties' obligations, and allocate the costs & risks
- Include water right considerations in the PSA:
    - Is water right good standing a contingency for the transaction to proceed?
    - Access Issues – Will the transaction include access to the source of water and all water right infrastructure?
    - Personal property – Will the transaction include any water right equipment included that is not a fixture of the property?

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Representations & Warranties

- Caveat Emptor – Buyer Beware!
- Seller would like to sell the property "as is" and make buyer rely on their own due diligence
  - Consider any representations made in marketing the property
- Buyer would like to purchase the property with limited risks
- Potential Water Right Reps & Warranties:
  - Water rights are in good standing and not at risk of cancellation
  - Water rights have been exercised in accordance with all terms and conditions
  - Water has been used under the water rights at least once every five years according to terms and conditions
  - The water source has been sufficient for exercise of the water rights
  - Define "Property" to include water rights so all other reps & warranties apply
- Will Reps & Warranties survive closing?
  - Consider whether seller must take any actions post-closing

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Title Review

- Water rights in Oregon are **not** typically recorded in county property records
  - Exceptions:
    - Water rights expressly granted or reserved by deed
    - Access for water rights (unless access is by implied right)
    - Agreements (contracts) impacting water rights
- Access for use of water is most often the fundamental issue for water rights at the title review stage
  - May object to rights asserted against the subject property
  - May become aware of un-adjudicated implied rights that may create disputes in the future
  - May become aware of the terms of access agreements & what that entails

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Due Diligence Inspections

- Phase I & II environmental inspections do not typically detail water rights
- Appraisals may provide a cursory mention of water rights, but are often incomplete or incorrect
- Seller's domestic well testing limited to arsenic, nitrates, and total coliform bacteria (ORS 448.271)
- Conclusion: Need to complete an independent review of the water rights!
- Resources:
    - OWRD records (online & paper files)
    - Historic aerial imaging (Google Earth & United States Geological Survey EarthExplorer)
    - Crop receipts or expenditures related to water (power bills, fertilizer or seed bills, FSA crop reports, irrigation district allocation records, etc.)
    - History of property use (from sellers, lessees, or neighbors)
    - On the ground inspections

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Due Diligence & Special Considerations

- Until a certificate is issued, **perfection** issues may arise:
    - Well construction may not be approved (review well logs, consult with driller)
    - Terms of water right permits may not be met (consider extension of time)
    - If subdividing a property, consider division of water right
- After a certificate is issued, **compliance** issues may arise:
    - Has water been used at least once every five years?
    - Have all measurements and reports been completed?
- Exempt uses
    - Well sharing agreements are the most common consideration
- Future intended uses & development – Is further development allowed?

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Financing

- Lending institutions may require co-ownership of water rights
    - The institution might already be a co-owner with the seller
- If you make changes in the future, you may need the lender's permission

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Closing

- Deed Form
    - Water rights may be listed in deeds
    - More typically, deeds include language such as: "all tenements, hereditaments, and appurtenances including but not limited to water rights"
    - Make sure to include or reserve easements for access to water source & infrastructure
- Applications/permits are personal property and should be assigned
    - The best practice is to include a Request for Assignment form in the closing documents
    - May alternatively be done by proof of ownership post-closing
- Bill of Sale – include any water use equipment that is not a fixture (for example, a portable pump, hand lines, etc.)

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Post-Closing Activities

- File Ownership Updates
- Submit a Request for Assignment
- Apply for a Well ID within 30 days of purchase (ORS 537.789)
- Take any actions needed to correct identified water right deficiencies (an extension of time may be necessary)
- Ensure compliance with water right conditions (e.g., measurement and reporting)
- Perfect water right permits or transfers (Claims of Beneficial Use)
- Use water at least once every 5 years to avoid cancellation due to forfeiture! (ORS 540.610)

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Questions?



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Chapter 5

Hot Topics in Oregon Residential Landlord-Tenant Law in the Post-Covid Landscape

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Troy Pickard
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FROM THE DESK OF:
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HB 2001: OREGON'S NEW NONPAYMENT LANDSCAPE
What's Old is New Again & The Perpetual Cure Period

Anna S. McCormack

I. NONPAYMENT NOTICES

A. GOODBYE 72; HELLO AGAIN, 10-DAY NONPAYMENT NOTICE

1. 72-Hour Notices Are Gone Forever

For more than two decades, the 72-Hour Notice reigned as the primary method of termination for nonpayment of rent. The 72-Hour Notice was "temporarily" retired and replaced with a 10-Day Nonpayment Notice pursuant to pandemic-era legislation. On October 1, 2022, the 72-Hour Notice came out of its pandemic-era retirement and was once again legal under state law. However, that turned out to be more of a Tom Brady un-retirement, as five months later, the 72-Hour Notice was permanently retired pursuant to HB 2001. So long and adieu, 72-Hour Notice.

2. 10-Day Nonpayment Notices Are Back and Here to Stay

HB 2001 has resurrected the pandemic-era 10-Day Nonpayment Notice. The 10-Day Nonpayment Notice permanently replaces the 72-Hour Notice. A 10-Day Nonpayment Notice cannot be served until the 8th day of the rental period and can only demand rent.

B. 30-DAY NONPAYMENT NOTICES

A 30-Day Nonpayment Notice (aka 30-Day for Cause or 14/30 for nonpayment) is still an option, and in some instances will be a better option than a 10-Day Nonpayment Notice because the landlord can demand payment of non-rent items like late fees and utilities.

C. NEW STATUTORY DISCLOSURE REQUIRED FOR NONPAYMENT NOTICES & FEDs

1. Statutory Disclosure Must be Served with Nonpayment Notices

Landlords must serve statutory disclosure with any nonpayment termination notice—10-Day Nonpaymenand/or 30-Day Nonpayment.
The only exception is a termination notice that demands payment solely for damage to the premises. See last page for statutory disclosure.

2. Statutory Disclosure Must be Served with FED Summons

3. No Statutory Disclosure, No Eviction for Nonpayment

A failure to serve the statutory disclosure with any nonpayment notice or any FED Summons in any nonpayment FED is a fatal defect and will result in dismissal of any nonpayment FED case.

II. CHANGES IN FED (EVICTION) PROCESS

A. NEW REQUIREMENT: POSSESSION DECLARATION (All FEDs)

In order to obtain a default judgment, landlords must now file a Declaration or testify under oath at the first appearance that:

1. Landlord Has No Knowledge of Surrender

The landlord must declare/swear under oath that the landlord does not have knowledge that the tenant has delivered possession of the premises as described in ORS 90.147(2).

2. Landlord Reasonably Believes Tenant Remains in Possession

This requirement applies in all FED cases, not just nonpayment cases.

B. NONPAYMENT FED TIMELINES LENGTHENED

1. First Appearances Scheduled at Least 15 Days After Filing Fee Paid

FEDs that aren’t based on nonpayment may still be scheduled as early as 8 days after the filing fee is paid.

2. Trials Scheduled at Least 15 Days After First Appearance

a) Nonpayment Trials 15-30 Days After First Appearance

Nonpayment FED trials cannot be scheduled earlier than 15 days after the first appearance and must be scheduled within 30 days of the first appearance—unless there isn't a judge available.

b) All Other FED Trials Within 15 Days after First Appearance

FEDs that aren't based on nonpayment may still be scheduled within 15 days of the first appearance—unless there isn't a judge available.

C. NEW DEFENSE: LANDLORD "CAUSED" TENANT TO NOT TENDER RENT

1. Failure to Reasonably Participate with a Rental Assistance Program

A landlord who fails to reasonably participate with a rental assistance program will be deemed to have "caused" the tenant to not tender rent. The result is a dismissal of the nonpayment FED (the landlord loses the case).

There is now a permanent obligation to actively cooperate with rental assistance agencies and to accept rental assistance.

2. Other Landlord Actions that "Cause" Tenant to Not Tender Rent

A landlord's failure to reasonably participate with a rental assistance program is not the exclusive basis for a finding that a landlord "caused" the nonpayment of rent. Time and litigation will tell how this provision is interpreted.

3. Effect: Dismissal of FED (Landlord Loses)

If a judge finds that the landlord "caused" the non-tender of rent by failing to reasonably participate with a rental assistance program, or by other actions, the judge is required to dismiss the FED. The landlord loses the case and is liable for the tenant's court cost and attorney fees. The tenant retains possession of the premises.

D. NEW POST-TERMINATION RIGHT TO CURE NONPAYMENT NOTICE

A judge must dismiss the nonpayment FED if they find that:

1. Payment/Rental Assistance Covering Amount in Notice Was Tendered

If the tenant tendered or caused to be tendered rental assistance or any other payment covering the nonpayment amount owed under the termination notice for nonpayment, the judge must dismiss the case.

a) Applies Up Until Trial

And perhaps even later? The statute isn't clear.

b) Tenant Only Has to Cure Notice, Not Total Balance Due

Let that sink in for a minute.

2. Tenant Not Entitled to Attorney Fees or Costs; Landlord Gets Filing Fee

If a nonpayment FED is dismissed because the tenant tendered payment sufficient to cure the underlying nonpayment notice at some point after the case was filed, the landlord is not liable for the tenant's attorney fees and costs. The landlord may also charge the tenant for their filing fees (but not service fees or attorney fees).

Summary: A nonpayment termination notice isn't really a termination notice anymore. The cure date isn't really the cure date. Weeks or even months after both the cure date and termination date have passed, the tenant will be able to cure the notice and resurrect the tenancy. The landlord will have to absorb the attorney fees incurred in filing the nonpayment FED and can only charge the tenant for the filing fee . . . and the process will start all over again with the rents that have accrued in the interim.

Anna S. McCormack has been a litigator with Warren Allen LLP since 2003 and represents many of the region's premier management companies and ownership groups. Ms. McCormack's civil litigation practice emphasizes landlord's rights and business disputes. She has appeared in state, federal, tribal, and municipal courts, as well as administrative and appellate proceedings. Ms. McCormack is committed to making the legal process understandable to her clients, and to finding practical and creative alternatives to litigation when possible. Ms. McCormack attained a B.A. summa cum laude from the University of Cincinnati and earned her J.D. cum laude from the Northwestern School of Law of Lewis and Clark College. When she is not parsing the Portland landlord/tenant ordinances or pondering Oregon's utility billing statute, Ms. McCormack enjoys imagining what she might do if she had spare time.

THE INFORMATION AND MATERIALS PRESENTED BY ANNA S. McCORMACK AND WARREN ALLEN LLP ARE INTENDED TO BE EDUCATIONAL ONLY AND ARE NOT SPECIFIC LEGAL ADVICE. THE LAW CAN CHANGE VERY RAPIDLY, SO DO NOT ASSUME THAT ANY LAW DISCUSSED HEREIN APPLIES IN PERPETUITY OR THAT IT REMAINS AS DESCRIBED HEREIN. THESE MATERIALS DO NOT COVER OTHER FEDERAL, STATE, OR LOCAL LAWS THAT MAY APPLY.

NOTICE RE: EVICTION FOR NONPAYMENT OF RENT

THIS IS AN IMPORTANT NOTICE OF WHERE TO GET HELP IF YOU ARE FACING POTENTIAL EVICTION FOR NONPAYMENT

(Spanish) Este formulario está disponible en español en:
(Russian) Бланк этого документа можно получить на русском языке в:
(Vietnamese) Đơn này có bằng tiếng Việt tại:
(Traditional Chinese) 本表格的繁体中文版在:
(Korean) 한국어로 번역된 양식은 다음 웹 싸이트에서 찾을 수 있습니다:
https://www.courts.oregon.gov/forms/Pages/landlord-tenant.aspx

You must comply with deadlines identified in a notice of nonpayment or you risk losing your housing

Rental assistance and support services may be available. Dial 2-1-1 or go to www.211info.org. Find a local service provider at https://www.oregon.gov/ohcs/housing-assistance/pages/emergency-rental-assistance.aspx

Low-income tenants may be able to receive free or low-cost legal advice by contacting a legal aid organization. Go to https://oregonlawhelp.org to find an office near you. The Oregon State Bar provides information about legal assistance programs at www.osbar.org/public



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SB 611 (2023): NEW LIMITS ON RENT INCREASES

Effective July 6, 2023, SB 611 significantly decreases the maximum rent increase that can be given in most cases.

BACKGROUND: In 2019, Oregon passed SB 608, which created a state-wide rent control system. Under that system, landlords were generally limited to raising the rent in any 12-month period by 7% plus the CPI measure of inflation. For the first 20 years of this century, inflation was typically between 1 and 3 %, so this rent control law would have generally limited rent increases to around 8-10% per year. However, during the pandemic, inflation spiked as high as 9%, and when the applicable 2023 rent caps were calculated in late 2022, the CPI measure was 7.6%, which meant landlords could (and did) raise rents by up to 14.6%.

Under SB 611, the state-wide rent cap is now the lesser of:

- 10% or
- 7% + CPI

In other words, the calculation for the maximum allowable rent increase is the same as it has been for the past several years, unless that calculation yields a number higher than 10%, in which case 10% is the maximum.

Another important change from SB 611 is that in month-to-month or fixed-term tenancies, a landlord may now raise the rent only once in any 12-month period.

These new rules apply to rent increase notices given on or after July 6, 2023. So, if a landlord managed to issue a rent increase notice prior to July 6, they can take advantage of the previously-existing 14.6% limit for 2023, even if the rent increase will take effect after July 6. The relevant date is when the notice was issued.

Note: Landlords can disregard the rent increase caps if the first certificate of occupancy for the home was issued within the last 15 years, and also in many cases where the unit is regulated as affordable housing.

Troy Pickard opened Portland Defender PC in 2010, where his practice is focused on affirmative claims against landlords on behalf of residential tenants. Troy is from Portland, having returned after attending Chapman University and the University of San Diego School of Law. He has one wife, one son, and one cat.

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SB 1069 (2023): CAN YOU JUST EMAIL ME?
New notice opportunities for landlords and tenants

SB 1069 drags landlord-tenant law into the 21st century by affording parties the option to mutually agree that e-mail is an allowable method of serving written notices to one another.

Note on effective date – unlike many recent landlord-tenant laws, the amendments in SB 1069 are *not* effective immediately upon the governor's signature. Instead, they will become effective at the start of 2024.

NOTICES

ORS 90 distinguishes between "actual notice" and "written notice." Both are defined terms. "Actual notice" doesn't mean what it sounds like it might mean – it simply defines what methods may be used to achieve "actual notice," which can potentially include leaving voice mail for someone. Certain sections of ORS 90 require (or permit) one party to provide the other with "actual notice" of various information, such as a landlord giving notice of an intent to make an entry into someone's rental home.

"Written notice" is for the more-serious types of notices that might be given – most typically, termination notices and rent increase notices. Currently, the statute defining "written notice" (ORS 90.155) provides three methods that will satisfy the standard:

1. Personal delivery (handing it to the landlord or tenant)
2. First class mail (note that this specifically excludes certified mail and any other form of mail that *may* delay the actual delivery of the mail to the recipient)
3. So-called "nail-and-mail," where the notifying party both mails a copy to the recipient and attaches a second copy to the recipient's door. The benefit here is that it allows the sender to shave off the added three days required if a notice is *only* mailed. Note also that "nail-and-mail" is only allowed if the parties have a written rental agreement that provides for it.

SB 1069 gives landlords the opportunity to utilize a fourth method: e-mail.

REQUIREMENTS

- The parties must execute a written addendum *after* the tenancy begins and the tenant begins their occupancy;

- The addendum must specify an acceptable email address from both landlord and tenant;

- The addendum must allow either party to terminate their consent to emailed notices, or to change their specified email address, by giving no less than three days' written notice

- The addendum must include a statutorily-proscribed notice to the tenant explaining that the addendum is voluntary and something they should pay attention to

LIMITATION:

Even once the addendum is in place, a party can only send a *termination notice* via email if they also send a copy via first class mail. No extra three days must be added under this method, so it's a bit like nail-and-mail.

SECURITY DEPOSITS

SB 1069 allows a landlord to email a deposit accounting to a tenant, *if* the parties have the previously-described addendum for email delivery of written notices.

In a related addition, SB 1069 also allows a landlord to issue deposit or prepaid rent refunds via making an electronic payment to a bank account or other financial institution designated by the tenant. This requires the parties to have executed an addendum, again executed *after* the tenancy begins and the tenant begins their occupancy.

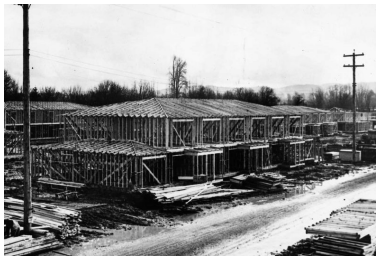
Note: this statute doesn't seem to allow a landlord to walk into a bank and deposit a refund into a tenant's account by hand – it uses the language "the landlord may return any amount due… electronically to a bank account…"

If a landlord needs to refund rent to a tenant to avoid a waiver under ORS 90.414, SB 1069 allows the landlord to make that refund in the same way as an electronic deposit refund, if the parties have the deposit addendum in place.

Chapter 6

Presentation Slides: Oregon Housing Needs Analysis (HB 2001)

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OREGON
Department of Land Conservation & Development



Oregon Housing Needs Analysis (HB 2001)

Real Estate and Land Use Conference 2023

August 11, 2023

Sean Edging, Housing Planner

Agenda

- Background
- House Bill 2001 Overview
- Administrative Rulemaking
- Work Schedule
- Questions/Discussion

2

Background

Legislative Direction

- HB 2003 (2019 Session) – Pilot Methodology

  OHCS "shall develop a methodology for calculating… A regional housing needs analysis" | DLCD to develop an evaluation report

- HB 5006 (2021 Session) – OHNA Implementation

  OHCS and DLCD "to study and make legislative recommendations on the incorporation of a regional housing needs analysis into state and local planning programs" by December 31, 2022

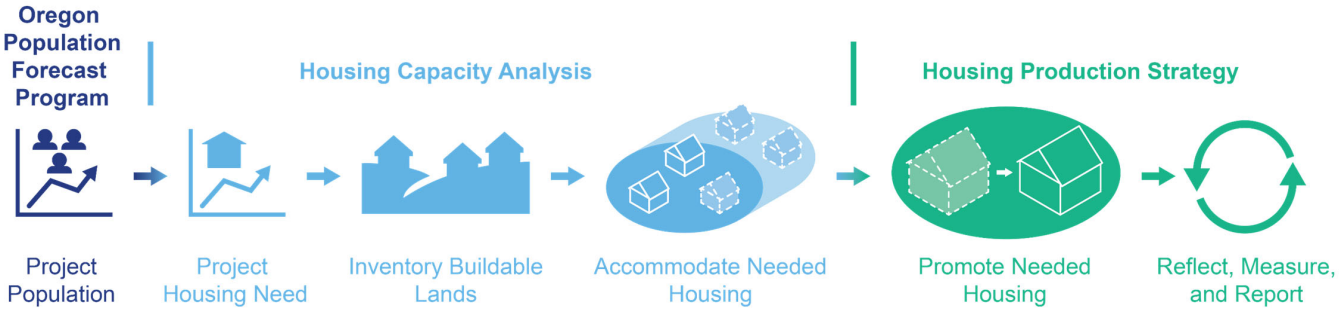
- HB 5202 (2022 Session) – Prepare land for housing production

  DLCD "to support work on regional housing needs and land supply issues"

4

Goal 10 – Housing

*"**To provide for the housing needs of citizens of the state.** Buildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density."*



OHNA Legislative Recommendations

Recommendation 1: Plan for what's needed

- **1.1) Plan for more housing, especially affordable housing**
- **1.2) Set targets, track progress and outcomes**
- **1.3) Refocus local action on production**
- **1.4) Unlock land, where it's needed**

Recommendation 2: Build what's needed, where it's needed

- **2.1) Fund housing the market would not produce on its own**
- **2.2) Make "housing choice for all" a state policy goal**

Recommendation 3: Commit to working together with urgency

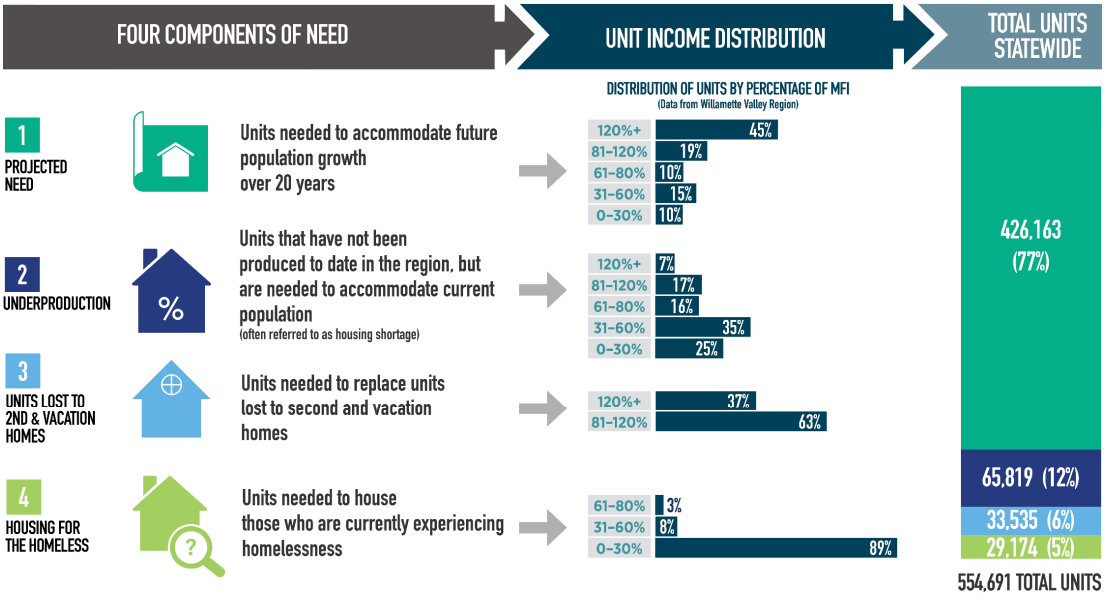
- **3.1) Coordinate state agencies on housing production**
- **3.2) Organize continuing policy work to support production**

House Bill 2001

House Bill 2001 (2023 Session)

Recommendation 1: Plan for what's needed	1.1) Plan for more housing, especially affordable housing
	1.2) Set targets, track progress and outcomes
	1.3) Refocus local action on production
	1.4) Unlock land, where it's needed
Recommendation 2: Build what's needed, where it's needed	2.1) Fund housing the market would not produce on its own
	2.2) Make "housing choice for all" a state policy goal
Recommendation 3: Commit to working together with urgency	3.1) Coordinate state agencies on housing production
	3.2) Organize continuing policy work to support production *

OHNA Methodology



OEA & OHCS

Estimates full statewide need:

- 20-year growth
- Underproduction
- Homelessness
- 2nd & Vacation Homes

Allocation to cities and counties

Establishes production targets

Measure progress and outcomes

Goal 10 - Housing



DLCD

Goal 10 refocus on production, affordability & choice

LCDC Rulemaking

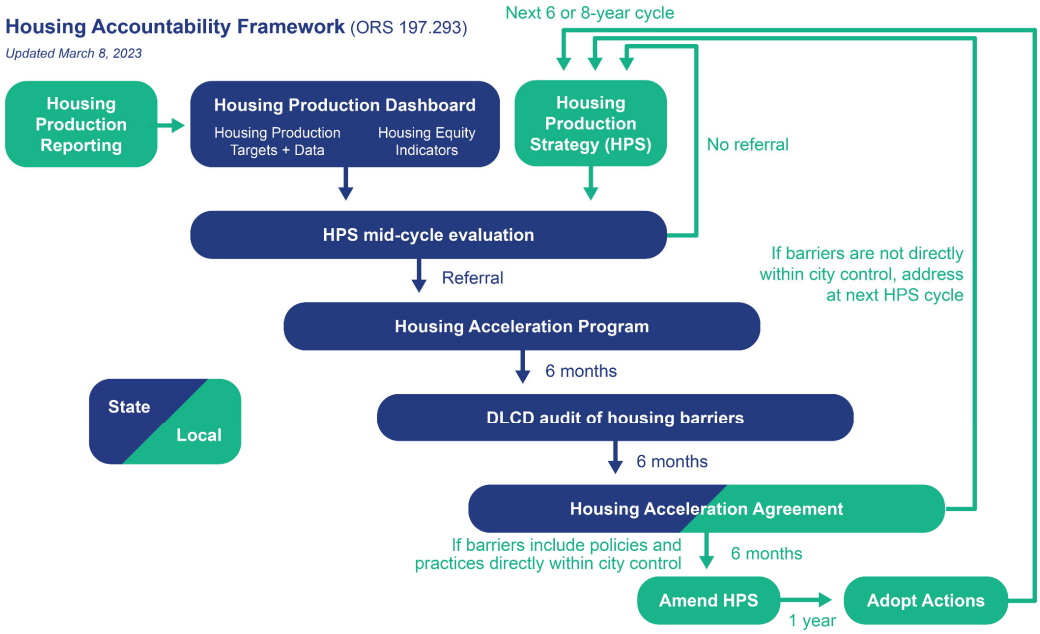
- Need/Production
- Capacity/Urbanization
- Accountability

"Development-ready lands"

UGB & Urban Reserve refinements

Accountability (next slide)

Housing Accountability



Administrative Rulemaking

Direction

- Section 8 (3) of the bill includes directive
  - Adopt or amend rules related to:

(3) In adopting rules implementing ORS 197.286 to 197.314 and statewide land use goals relating to housing and urbanization, the commission may approve a range of methodologies, policy options or assumptions that a local government may adopt in determining:
(a) Needed housing;
(b) Housing production strategies or housing coordination strategies;
(c) Buildable lands or housing capacity;
(d) Amendments to urban growth boundaries, including under ORS 197.296 (6)(a), 197.299, 197.764 and 197A.300 to 197A.325 and section 22 (5)(a) of this 2023 Act; or
(e) Adoption or amendments to urban reserves or rural reserves under ORS 195.137 to 195.145.

- Section 9 includes Legislative priorities and principles

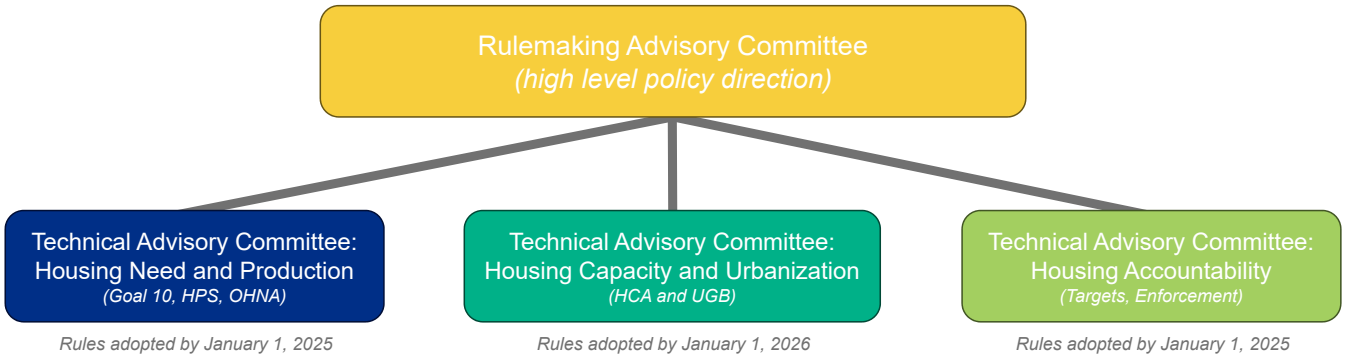
13

Rulemaking Topic Areas

LCDC Housing Rulemaking – focus on three major focus areas:

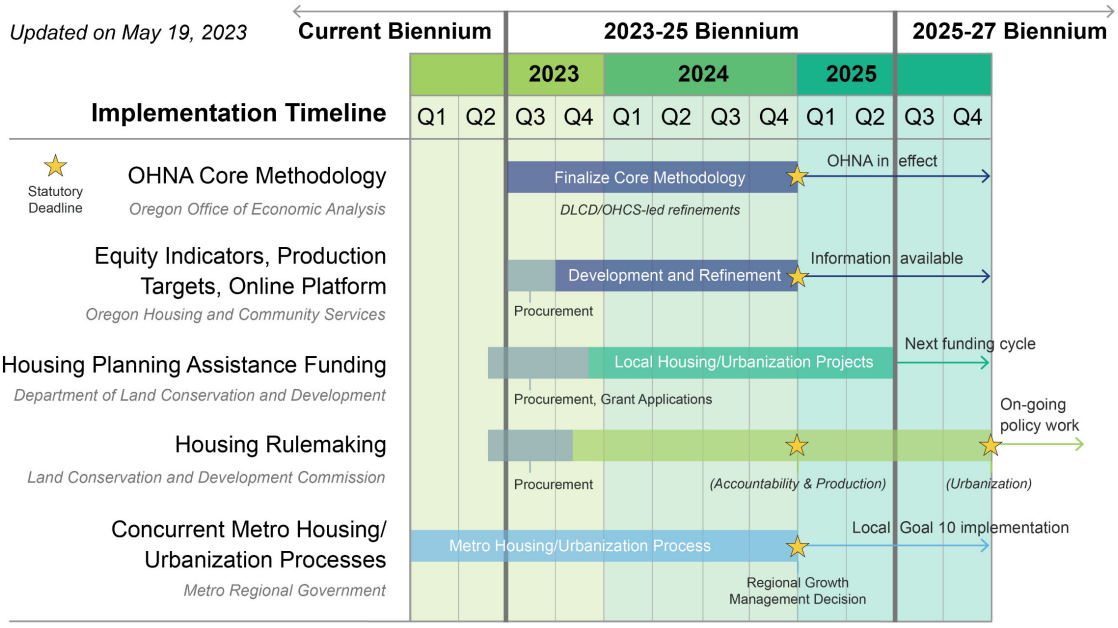
Housing Need & Production	Housing Capacity & Urbanization	Housing Accountability
• OHNA implementation; "needed housing" • Adoption-ready policy options – e.g. permit-ready plans, SDC/public facilities, permitting/review, etc. • Integrate fair and equitable housing into Housing Production Strategy	• "Off the shelf" methodologies & assumptions – e.g. BLI, UGB, etc. • Greater clarity/certainty for analyses, UGB amendments, land exchanges, & urban reserves • Facilitate development-readiness of lands brought into the UGB	• Measuring (under)performance • Scope and process of DLCD review of local/state barriers to housing production • Steps to ensure local gov'ts take meaningful actions to address identified barriers

RAC Structure



15

OHNA Implementation Timeline



Questions & Discussion





OREGON HOUSING and COMMUNITY SERVICES

DLCD

Real Estate and Land Use Conference 2023 - August 11, 2023

Sean Edging, Housing Planner

Thank you!

Chapter 7

2022 Report on Legal Opinions in Oregon Real Estate Transactions

Dustin Klinger
Thede Culpepper Moore Munro & Silliman LLP
Portland, Oregon

Bryan Powell
Lane Powell PC
Portland, Oregon

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2022 Report on Legal Opinions in Oregon Real Estate Transactions

Bryan Powell, Lane Powell PC
Dustin Klinger, Thede Culpepper LLP

INTRODUCTION

After months of trials and tribulations, the 2022 Report on Legal Opinions in Oregon Real Estate Transactions ("2022 Oregon Model Opinion Report" or "**Report**") is now published and ready for use. You can find the 2022 Oregon Model Opinion Report online under OSB BarBooks, Oregon Real Estate Deskbook, Vol. 2 (Financing Transactions), Chapter 26: Legal Opinion Practice.

This Report is a comprehensive and long awaited update to the 2004 Oregon Model Opinion Report regarding opinions given and received in Oregon real estate financing transactions, which has been used by many Oregon attorneys over the years who practice in this area of law. The RELU Section's Committee on Opinion Letters ("**Committee**") spent considerable time reviewing current treatises and literature, and discussed current trends in customary practices and principles in opinion giving in Oregon and national real estate secured financing transactions. Following the recommendation of the Committee, the RELU Section Executive Committee formally adopted this 2022 Oregon Model Opinion Report and the accompanying 2022 Oregon Model Opinion for use in Oregon secured real estate transactions on September 16, 2022.

In finalizing the updated Report, the Committee strove to provide extensive footnotes explaining the rationale and applicable case law or statutory support whenever possible, and added some new alternative legal opinions consistent with current opinion practice. The final Report includes an unannotated 2022 Oregon Model Opinion attached as Addendum A (the "**Model Opinion**"), which is the form of opinion that the Committee suggests for use in Oregon secured real estate transactions, superseding the prior forms, including the 2004 model opinion.

The Report also includes a suggested form of "**Borrower's Certificate**" attached as Addendum B, a sample form of "**Pro Forma Action Authorizing Loan**" for a borrower entity attached as Addendum C, and (iii) a sample "**Certificate of Escrow Officer**" attached as Addendum D, each of which can be used to support opinions as explained in more detail in the Report.

The Committee's goal is that the 2022 Oregon Model Opinion Report remains convenient and practical for use by both opinion givers and recipients which conforms to national opinion letter practice in Oregon real estate finance transactions.

For those practitioners who want to see the evolution of the Oregon model opinion reports over time, you can find prior iterations including the 2004 Oregon Opinion Report available at www.osbar.org/_docs/legalpubs/barbooks/ored-2004-report.pdf; the 1996 Oregon Opinion Report available at www.osbar.org_docs\legalpubs\barbooks\ored-1996-report.pdf; and the 1992 Oregon Opinion Report available at www.osbar.org_docs\legalpubs\barbooks\ored-1992-report.pdf.

NOT A "LOCAL COUNSEL" OPINION

The Model Opinion is not intended to be used as a form of "local counsel opinion" without extensive revisions or edits. On occasion, an Oregon attorney might be engaged as local counsel for a real estate secured financing that involves Oregon real estate collateral. As part of that engagement, the Oregon attorney would likely be asked to prepare an opinion letter about the enforceability of a deed of trust or mortgage involving Oregon real estate owned by an entity organized in Delaware (typically the borrower or possibly a guarantor), with New York law applicable to the loan documents, other than discrete issues involving the Oregon deed of trust or mortgage, and sometimes an assignment of leases and rents or UCC financing statement. In some instances the borrower (or guarantor) might be an Oregon entity.

In this kind of local counsel engagement, the opinion giver needs to be particularly attuned to the specific subjects being asked to opine on in the opinion letter and then needs to carefully tailor the opinion letter with the appropriate assumptions, limitations and exceptions applicable to the subject transaction. While the Oregon Model Opinion can be used as a base form in a local counsel opinion situation, the Oregon attorney needs to be particularly careful to fully understand the engagement and what opinions are being required (e.g., a local counsel is often not involved in the formation or organization of the borrower or guarantor) and to then modify or revise the Model Opinion accordingly which closely tracks the local counsel engagement.

PRIMARY CHANGES TO 2004 MODEL OPINION

1. OPINIONS. There are 14 sample opinions provided in the 2022 Report and Model Opinion. Four new opinions were added to the 2004 Model Opinion along with a number of revisions, and two opinions have been deleted from the 2004 Model Opinion. The key opinions revised include:

a. Enforceability opinion (updated opinion #5)

b. Usury (added an alternative usury opinion #6 for consideration)

c. Execution and delivery (new opinion #7)

d. No Violation or Breach (new opinion #8)

e. No Violation of Law (updated opinion #9)

f. Choice of Law (revised opinion #10 primarily because of ORS 15.300)

g. Form of Security Documents [Trust Deed/Mortgage] (updated opinion #11)

h. Form of Assignment of Leases and Rents (new opinion #12)

i. Litigation (new opinion #13)

j. UCC Opinions (updated UCC opinions in #14)

k. Nonconsolidation Opinion and Adequacy of Document Opinion are now omitted from the Report and 2022 Model Opinion.

2. ASSUMPTIONS. The following new Assumptions have been added to the Model Opinion:

a. that Borrower is a general business entity of a type that is not regulated by governmental authority in a manner that restricts its ability to alienate or encumber its property to secure indebtedness or to enter into the Loan Documents;

b. that the signatures of the Borrower on the [Trust Deed] [and the Lease Assignment] have been properly acknowledged according to applicable law;

c. the funding of the Loan to Borrower and that value has been given in accordance with Article 9 of the Uniform Commercial Code as adopted in the State of Oregon and codified under ORS Chapter 79 ("Oregon UCC");

d. that the beneficiary prosecuting a non-judicial foreclosure of the Trust Deed and the plaintiff in a judicial foreclosure of the Trust Deed or other legal action enforcing the Trust Deed will be able to establish, to the satisfaction of any applicable court, that it is the holder of the Note and other obligations secured by the Trust Deed ("**Holder**"), or is authorized to act on behalf of the Holder, which (for a non-judicial foreclosure) may require recordation of modifications of the Trust Deed or assignments of the beneficiary's interest;

The following Assumptions are now recommended to be added if UCC Opinions are given:

- Borrower has rights in the Collateral or the power to transfer rights in the Collateral to a secured party;

- the Possessory Collateral (defined below) is located, within the meaning of Sections 9-301 and 9-305(a)(1) of the Oregon UCC, only in the State of [Oregon] (the "Possessory Collateral State");

- each Intermediary (defined below) is located, within the meaning of Sections 9-304, 9-305 and 9-306 of the Oregon UCC, only in the State of [Oregon] (the "Control Collateral State").

3. QUALIFICATIONS (of matters as to which no opinion is expressed). The following Qualifications were revised as shown below in redline:

(c) provisions relating to the waiver of rights, remedies, and defenses, including without limitation those purporting to waive the ~~extent such amounts exceed actual damages,~~ right of redemption or the statutory provisions of the Oregon Trust Deed Act that permit Borrower to reinstate a trust deed during a non-judicial foreclosure proceeding;

(d) provisions that permit Lender to collect a late charge, increase interest rate after a default or maturity, a yield maintenance charge or ~~a~~ prepayment premium, acceleration of future

amounts due (other than principal) without appropriate discount to present value, liquidated damages, penalties, or interest on interest;

(e) any reservation of the right to pursue inconsistent or cumulative remedies;

~~(f) any "due on sale" clause to the extent that enforcement is not mandated by applicable federal law and that the security of the Loan would not be impaired;~~

~~(g) any "due on encumbrance" clause in any circumstance in which the security for the Loan would not be impaired;~~

~~(h) the effect of any~~ provisions providing that the maturity date of the Loan my be accelerated upon a sale, other transfer, or encumbrance of the Real Property or Collateral, or a change in control, ownership, or management of any party;

(f) provisions impacting "one-action" ~~or~~and "anti-deficiency" pro~~vis~~tections contained in ~~applicable trust deed statutes~~the Oregon Trust Deed Act, including ~~any~~without limitation, the statutory restrictions on deficiency judgments after a non-judicial foreclosure~~, including, without limitation, the provisions of ORS 86.770~~;

The following new Qualifications were added to the 2022 Model Opinion:

a. provisions that purport to prevent any party from becoming a mortgagee-in-possession, notwithstanding any enforcement actions taken under the Loan Documents;

b. provisions that purport to require waiver of the obligations of good faith and fair dealing;

c. provisions that preclude a party who has materially failed to render or offer performance required by the Loan Documents to cure that failure, unless (i) permitting a cure would unreasonably hinder the aggrieved party from making substitute arrangements for performance, or (ii) it was important in the circumstances to the aggrieved party that performance occur by the date stated in the Loan Documents;

d. provisions that provide for the application of insurance and condemnation proceeds to the indebtedness;

e. provisions waiving trial by jury;

f. provisions which provide for service of process in a manner not authorized under the laws of the State of Oregon;

g. provisions in any documents executed and delivered by Borrower [or Guarantor] in connection with the Loan not expressly set forth herein;

h. provisions in the Loan Documents which provide that the assignment of leases and rents is in a form to create an assignment other than for collateral purposes, including but not limited to provisions that purport to assign the leases and rents absolutely; and

i. provisions in the Loan Documents assigning to Lender or otherwise prohibiting or restricting Borrower's [or Guarantor's] rights under the U.S. Bankruptcy Code.

4. LIMITATIONS. The following Limitations were added to the 2022 Model Opinion regarding:

a. patent, copyright and trademark, state trademark, and other intellectual property law;

b. laws concerning international treaties or conventions, national and local emergency, possible deference to acts of sovereign states, criminal forfeiture and criminal prosecution (including mail fraud and wire fraud statutes) and racketeering;

c. the statutes and ordinances, the administrative decisions, and the rules and regulations of counties, towns, municipalities, and special political subdivisions, and judicial decisions to the extent that they deal with any of the foregoing matters in this paragraph (collectively, "**Local Law**").

d. the enforceability of any provision in the Loan Documents that excludes, waives or limits the liability of any party for matters set forth in Section 9-602 of the Oregon UCC.

And also added the following Limitation regarding documents reviewed:

- We have reviewed copies or originals of the Loan Documents and the Authority Documents, and we have given consideration to such matters of law [and facts], as we have deemed appropriate, in our professional judgment, to render such opinions.

5. RELIANCE PROVISION. The last two paragraphs of the Model Opinion were revised to make the reliance provision more consistent with national lending practices, although an alternative shorter paragraph is still included for consideration.

6. ADDENDA. The addenda attached to the Model Opinion were revised, specifically:

- Borrower's Certificate (Addendum B) – updated regarding execution and delivery.
- Pro Forma Action Authorizing Loan" for a borrower entity (Addendum C) – added financial statements and affidavits references
- Certificate of Escrow Officer for execution and delivery opinions (Addendum D) – *NEW*

2022 REPORT ON LEGAL OPINIONS IN OREGON REAL ESTATE TRANSACTIONS BY THE REAL ESTATE AND LAND USE SECTION OF THE OREGON STATE BAR, STANDING COMMITTEE ON OPINION LETTERS[1]

INTRODUCTION

In the Pacific Northwest, we take pride in our mountains, coastline, and many rivers connecting us to the ocean. The bridges crossing our rivers are important connectors in our daily lives. This holds true also in the Oregon State Bar, where for nearly 35 years, a mixed group of lawyers have served to monitor the national practice on giving and receiving legal opinions in real estate secured financing transactions. This Standing Committee on Opinion Letters of the Real Estate and Land Use Section of the Oregon State Bar (the "**Committee**") is comprised of active lender and borrower counsel, large and small firm lawyers and other practitioners and continues to monitor national opinion letter practice. Many Committee members have been on both sides of opinion transactions and have tried to provide for a balanced model opinion consistent with Oregon practice which serves the practical needs and objectives of all parties to a real estate financing.

Generally, Oregon "opinion givers" (usually borrower's counsel) have been successful in giving and Oregon "opinion recipients" (usually lender's counsel) have been willing to accept legal opinions based on the illustrative form of Oregon Model Opinion over the years. However, much has happened since the Committee's last report in 2004 and the publishing of the illustrative "2004 Oregon Model Opinion", so the time is right to update the 2004 Oregon Opinion Report to be more in keeping with recent practice and principles in opinion giving. These introductory comments provide some background for the suggested changes in the 2004 Oregon Model Opinion. Both opinion givers and opinion recipients should continue to refer to national resources and commentaries for further guidance when the Oregon Report might be lacking on a specific issue.[2]

The Committee ultimately determined that recent developments in the law, opinion practice, and legal practice as a whole warranted a new Oregon report on real estate secured transaction legal opinions (this "**Report**") which integrates, amends, and restates all of the prior Oregon reports on this subject.[3] The purpose of this Report is to provide a reference guide for lawyers engaged in preparing, reviewing and issuing third-party legal opinion letters in the state of Oregon. The Report does not purport to be exhaustive in its treatment of legal opinions in real

[1] The following lawyers actively participated in the preparation of these materials: Dina Alexander, Thomas Bahrman, Jesse Calm, Don G. Carter, Brian DiFonzo, Jonathon L. Goodling, Susan Glen, David Green, Dave Hepler, Scott Howard, Dustin R. Klinger, Co-Chair & Editor, Mark A. Manulik, Bryan E. Powell, Co-Chair & Editor, and David P. Weiner, Chair-Editor Emeritus.

[2] For excellent resources on legal opinions generally, check out the *Legal Opinion Resource Center*, an online library co-sponsored by the Legal Opinions Committee of the ABA Business Law Section and the TriBar Opinion Committee. https://www.americanbar.org/groups/business_law/migrated/tribar/.

[3] The Committee's most recent report was last issued in 2004, so an update is welcome. For copies of prior Committee reports on Oregon legal opinions in commercial real estate finance, see archives available in the Oregon State Bar's Oregon Real Estate Deskbook – Financing Transactions.

estate financing or to replicate the considerable volume of general information already available to practitioners.

BACKGROUND

The most recent 2004 Report on Lawyers Opinions in Oregon Real Estate Transactions (the "**2004 Opinion Report**") was written after the publication of the 1999 "Inclusive Opinion Report" and accompanying model "Inclusive Real Estate Secured Transaction Opinion"[4] which was intended at that time to be a national model legal opinion for real estate secured loan transactions. The Committee did not adopt the Inclusive Opinion; however, it did provide guidance in preparing the 2004 Opinion Report and Oregon Model Opinion.

In January 2003, the ABA-ACREL Joint Committee adopted "Real Estate Opinion Letter Guidelines"[5] (the "**2003 Guidelines**"). The 2003 Guidelines were "intended to fill that void with a single, integrated set of opinion Guidelines, reflecting the current state of customary real estate opinion letter practice."[6] The Committee generally supports the principles set forth in the 2003 Guidelines, as updated and modified by the "Statement of Opinion Practices" (the "**2018 ABA Statement**") published by the Joint Committee of the Working Group on Legal Opinions Foundation and the American Bar Association's Legal Opinions Committee[7] as being appropriate for consideration of Oregon opinion letter practice. The 2018 ABA Statement includes a Statement of Opinion Practices and Core Opinion Principals and is worthy of consideration by any opinion giver and recipient.

Since the publishing the 2004 Opinion Report, the Committee has reviewed the *Real Estate Finance Opinion Report of 2012*[8] and the accompanying illustrative opinion (the "**2012 ABA/ACREL Opinion**") published by a joint committee consisting of the ABA RPTE Legal Opinions Committee, American College of Real Estate Lawyers ("ACREL") Attorneys Opinions Committee, and American College of Mortgage Attorneys Opinions Committee, as well the *Local Counsel Opinion Letters in Real Estate Finance Transactions*[9] and other state bar opinion letter reports.[10] It is the goal of the Committee to update the 2004 Opinion Report and to make sure the

[4] Published by the Joint Committee of the American Bar Association for Real Estate Secured Transactions of the Section of the Real Property, Probate and Trust Law and the American College of Real Estate Lawyers. *See* http://www.abanet.org/rppt/committees/rp/i5/home.html.

[5] *See* Attorneys' Op. Comm., Am. Coll. of Real Estate Lawyers & Comm. on Legal Ops. in Real Estate Transactions, ABA Section of Real Prop., Prob. & Tr. Law, Real Estate Opinion Letter Guidelines, 38 REAL PROP. PROB. & TR. J. 241, 253 § 4.1.a (2003) (The "**2003 Guidelines**").

[6] See 2003 Guidelines @ p. 242.

[7] See 2018 ABA State of Opinion Practices, published in The Business Lawyer, 74 BUS. LAW. 807 (2019).

[8] *See* ABA Real Prop. Tr. & Est. L. Section Legal Opinions in Real Est. Trans. Comm., et al., *Real Estate Finance Opinion Report of 2012*, 47 REAL PROP. TR. & EST. J. 213 (2012) (the "**2012 ABA/ACREL Report**").

[9] *See*, the ABA Real Prop. Tr. & Est. L. Section Legal Opinions in Real Est. Trans. Comm., et al., *Local Counsel Opinion Letters in Real Estate Finance Transactions*, 51 REAL PROP. TR. & EST. L.J. 167 (2016) (the "**ABA/ACREL Local Counsel Report**"). The ABA/ACREL Local Counsel Report is an excellent resource for anyone being asked to give a local counsel opinion for by an out-of-state lender for a real estate secured financing transaction.

[10] For an excellent, well-reasoned legal opinion report, look no further than our neighbor to the north, the great State of Washington's "*Amended and Restated Report on Third-Party Legal Opinion Practice in the State of Washington*"

2022 Oregon Model Opinion remains convenient and practical for use by both opinion givers and recipients and also to insure that it conforms to national opinion letter practice in real estate finance transactions.

USE OF THE OREGON MODEL OPINION

This Report contains an illustrative form of opinion letter for commercial real estate secured lending transactions, which has been annotated throughout with the Committee's commentary (the "**2022 Oregon Model Opinion**"). The 2022 Oregon Model Opinion contains some opinions (such as existence, authority and enforceability) that are commonly given in most opinion letters, and also provides examples of less common opinions sometimes used in more complex financings. The 2022 Oregon Model Opinion also includes customary assumptions, qualifications, exclusions, and other limitations.

In preparing this Report, the Committee sought to strike a balance between presenting material and language that is appropriate only in certain transactions, while offering commentary and explanations for what is customary in Oregon opinion giving generally. Accordingly, the 2022 Oregon Model Opinion form is not meant to be used indiscriminately. Instead, opinion givers should thoughtfully prepare an opinion letter that consists of provisions relevant to the particular real estate financing transaction. The footnotes and other commentary in this Report are intended to assist with such efforts.

A clean copy of the 2022 Oregon Model Opinion without footnotes is attached as Addendum A below. As with all forms, careful review must be given by both the opinion giver and the opinion recipient to ensure that the inclusion of each provision is appropriate to the transaction.

Form of Opinion Certificate. As part of the lawyer's diligence with respect to giving an opinion letter, an opinion giver should ensure that all material facts required to support the opinions have been obtained through reliance on the representations and warranties contained in the transaction documents, public authority documents, or through confirmations received directly from the client or others. If an opinion is based on confirmations received directly from the client, these confirmations should be set forth in a written certificate signed by an appropriate officer or other representative of the client the opinion giver believes to be knowledgeable about the subject matter involved. Used in conjunction with the 2022 Oregon Model Opinion, a typical form of opinion certificate (see Addendum B below) usually covers factual matters on which an opinion giver may base its legal conclusions.

published by the Legal Opinions Committee of the Business Law Section of the Washington State Bar Association on November 30, 2018 ("**WSB Opinion Report**"). Here is the link: WSB Opinion Report 2018.

ADOPTION

The Committee hopes that this Report and the illustrative form of 2022 Oregon Model Opinion will be useful to Oregon lawyers. We anticipate that this Report, like its predecessor reports, will be supplemented or updated from time to time as opinion practice developments warrant.

Following the recommendation of the Committee, the Executive Committee of the Real Estate and Land Use Section of the Oregon State Bar has adopted this Report and the 2022 Oregon Model Opinion for use in Oregon secured real estate transactions.

2022 OREGON MODEL OPINION
FOR REAL ESTATE SECURED LOANS

[Date]

[Name and Address of Opinion Recipient][11]

Re: $_____ Loan to _____ (the "**Loan**")

Ladies and Gentlemen:

INTRODUCTION[12]

We have acted as Oregon counsel to _____ ("**Borrower**")[13] in connection with that certain Loan Agreement ("**Loan Agreement**") dated _____, ___, between _____ ("**Lender**") and Borrower.

We have also acted as Oregon counsel to _____ ("**Guarantor**")[14].

[*Alternate clause*: We are not Borrower's [or Guarantor's][15] general counsel, we have not previously represented Borrower [or Guarantor], and we have made no investigation of Borrower's [or Guarantor's] legal affairs except as expressly set forth in this letter.][16]

[11] The typical approach is to only list the lender(s) as addressees which are named in the loan documents or the named agent for such lender(s). The ability of successor lenders who take interests in the loan documents after closing (through assignment or participation) to rely on the opinion letter is addressed in the reliance paragraph at the end of the opinion letter. Including as addressees "all lenders who become parties to the Credit Agreement from time to time" may undercut the protections provided in the reliance paragraph.

[12] This portion of the opinion sets forth the relationship between the opinion giver and the Borrower and, if a part of the transaction, a Guarantor. The inclusion of a Guarantor recognizes the current state of commercial real estate transactions wherein a limited liability entity is typically the Borrower and one or more principals of the Borrower are required to guaranty the entire principal balance of the Loan or some portion thereof (e.g., the non-recourse carveouts).

[13] This model form of opinion letter assumes that the borrower is an Oregon entity, will likely be an Oregon limited liability company, and that the loan documents are governed by Oregon law. In any given transaction, the borrower or the guarantor (if any) may be a different type of entity, so the opinion giver will need to modify terms to reflect the actual status of the borrower or the guarantor. Coverage of entities organized under the law of a jurisdiction other than the state of Oregon (other than to confirm such entity's authorization to transact business in the State of Oregon) and of loan documents governed by the law of another jurisdiction are beyond the scope of this Report. The ABA/ACREL Local Counsel Report offers an excellent summary of how to deal with foreign borrower entities in local counsel opinions.

[14] See Footnote 13 regarding form of entity issues.

[15] Here and elsewhere in this Report, the [bracketed], *italicized text* or alternate clauses should be used with the appropriate modifications to the opinion letter as necessary for applicable transaction.

[16] In some circumstances, typically as local counsel, the opinion giver might not be involved in the formation or organization of the Borrower or Guarantor. In such instance, an alternate clause might be included as follows: "[Although we represent Borrower [or Guarantor] from time to time in connection with specific transactions, we are not general counsel to Borrower [or Guarantor], and we did not participate in the formation or organization of Borrower.]"

In this capacity, Borrower [and Guarantor] [has] [have] requested that we deliver to you our opinion as to certain matters relating to the Loan. This opinion is delivered to you pursuant to Section ___ of the Loan Agreement[17].

DOCUMENTS REVIEWED[18]

In rendering our opinion, we have examined originals, copies identified to our satisfaction as true copies of the originals, or copies certified to us as being execution copies of the following documents, provided to us [via email][under cover of a letter dated] _____ from _____, all bearing the date of _____, 20__, unless otherwise indicated:

1. [The Loan Agreement dated as of _____ executed by Borrower and Lender;]

2. Promissory Note ("**Note**") dated as of _____ executed by Borrower and payable to the order of Lender in the sum of $_____;

3. Deed of Trust ("**Trust Deed**") dated as of _____ executed by Borrower as grantor, in favor of Lender as beneficiary, securing the Note, encumbering certain property including real property located in _____, County in the state of Oregon (the "**Real Property**");

4. [Assignment of Rents and Leases ("**Lease Assignment**") dated as of _____ executed by Borrower, as Assignor, for the benefit to Lender, as Assignee;]

5. [Security Agreement ("**Security Agreement**") dated as of _____ executed by Borrower, as debtor, and naming Lender as secured party;]

6. [Guaranty Agreement ("**Guaranty**") dated as of _____ executed by Guarantor as Guarantor in favor of Lender;]

7. [Hazardous Material Indemnification Agreement ("**Indemnification Agreement**") dated as of _____ executed by Borrower [and Guarantor] in favor of Lender;] and

8. [UCC Financing Statement ("**Financing Statement**") naming Borrower as debtor and Lender as secured party.[19]]

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[17] If there is no Loan Agreement used, then delete this sentence or refer to the correct document name which requires the opinion. If the opinion giver has not participated in the negotiation or preparation of the Loan Documents, which typically occurs in a local counsel opinion engagement, then consider adding the following sentence: "*We have not participated in the negotiation or preparation of the Loan Documents (defined below).*"

[18] This section of the opinion letter contains an illustrative list. The actual Loan Document with their correct titles should be included.

[19] The 2012 ABA/ACREL Opinion deletes the UCC Financing Statement as a "Loan Document" because there are no covenants or agreements of the Borrower contained therein -- therefore, there is nothing to "enforce". The 2012 ABA/ACREL Opinion refers to the UCC Financing Statement as a "Security Document" with the opinion giver acknowledging the review thereof.

The documents listed as 1 through 7 above are collectively referred to herein as the "**Loan Documents**."[20] All property described in any of the Loan Documents in respect of which provision is made by the Loan Documents for a lien or security interest is referred to herein as the "**Collateral**."

In addition to the Loan Documents, we also have been furnished with and have examined the following:

A. A Borrower's Certificate [*and Guarantor's Certificate*][21] dated _____, 20___ [a copy of which is attached hereto and by this reference incorporated herein]("**Borrower's Certificate**");[22]

B. A Certificate issued by the Oregon Secretary of State, Corporation Division, with respect to Borrower, dated _____, _____, ("**Authority Certificate**" a copy of which is attached hereto and by this reference incorporated herein; [23] and

C. The following with respect to the Borrower: (i) Articles of Organization as filed with the Oregon Secretary of State; and (ii) Operating Agreement dated [_____] (collectively, the "**Borrower Entity Documents**").

D. [*Consent/Resolution*] of the [members][manager] of the Borrower.

E. [The following with respect to the Guarantor: (i) Articles of Organization as filed with the Oregon Secretary of State; and (ii) Operating Agreement dated [_____] (collectively, the "**Guarantor Entity Documents**").]

F. [*Consent/Resolution*] of [members or managers] of the Guarantor.

[20] See Footnote 19 for explanation why the Financing Statement is not included as a Loan Document.

[21] If the Guarantor is an entity, then a Guarantor's Certificate should also be obtained for the Guarantor entity. Even when the Guarantor is an individual or trust, a separate Guarantor's Certificate or Trust Certificate may also be necessary depending on the facts of the subject transaction.

[22] The decision of whether to deliver a copy of the Borrower's Certificate is reserved to the opinion giver. There is no strong argument either in favor or against such delivery. Care should be taken so that opinion certificates state objective facts rather than legal conclusions. Some opinion recipients may derive comfort from having the Borrower's Certificate delivered. On the other hand, some opinion recipients do not want to have the Borrower's Certificate in their file. The opinion givers should carefully review and consider using the suggested form of Borrower's Certificate attached as Addendum B to this Report or some variant thereof. *See also* Footnote 21 and Footnote 44 *infra*. Some opinion givers attach copies of opinion certificates to the opinion letter, either in signed or unsigned form. Although the practice is not universal, attaching copies or otherwise providing the opinion certificates to the opinion recipient can help to avoid confusion regarding the facts on which the opinion giver is relying. In some cases, however, the information contained in the opinion certificates will be proprietary or confidential, in which case the client may be unwilling to give it to the opinion recipient. The *opinion giver* is permitted to rely on the accuracy and completeness of the certifications contained in the opinion certificates.

[23] The Certificate from the Secretary of State showing the status of the Borrower should be attached to the Opinion.

The Borrower's Certificate and the Authority Certificate are collectively referred to herein as the "**Certificates**". The Borrower Entity Documents [and Guarantor Entity Documents] are collectively referred to as the "**Authority Documents**."

RELIANCE WITHOUT INVESTIGATION[24]

We disclaim any responsibility for any changes that may have occurred with respect to the status of Borrower [or Guarantor] from and after the respective dates of the Certificates mentioned above. We also assume that the Certificates and the public records upon which they are based are accurate and complete.

Except to the extent the information constitutes a statement, directly or in practical effect, of any legal conclusion at issue,[25] we have relied without investigation or analysis upon the information contained in representations by the Borrower [or Guarantor] in the Loan Documents and in the Borrower's Certificate [and Guarantor's Certificate] and public officials. We have made no independent investigation with regard to such matters or with regard to the warranties and representations made by Borrower [or Guarantor] in the Loan Documents or of any related matters. Except as specifically identified herein, we have not been retained or engaged to perform, and we have not performed, any independent review or investigation of (1) any agreement or instrument to which Borrower [or Guarantor] may be a party or by which Borrower [or Guarantor] or any property owned by Borrower [or Guarantor] may be bound, or (2) any order of any governmental or public body or authority to which Borrower [or Guarantor] may be subject.

ASSUMPTIONS

In issuing this opinion, we assume:

a. that Lender and all other parties to the Loan Documents (other than Borrower [and Guarantor]) have satisfied all necessary legal requirements applicable to it and that Lender has all necessary corporate authority to enter into the Loan Documents and consummate the Loan;

b. the legal capacity of all natural persons to enter into and perform their respective obligations under the Loan Documents;

c. the authenticity and completeness of all documents submitted to us for review, that each such document that is a copy conforms to an authentic original, and that all signatures on each such document are genuine;[26]

[24] This Section substantively conforms to the 2012 ABA/ACREL Opinion.

[25] The Committee debated the nature of the representations made in the Borrower's Certificate and whether they were factual or legal conclusions. In conforming this language to the 2012 ABA/ACREL Opinion, the opinion recipient should obtain comfort that the opinion giver is making independent conclusions.

[26] Opinion letters usually assume that all signatures are genuine. Opinion recipients occasionally request that an assumption that signatures are genuine not apply to signatures of the opinion giver's clients. In effect, such a request might be construed to require the opinion giver to assure that signatures are not forgeries and that the persons signing are in fact the persons they purport to be. Such an assurance is a purely factual matter.

d. that Borrower is a general business entity of a type that is not regulated by governmental authority in a manner that restricts its ability to alienate or encumber its property to secure indebtedness or to enter into the Loan Documents;[27]

e. the due execution and delivery of the Loan Documents by all parties [except Borrower] [and Guarantor] in accordance with the laws of their governing jurisdictions;[28]

f. that the signatures of the Borrower on the [Trust Deed] [and the Lease Assignment] have been properly acknowledged according to applicable law;[29]

g. the vesting of fee title to the Real Property in Borrower at the time the Loan Documents are executed and recorded or filed and that Borrower has good and sufficient rights in and title to the Collateral;

h. the accuracy and sufficiency of the description of the Collateral[30] to provide notice to third parties of the liens and security interests created by the Loan Documents and to create an effective contractual obligation under the laws of the State of Oregon;

i. that the trustee named in the Trust Deed is validly existing, and has full power and authority to act as trustee;

j. the due recording of the Trust Deed [and the Lease Assignment] in the Official Records of _____ County, Oregon;

k. the due filing[31] and indexing of the Financing Statement or the Security Agreement in the Office of the Secretary of State of Oregon[32] [and the proper filing and indexing of a UCC

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[27] If the opinion giver is serving as local counsel and the Borrower and Guarantor are not Oregon entities, add the following assumption: "*that Borrower [Guarantor] is duly organized and validly existing as a [_____ under the laws of the State of [_____], and has taken all action required to authorize Borrower [Guarantor] to enter into and execute the Loan Documents and perform all obligations of Borrower [Guarantor] under the Loan Documents;]*"

[28] Many opinion recipients will not allow the opinion giver to include this assumption. If the opinion giver is required to opine on execution and delivery, *see* Opinion 7 below and accompanying Footnotes.

[29] Acknowledgments in Oregon are usually taken by a notary public. See ORS 93.410. The requirements for acknowledgment of real property instruments are set out in ORS 194.285; ORS 93.530; ORS 93.610 et seq. The acknowledgment statutes have a number of requirements that are factual in nature which cannot be verified by an opinion giver. Furthermore, where a document is signed outside Oregon, it will be acknowledged by an out of state notary or other appropriate official governed by the law of the jurisdiction of signing and will also be subject to the provisions of ORS 194.260. For the reasons stated above, it is appropriate for an opinion giver to assume that a document requiring acknowledgment has been properly acknowledged in accordance with applicable law.

[30] The inclusion of this assumption as it relates to personal property is not necessary if the personal property is described as a recognized category pursuant to UCC Revised Article 9 (e.g. "equipment", "inventory", or in appropriate cases, "all assets").

[31] This assumption is not necessary if a UCC perfection opinion is being given. See Opinion 14 and accompanying footnotes regarding UCC perfection opinions, along with Assumptions (w), (x) and (y).

[32] Assuming Borrower is an entity organized under Oregon law or an individual residing in Oregon.

Financing Statement or the Security Agreement in the Official Records of _____ County, Oregon,][33] so as to give constructive notice of the security interests described therein;

l. the funding of the Loan to Borrower and that value has been given in accordance with Article 9 of the Uniform Commercial Code as adopted in the State of Oregon and codified under ORS Chapter 79 ("**Oregon UCC**");[34]

m. that Lender has negotiated the Loan transaction and will exercise its rights and remedies under the Loan Documents and applicable law in good faith, with fair dealing and in a commercially reasonable manner;

n. that Lender has no notice of any defense against the enforcement of the Loan Documents;

o. that there has not been any mutual mistake of fact or misunderstanding, fraud, duress, or undue influence with respect to the Loan Documents;

p. that Oregon law (without regard to Oregon law regarding conflicts of law) will apply to the interpretation, validity, and enforceability of the Loan Documents;[35]

q. that all statutes, judicial and administrative decisions, and rules and regulations of governmental agencies, constituting the law of the State of Oregon are generally available (i.e., in terms of access and distribution following publication or other release) to lawyers practicing in the State of Oregon, and are in a format that makes legal research reasonably feasible;

r. that the constitutionality or validity of a relevant statute, rule, regulation or agency action is not in issue unless a reported decision in the State of Oregon has specifically addressed but not resolved, or has established, its unconstitutionality or invalidity;

s. that Borrower (and Guarantor) has or will obtain all permits and governmental approvals required in the future, and take all actions similarly required subsequent to consummation of the Loan or relevant to performance of the Loan Documents;

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[33] This provision should only be used if a separate UCC Financing Statement is being recorded in the real estate records.

[34] This assumption supports both the enforceability opinion and the UCC perfection opinion (if applicable). Under the Oregon UCC, value must be given for a security interest in personal property to attach and be enforceable, and the security interest must attach before it can be perfected. *see* ORS 79.0203(2)(a).

[35] *See also* Limitation 1 and Footnotes 60 and 91 below, regarding applicability of Oregon law. Whether or not this language is expressly included, the Committee believes that an opinion letter issued by an Oregon attorney is limited to the law of the state of Oregon unless the opinion letter expressly states that it also covers the law of other jurisdictions. With respect to federal law, if an opinion letter does not state that it covers federal law, that law is understood as a matter of customary practice not to be covered except to the extent that it is expressly addressed by specific opinions in the letter. *See* 2012 ABA/ACREL Report at §1.3. Even when a federal law opinion is given, nonapplicable federal law is customarily viewed as being excluded from the opinion unless explicitly included. Thus, if an opinion giver has examined specific federal statutes or regulations (such as securities laws, tax laws, or other specific statutes or regulations) for purposes of giving an opinion, such statutes and regulations should be identified in the opinion letter.

t. that there are no agreements or understandings among the parties, written or oral, and there is no usage of trade or course of prior dealing among the parties that would in either case, define, supplement, or qualify the terms of the Loan Documents[36]; and

u. that the beneficiary prosecuting a non-judicial foreclosure of the Trust Deed and the plaintiff in a judicial foreclosure of the Trust Deed or other legal action enforcing the Trust Deed will be able to establish, to the satisfaction of any applicable court, that it is the holder of the Note and other obligations secured by the Trust Deed ("**Holder**"), or is authorized to act on behalf of the Holder, which (for a non-judicial foreclosure) may require recordation of modifications of the Trust Deed or assignments of the beneficiary's interest[37];

[if UCC Opinions are given, then include the following Assumptions in this letter] [38]

v. Borrower has rights in the Collateral or the power to transfer rights in the Collateral to a secured party;

w. the Possessory Collateral (defined below) is located, within the meaning of Sections 9-301 and 9-305(a)(1) of the Oregon UCC, only in the State of [Oregon] (the "**Possessory Collateral State**")[39];

x. each Intermediary (defined below) is located, within the meaning of Sections 9-304, 9-305 and 9-306 of the Oregon UCC, only in the State of [Oregon] (the "**Control Collateral State**").[40]

[36] Assumptions (o), (q), (r) and (t) are substantially taken from the 2012 ABA/ACREL Opinion. An opinion giver should carefully review all assumptions to make sure they are applicable to the transaction.

[37] Oregon case law has created some uncertainty regarding the ability to foreclose or otherwise enforce an Oregon deed of trust which names as beneficiary an agent, nominee, or any other representative which is not the actual holder(s) of the instruments evidencing the obligations secured by the deed of trust. See, e.g., Brandrup v. ReconTrust Co., N.A., 353 Or. 668, 303 P.3d 301 (2013); Federal Home Loan Mortgage Corp. v. Smith, 287 Or.App. 42, 400 P.3d 1009 (2017).

[38] Include these assumptions only if UCC perfection opinions are issued. *See* Opinion 14 and accompanying footnotes for more information on UCC perfection opinions.

[39] If no opinion is rendered on Possessory Collateral, this assumption may be omitted. If an opinion is rendered and if the Possessory Collateral State is not Oregon, see Opinion 14 and accompanying footnotes.

[40] If no opinion on is rendered on Control Collateral, this assumption may be omitted. If an opinion is rendered and if the Control Collateral State is not Oregon, see Opinion 14 and accompanying footnotes.

OPINIONS

Subject to the assumptions and qualifications stated herein, we are of the opinion that:

1. Borrower is a limited liability company [or other applicable entity] validly existing under the laws[41] of the State of Oregon.[42]

[*Alternate clause if the Borrower is not organized under Oregon law: "*Based solely on the Authority Certificate(s), the Borrower is qualified to do business in Oregon."]

2. [Guarantor is a limited liability company [or other applicable entity] validly existing under the laws of the State of Oregon.][43]

[*Alternate clause if the Guarantor is not organized under Oregon law: "*Based solely on the Authority Certificate(s), the Guarantor is qualified to do business in Oregon."]

3. All actions or approvals by Borrower, and its [members] [managers or other applicable parties] necessary to bind Borrower under the Loan Documents have been taken or obtained.[44]

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[41] Contrary to the 2012 ABA/ACREL Opinion which uses an explicit definition of "Law", the Committee does not believe it is necessary to define law as used throughout this illustrative form opinion other than "Local Law" referred to in Limitation 3(n) and Footnote 98 below.

[42] Opinion recipients require opinions that address the Borrower's current legal status as an entity that is capable of entering and performing the Loan. Note that there are no "good standing" opinions given in Oregon as the Oregon Secretary of State certificate of existence does not mention good standing. The concept of being duly formed (including "duly incorporated" or "duly organized") has been eliminated as being unnecessary. As a normal part of the opinion giver's due diligence, a certified copy (if the opinion giver did not form the entity) of the Borrower's filed organization documents should be obtained from the Secretary of State in addition to a currently dated Certificate of Existence. Under Oregon law, the Secretary of State's filing of the Borrower's Articles of Incorporation or Articles of Organization is conclusive proof that the entity has satisfied all conditions precedent to formation except in a proceeding by the state to cancel or revoke the formation or to involuntarily dissolve the entity (*see*, *e.g.*, ORS 60.05(2) for private corporation and ORS 63.051(2) for limited liability companies). If, however, the Borrower is a limited partnership, the opinion giver cannot rely on a similar statute became ORS 70.070(4) provides that the Secretary of State's duty to file a limited partnership certificate is ministerial, ORS 70.110 provides that the filed certificate is only notice that the entity is a limited partnership and the persons designated are general partners. As a result, in the case of a limited partnership, the opinion giver must undertake sufficient due diligence and obtain necessary certificates from the principals of the limited partnership in order to give this opinion.

If the Borrower is a private corporation or a limited liability company, a Certificate of Existence issued by the Secretary of State may be relied on, subject to any qualification set forth in the Borrower's Certificate, as conclusive evidence that the entity is in existence or is authorized to transact business in Oregon. (*See* ORS 60.027 for domestic or foreign private corporations or ORS 63.027 for domestic or foreign limited liability companies).

[43] Only give this opinion if a Guarantor is involved. *See* Footnotes 12 and 13 regarding entity selection.

[44] This opinion is included to conform to the 2012 ABA/ACREL Opinion. This opinion relating to Borrower's actions or approvals is given to provide the opinion recipient with comfort that the Loan is authorized. As a part of the opinion giver's due diligence, the entity's organizational documents must be examined to determine what actions must be taken to authorize the Loan. After such a review, an appropriate meeting must be held or an appropriate action must be executed authorizing the Loan. *See, e.g.,* the *Proforma Action Authorizing Loan* attached as Addendum C to this Report. A copy of the minutes or action is then normally attached to the Borrower's Certificate (see the Borrower's Certificate attached to this Opinion). This Opinion should be eliminated if the opinion giver is local counsel and

4. Borrower has all requisite [*insert applicable entity*] power to execute, deliver and perform the obligations of Borrower under the Loan Documents.[45]

5. The Loan Documents are enforceable[46] against Borrower [and Guarantor, as applicable,] in accordance with their terms, except that the foregoing may be limited by bankruptcy, insolvency, reorganization, fraudulent transfer,[47] civil forfeiture,[48] and moratorium laws, or similar laws relating to or limiting the rights of creditors generally, or by equitable principles (regardless of whether such enforcement is considered in a proceeding in equity or at law). The use of the term "enforceable" does not imply any opinion on the availability of equitable remedies other than the foreclosure of the liens created by the Loan Documents in accordance with Oregon law. In giving this opinion number [__], we advise you that an Oregon court may not enforce[49] certain provisions contained in the Loan Documents or allow acceleration of the maturity of the indebtedness. Nevertheless, subject to the other qualifications and limitations set forth in this opinion, (i) upon a material breach by Borrower [or Guarantor; as applicable][50] of a material provision of the Loan Documents or maturity of the Loan, there will be available to Lender the judicial enforcement of the obligation of Borrower [and Guarantor, as applicable] to repay the

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assumption (d) has been included; *see also* Footnote 26. This Opinion will need to be modified to include Guarantor if appropriate for the transaction involved.

[45] The Committee recommends avoiding words like "own, lease, and operate the property" which potentially conflict with assumption (g) and adds nothing to this opinion. This Opinion will need to be modified to include Guarantor if appropriate for the transaction involved.

[46] On occasion, some lenders might request an enforceability opinion using words like: "legal, valid, and binding obligations of the Borrower" which really has the same meaning as enforceable used in Opinion 5. Moreover, it is not customary in Oregon to give an unqualified enforceability opinion which is the reason for the list of qualifiers that follow.

[47] *See* Section 4.6 of the 2003 Guidelines.

[48] *See* ORS 475.485.

[49] The Committee determined that the previous inclusion of the term "strictly enforce" did not serve the opinion recipient and could expose the opinion giver to unintended liability.

[50] Special consideration must be taken by the opinion giver if an enforceability opinion is requested on a guaranty. Affiliated corporate entities are frequently requested to guarantee corporate loans. If the guaranty is given without adequate consideration, the guarantor or creditors of the guarantor may challenge enforceability of the guaranty based on concepts of "consideration" or "fraudulent transfer." On this issue generally, see David Murdoch, Linda Sartin & Robert Zadek, *Leveraged Buyouts and Fraudulent Transfers: Life After Gleneagles*, 43 BUS LAW 1 (1987), and Kirby, McGuinness & Kandel, *Fraudulent Conveyance Concerns in Leveraged Buyout Lending*, 43 BUS LAW 27 (1987). See also, the Equal Credit Opportunity Act (Pub L No 93-495, Title V, 88 State 1521 (1974)) which applies not only to consumer debt, but also to commercial loans. Some guaranties may even be determined by a court to be fraudulent transfers. *See, e.g., In re* Sabine Oil & Gas Corp., 547 B.R. 503 (Bankr. S.D.N.Y. 2016) (upstream guaranties and security interests granted by insolvent subsidiaries were potentially avoidable fraudulent transfers); *see also In re* UC Lofts on 4th, LLC, 2015 WL 5209252 (9th Cir. BAP 2015) (declining to treat benefit to an upstream entity as reasonably equivalent value). The opinion giver should be cautious about opining on the enforceability of a guaranty given by a spouse of a Borrower who is not a co-applicant. Of particular importance is the instance in which a married business owner seeks a business line of credit and the spouse does not have an ownership interest in the business. *see* 15 USC §§ 1691a-f and regulations and interpretations promulgated pursuant thereto.

Lenders occasionally ask an individual Borrower to guarantee his or her own debt. One purpose of such guarantees is to ask the Borrower to waive defenses that are not waivable by the maker of a note under the Uniform Commercial Code, but are waivable by a guarantor. It is not clear whether guarantees of a person's own debt of that of a person's "alter ego" are enforceable in Oregon.

Loan principal together with interest thereon[51] to the extent provided in the Loan Documents; (ii) upon a material breach by Borrower of a material provision of the Loan Documents, Lender will have the right to accelerate the obligation of Borrower [and Guarantor, as applicable] to repay such principal, together with interest to the extent provided in the Loan Documents; and (iii) upon maturity of the Loan or upon acceleration pursuant to clause (ii) above, Lender will have the right to foreclose the liens created by the Loan Documents in accordance with Oregon law.

6. The Loan is not usurious under the laws of Oregon.[52]

[Alternate clause: The payment of interest as set forth in the [Note] will not violate the usury laws or other applicable laws of the State of Oregon regulating the use or forbearance of money.]

[The following additional opinions should only be given if applicable in exceptional circumstances. The opinion giver should conduct thorough due diligence and careful review before giving any of the following opinions.]

7. [*Execution and Delivery*] Based on the attached Certificate of Escrow Officer, Borrower has executed[53] [and delivered[54]] the Loan Documents[, and Guarantor has executed [and delivered] the Guaranty].

8. [*No Violation or Breach*] The borrowing of the Loan, and the execution and delivery by the Borrower of, and performance of its payment obligations in, the Loan Documents,

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[51] This language was included to conform to that language suggested in the 2012 ABA/ACREL Opinion.

[52] *See* ORS 82.010 and 82.025. *See also* Chapter Three, 3.10 of the 2012 ABA/ACREL Opinion.

[53] The opinion giver must either be physically present when the Borrower and Guarantor sign the Loan Documents and delivers them to the escrow officer at or before closing, or must otherwise insure that the Borrower and Guarantor have in fact signed the Loan Documents. *See e.g.,* sample "Certificate of Escrow Officer" attached as Addendum D to this Report which can be used when asked to give this execution and delivery opinion where the opinion giver is not present to see the documents being signed. If the opinion giver is not in a position to confirm that the authorized persons have executed the Loan Documents, or if the opinion giver has examined only unexecuted drafts for purposes of the opinion, then an assumption as to execution and delivery is appropriate in place of an opinion.

The execution opinion means that (a) the individual or individuals who signed the applicable document on behalf of the borrower were authorized to sign in a representative capacity, and (b) such execution by those individuals was sufficient, as a matter of law, to make the obligations of the executed document binding on the borrower and guarantor (if applicable), assuming that the agreement is delivered to the other parties to the transaction. The board resolutions approving the borrower's participation in the transaction will typically designate the officer or manager having authority to execute and deliver transaction documents on behalf of the borrower. *See, e.g.,* the Proforma Action Authorizing Loan attached as Addendum C to this Report. Confirmation that the person signing in fact holds an office with the requisite authority is usually evidenced by an incumbency certificate certifying that the designated person was elected and continues to hold the designated office. *See also,* 2012 ABA/ACREL Report, §3.4(a)

[54] The delivery opinion means that the borrower has delivered the transaction documents to the lender with an intent to be bound (meaning there are no unfulfilled conditions or contingencies that must be satisfied before the documents would be binding on the borrower). Conditions to the effectiveness of the documents contained within the documents themselves do not prevent a legally effective delivery. The delivery opinion is, in virtually all cases, coupled with requests for authorization and execution opinions.

do not: (i) violate the Authority Documents[55][or (ii) breach[56] any existing obligation of the Borrower under any of the agreements and documents specified in Attachment **[__]** hereto (collectively, the "**Specified Agreements**")]. [Execution and delivery by the Guarantor of, and performance of its payment obligations in, the Guaranty, do not: (x) violate the Authority Documents [or (y) breach any existing obligation of the Guarantor under any of the agreements and documents specified in Attachment [__] hereto].] Our opinions in this paragraph do not extend to any action or conduct of [either the] Borrower [or the Guarantor] that an agreement or document may permit but does not require.[57]

9. [*No Violation of Law*][58] The execution and delivery by the Borrower of, and performance by the Borrower of its payment obligations in, the Loan Documents, neither are prohibited by applicable provisions of law comprising published statutes of the State of Oregon, administrative rules and regulations of agencies of the State of Oregon, as contained in the published administrative rules compilation, as duly enacted or promulgated by the State of Oregon ("**Statutes or Regulations**") nor subject the Borrower to a fine, penalty, or other similar sanctions, under any Statutes or Regulations. [Execution and delivery by the Guarantor of, and performance by the Guarantor of its payment obligations in, the Guaranty, neither are prohibited by applicable provisions of Statutes or Regulations nor subject the Guarantor to a fine, penalty, or other similar sanctions, under any Statutes or Regulations.] Our opinions in this paragraph do not extend to any

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[55] If Borrower or Guarantor is formed under the law of a state other than Oregon Law, then the opinion giver typically would not give this opinion about breach or violation of Borrower's (or Guarantor's) organizational documents pertaining to the other state's law.

[56] The Committee recommends not requesting or giving opinions regarding no breach of certain obligations. The no breach opinion provides that the borrower's execution and delivery of, and the consummation by the borrower of the transactions effected by, the transaction documents will not constitute a breach under certain obligations of the borrower. The term "breach" covers situations in which entering into transactions constitutes the breaking of a promise given by the borrower to some other party or constitutes an "event of default" as that term is defined in the other agreement to which the borrower is a party. The opinion recipient may prefer the term "default" or may ask that both "breach" and "default" be addressed. The Committee views these terms as interchangeable in this context. Because the phrase "conflict with" is uncertain and vague in this context, however, the Committee disfavors the use of this phrase in the no breach opinion.

[57] If the opinion giver is requested to give an opinion about no violation of existing obligations of the Borrower under any court orders, although such opinion is not recommended to be requested or given by the Committee, in such an event consider giving the following:

> "[(iii) violate any existing obligation of the Borrower under any orders, if any, which are identified as such in Attachment **[__]** hereto (collectively, the "**Court Orders**"), which the Borrower has confirmed to us are the only court and administrative orders that name the Borrower and or its property. For purposes of this paragraph, we assume that [Specified Agreements and] Court Orders, if any, are governed by law other than that of the State of Oregon, would be enforced to the same extent as under the law of the State of Oregon.]"

[58] The Committee recommends not requesting or giving opinions regarding no breach or violation of law. Such a requested opinion is overly broad and generally beyond the scope of the practice of opinion givers. This opinion specifically limits the scope to the execution and delivery of Loan Documents and further limits the definition of applicable laws. *See* 2012 ABA/ACREL Opinion §3.7 and discussion relating thereto. Opinion recipients who insist on an opinion relating to violation of agreements to which the Borrower or Guarantor may be a party have sometimes allowed the opinion giver to rely "solely" on the Borrower's or Guarantor's Certificate. The giving of such an opinion based on the Certificate should be resisted by the opinion giver and not requested by the opinion recipient as it constitutes a "conduit" opinion as discussed in Section 1.5.b of the 2003 Guidelines and 2012 ABA/ACREL Report §3.7.

action or conduct of [either] the Borrower [or the Guarantor] that a Loan Document may permit but does not require.

10. [*Choice of Law*][59] Except as expressly stated below in this paragraph, this letter does not express any opinion as to the enforceability of any choice-of-law or analogous provisions in the Loan Documents.[60] Section ___ of the [*identify specific Loan Document*] (the "**Choice-of-Law Clause**") provides that for most purposes, the parties thereto select the laws of the State of [_____] ("**Selected Jurisdiction**"), and not Oregon law, to govern the parties' contractual rights and duties under the Loan Documents. For purposes of this opinion, we assume that the Collateral described in the Trust Deed is situated in the state of Oregon and that one or more parties involved in this Loan were domiciled in or conducting business in a state other than the state of Oregon when this Loan was negotiated or that the Loan is otherwise reasonably connected with a state other than Oregon.[61] Based on the foregoing and the assumptions and qualifications stated elsewhere herein[62], we are of the opinion that an Oregon state court applying ORS 15.300 et seq.[63] would enforce the parties' selection of the law of Selected Jurisdiction to govern the contractual rights and duties of the parties under the Loan Documents to the extent provided in the Choice-of-Law Clause, except to the extent that the application of the law of the Selected Jurisdiction would: (a) require a party to perform an act prohibited by the law of the state where the act is to be performed; (b) prohibit a party from performing an act required by the law of the state where it is to be performed; or (c) contravene an established fundamental policy embodied in the law of the state that would otherwise govern the issue in dispute under ORS 15.360. Notwithstanding the foregoing, (i) the law of the Selected Jurisdiction will not govern the creation, recording, priority, and enforcement of a lien on real property that is located in the State of Oregon, (ii) to the extent

[59] Include this choice-of-law opinion only if (i) the opinion recipient requires this opinion in order to close the financing, and (ii) one or more Loan Documents expressly choose the governing law of a state other than Oregon. *See* Qualification (i) and Footnote 84, which must be modified if this opinion is given. As an aside, virtually all loan documents requiring a legal opinion will have a provision selecting the jurisdictional law that governs. In Oregon (like most states), contractual choice-of-law provisions are often subject to a number of limitations, including that the law where the real property collateral is located governs perfection, priority, procedural and enforcement issues and considerations of public policy among others. In Oregon (unlike many other states), the validity of a choice-of-law clause is determined by statute, ORS 15.300 through 15.380. For a full explanation of this statute, see Symeon C. Symeonides, *Oregon's Choice-of-Law Codification for Contract Conflicts: An Exegesis*, 44 Willamette L Rev 205 (2007).

[60] As 2012 ABA/ACREL Opinion §3.9 suggests, if no choice-of-law opinion is given, an express exclusion of choice-of-law is more appropriately stated in the "Qualifications" section of this opinion letter than in the Opinions portion of the letter. *See* Qualification (i) below, which excludes choice-of-law provisions.

[61] ORS 15.300 et seq. only applies if more than one state has contacts with the transaction. 44 Willamette L Rev 205, 210 (2007). If the transaction does not have contacts with any state other than Oregon, the statute does not apply and a choice-of-law clause choosing another state will likely be unenforceable. ORS 15.305. There is not a requirement under the statute that the state whose law is selected to govern bear minimum contacts to the transaction, so long as the transaction has contacts with at least two states. 44 Willamette L Rev 205, 230 (2007).

[62] To be enforceable, the choice-of-law clause must first meet the basic requirements of contractual enforceability (*e.g.*, proper formalities, capacity on the part of the parties, and actual consent (i.e., execution and delivery without fraud, duress, etc.).) Due to their factual nature and because in multi-state transactions it often is not clear which state's law governs these issues, they are dealt with in this opinion through assumptions.

[63] Provided that no other Oregon statute mandates that the law of Oregon govern the loan documents (*e.g.*, ORS 15.320), an Oregon court should apply ORS 15.350 in determining if and to what extent the choice-of-law clause will be enforced.

otherwise provided in the Uniform Commercial Code as adopted in any applicable jurisdiction with respect to the perfection or non-perfection of security interests, the effect of perfection or non-perfection of security interests, and the priority of security interests, the law of jurisdictions other than the Selected Jurisdiction may govern such matters, and (iii) matters that are procedural rather than substantive may be governed by the law of the forum in which a legal proceeding is pending rather than the law of the Selected Jurisdiction. We express no opinion as to whether any Loan Document constitutes valid and legally binding obligations of any person or are enforceable against any person under laws of the Selected Jurisdiction.

11. [*Form of Security Documents*] The Trust Deed is in a form sufficient to create a lien on all right, title, and interest of the Borrower in and to the Real Property.[64]

[Alternatively, in place of above sentence, use the following sentence when appropriate: "The Trust Deed is in form sufficient to create a lien (i) on all right, title, and interest of the Borrower in and to the Real Property, including the Borrower's interest in the leases of the Real Property, and (ii) on the Borrower's interest in the unpaid rents of the Real Property."]

Note that if a separate Security Agreement that is governed by Oregon law is included as one of the Loan Documents, then add the following: The Security Agreement is in a form sufficient to create a security interest in those items of the personal property stated as constituting part of the Collateral in which a security interest can be created under Article 9 of the Oregon UCC.

12. [*Form of Assignment of Leases and Rents*] The Lease Assignment is in form sufficient (i) to create a lien on the Borrower's interest in the unpaid rents of the Real Property and (ii) for recording in the real property records of county in which the Real Property is located.[65]

13. [*Litigation*][66] To our knowledge, there are no suits, actions or proceedings at law or in equity before any court, governmental instrumentality or agency now pending or threatened against Borrower [or Guarantor] which seek to enjoin the performance of the Loan Documents or to declare the Loan Documents invalid or subordinated.

[64] The Committee suggests that this opinion not be requested or given. The Committee believes this opinion is subsumed within the enforceability opinion. *But see*, 2012 ABA/ACREL Opinion 3.6(a) and WSB Opinion Report Opinion C.15 for other perspectives. See Footnote 65 regarding assignment of rents opinions.

[65] For further commentary on assignment of rents opinion, s*ee* 2012 ABA/ACREL Opinion 3.6(a) and 4.4; ABA/ACREL Local Counsel Report 3.6(a)(i); and WSB Opinion Report opinion C.16. For the opinion giver to provide an opinion that the assignment of leases and rents is in a form sufficient to create a lien, the assignment should clearly state that the parties intended the assignment to be for security or collateral purposes and not an absolute assignment. See Qualification (w) *infra*.

[66] Some lenders require a no litigation opinion covering the existence of legal proceedings against the opinion giver's client. Opinion givers usually decline to provide a no litigation opinion or confirmation because they do not want to be a certifier of facts. If nonetheless such an opinion is to be given, it needs to qualified to the knowledge of the opinion giver and/or based solely on a certificate or certificates from the borrower and/or results of a search provider.

14. [*UCC Opinions*][67]

a. The Security Agreement[68] is effective to create a security interest in the Collateral in favor of the Lender in those items of Collateral consisting of personal property in which a security interest can be created under Article 9 of the Oregon UCC. [69]

b. The Financing Statement is in proper form for filing with the Central Filing Office (defined below), and upon filing and proper indexing of the Financing Statement in the Central Filing Office, the Lender will have a perfected security interest in those portions of the Article 9 Collateral that are described in both the Financing Statement and the Security Agreement and in which a security interest can be perfected under Article 9 of the Oregon UCC by the filing of a financing statement in the Central Filing Office.[70]

c. The Fixture Filing is in proper form for filing with the Local Filing Office (defined below), and upon filing and proper indexing of the Fixture Filing in the Local Filing Office, the Lender will have a perfected security interest in the Local Filing Collateral located at the Real Property.[71]

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[67] If UCC perfection opinions are being given, then the opinion giver needs to include certain UCC specific definitions in this opinion letter which are listed in paragraph 14(f). UCC perfection opinions in real estate financing transactions should only be given, and requested, with respect to collateral that is of material value. Lender's counsel should attempt to identify what types or items of personal property are significant enough to merit a specific opinion. For example, in a medical facility or hotel financing, the furniture, fixtures, equipment, accounts, and franchise or management agreement will be of significant value. Such value is less likely in a commercial retail building not occupied by its owner, or in a residential apartment complex.

[68] Note that if a Security Agreement is not used, then the name of pertinent Loan Document should be inserted here and throughout the UCC Opinions. For example, a deed of trust is often used as a security agreement which might include the UCC Collateral referred to in these UCC opinions.

[69] Opinions 14(a) through (e) are considered UCC perfection opinions, although Opinions 14(d) and (e) are rarely given in real estate secured loans because Possessory Collateral and Control Collateral are atypical in most real estate financings. Note that no opinion on priority is given. It is seldom cost-effective to identify all the possible exceptions and qualifications to priority, which in any event are generally known to sophisticated lenders and their counsel. Where a priority opinion is demanded in exceptional situations, a "laundry list" of UCC priority exceptions should be considered, including references to statutes other than the UCC such as the Bankruptcy Code and other federal statutes. A "laundry list" of exceptions is included in the *Special Report by the Tribar Opinion Committee, U.C.C. Security Interest Opinions*, 49 Bus. Law. 359 (1993), as supplemented by *An Addendum for Protected Purchasers – U.C.C. Security Interest Opinions*, 54 Bus. Law. 1261 (1999).

[70] This form of opinion assumes an Oregon entity or individual is the Borrower. This Opinion cannot be given if the debtor (as grantor of the security interest) is located in a jurisdiction other than the state of Oregon. Only after careful review by the opinion giver should this opinion be given. Some loan documents include language such as "*and upon such filing with create in favor of Lender a lien upon the collateral described in the Financing Statements to the extent such lien can be created under the UCC by such filing*." The opinion giver must be careful not to give such an expanded opinion as it can create a perfection opinion. Also note that this Central Filing Office opinion does not apply to security interests governed by (i) federal law, (ii) the UCC enacted in any jurisdiction other than Oregon, or (iii) Oregon law other than the Oregon UCC.

[71] Many real estate secured loans do not include a Fixture Filing. Rather, the Lender relies upon the deed of trust to perfect the interest in the Local Filing Collateral. *See* ORS 79.0502(3).

d. The security interest in the Possessory Collateral will be perfected upon: (i) execution of the Security Agreement by all parties thereto; and (ii) the Lender taking possession of the Possessory Collateral.

e. The security interest in the Control Collateral described in the Control Agreement will be perfected upon: (i) execution of the Security Agreement by all parties thereto; (ii) the execution of the Control Agreements by all parties thereto [*Alternate clause*: (ii) the Lender becoming the depository bank's customer with respect to deposit accounts], (iii) the Lender becoming the entitlement holder with respect to security entitlements; (iv) the Lender becoming the commodity intermediary with which the commodity contract is carried; and/or (v) with respect to uncertificated securities, such securities being registered in the name of the Lender by the issuer.

f. Certain UCC Definitions. *[If any of the above UCC Opinions are given, then some or all of the following definitions need to be included here]* Terms used herein that are defined in the Oregon UCC shall have the meanings set forth in the Oregon UCC. The following terms shall have the following meanings:

"**Article 9 Collateral**" means the Collateral described in the Security Agreement in which the Borrower has rights and as to which the creation of a security interest is governed by Article 9 of the Oregon UCC.

"**Central Filing Office**" means the office of the Secretary of State of the State of Oregon.[72]

"**Collateral**" has the meaning ascribed to such term in the Loan Documents.

"**Control Collateral**" means Collateral that is investment property, deposit accounts, electronic chattel paper and letter-of-credit rights as defined in the Oregon UCC.[73]

"**Intermediary**" means the depositary bank for a deposit account, the securities intermediary for a security entitlement, the commodity intermediary for a commodity account, the issuer of uncertificated securities or the issuer or nominated person of a letter of credit.[74]

"**Local Filing Collateral**" means Collateral located at the Real Property that consists of goods that are or become fixtures, timber to be cut, or as-extracted collateral.

[72] Pursuant to the Oregon UCC, the state of organization of entities comprising the debtor and the state of residence of individuals comprising the debtor are the states which govern the perfection, the effect of perfection or nonperfection, and the priority of nonpossessory security interests in the Article 9 Collateral. Consequently, in order to perfect the security interest in the Article 9 Collateral, the Financing Statement must be filed in the jurisdiction of organization or residence of the applicable party comprising the debtor as noted above.

[73] Most real estate secured loans will not include significant Control Collateral, other than perhaps deposit accounts. If Control Collateral does not comprise a significant portion of the value of the Collateral, no opinion should be requested for this type of collateral.

[74] The only "Intermediary" likely to be involved in a real estate secured loan is the depository bank for a deposit account. If no opinion is rendered on Control Collateral, then this definition may be omitted.

"**Local Filing Office**" means the office of the recorder of the County of [_____], State of Oregon.

"**Possessory Collateral**" means Collateral that is money, instruments, certificated securities, tangible chattel paper, and negotiable documents as defined in the Oregon UCC.[75]

QUALIFICATIONS

Although the following list is not a complete recitation of matters as to which no opinion is expressed, and this list is not intended to supersede or diminish other limitations set forth or incorporated by reference in the opinion, we wish to specifically emphasize and advise you that we express no opinion as to the enforceability of:

(a) provisions of the Loan Documents that grant rights of self-help, rights of setoff, or the right to possession of the real or personal property or collection of rental or other income without (i) appointment of a receiver, or acquisition of the Real Property through foreclosure or other means, (ii) complying with the procedural requirements for appointment of a receiver, and (iii) complying with the limitations applicable to the rights and powers of a receiver at law or in equity;[76]

(b) provisions purporting to establish evidentiary standards;

(c) provisions relating to the waiver of rights, remedies, and defenses,[77] including without limitation those purporting to waive the right of redemption or the statutory provisions of the Oregon Trust Deed Act that permit Borrower to reinstate a trust deed during a non-judicial foreclosure proceeding;

(d) provisions that permit Lender to collect a late charge, increased interest rate after default or maturity, a yield maintenance charge or prepayment premium,[78] acceleration of future

[75] Most real estate secured loans will not include significant Possessory Collateral. If so, no opinion should be requested with respect to this type of collateral and this definition may be omitted.

[76] A lender's right to collect rental or other income without taking possession or the appointment of a receiver is questionable under Oregon law. *See Investors Syndicate v. Smith,* 105 F2d 611, 619–621 (9th Cir 1939). Cautious lawyers take the position that the right to possession or collection of rents over the borrower's objection may be safely exercised only through the appointment of a receiver. In Oregon, receivers may not be appointed without notice and may not serve without bond or letter of credit; the entitlement to a receiver and to the powers of a receiver is within the discretion of the court notwithstanding the terms of the loan documents. *See* ORCP 80 and 82 A(2). On this subject generally, see also *The Lender's Rights to Rents and Profits From Real Property After Default,* VIII OREGON DEBTOR CREDITOR NEWSLETTER Number 2 (Mid-Winter 1989).

[77] Oregon law on the validity of these waivers is not well developed, but the controlling principle is set forth in *Turney v. J.H. Tillman Co.*, 112 Or 122, 132, 228 P 933 (1924):

> "[A] person may waive by agreement the benefit of a statutory provision. But there is an exception to this general rule in the case of a statutory provision whose waiver would violate public policy expressed therein, or where rights of third parties which the statute was to protect are involved.

[78] S*ee, e.g., Kesterson v. Juhl*, 157 Or App 544, 970 P2d 681 (1998).

amounts due (other than principal) without appropriate discount to present value, liquidated damages, ties, or interest on interest;[79]

(e) any reservation of the right to pursue inconsistent or cumulative remedies;[80]

(f) provisions providing that the maturity date of the Loan may be accelerated upon a sale, other transfer, or encumbrance of the Real Property or Collateral, or a change in control, ownership, or management of any party;[81]

(g) provisions impacting "one-action" and "anti-deficiency" protections contained in the Oregon Trust Deed Act, including without limitation, the statutory restrictions on deficiency judgments after a non-judicial foreclosure; [82]

(h) provisions for payment of damages, reimbursement of costs and expenses, or indemnification for claims, losses, or liabilities (including, without limitation, attorney fees) in excess of statutory limits or an amount determined to be reasonable by any court or other tribunal, and any provision for attorney fees other than to the prevailing party;[83]

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[79] Except for negative amortization loans and loans falling within the narrow scope of Oregon's usury laws, there are no Oregon statutory restrictions on prepayment premiums, interest rates (including default), or late fees. *See* ORS 82.010(3)-(4); *see also* ORS 86A.195(3)-(4) (setting forth restrictions applicable to negative amortization loans). Depending on the contract language, prepayment fees may be viewed as either liquidated damages, *See, e.g., Illingworth v. Bushong,* 297 Or 675, 688 P2d 379 (1984), or as an independent contractual promise, *e.g., DiTommaso Realty, Inc. v. Moak Motorcycles, Inc.,* 309 Or 190, 785 P2d 343 (1990). If viewed as liquidated damages, the provision will be scrutinized under a UCC-type analysis, and some courts have stricken prepayment charges determined not to be a reasonable estimate of the anticipated damages. *See In re Skyler Ridge,* 80 BR 500 (Bankr CD Cal 1987) (finding the prepayment provision in question to be unenforceable under Kansas law). The same liquidated damages analysis could be applied to default interest rates and late charges. Alternatively, excessive interest rates may be challenged as unconscionable.

[80] Oregon statutory and common law governing foreclosure restricts the Lender's choice of remedy and sequence. *See, e.g*., ORS 86.797(2) (restricting the right to seek a deficiency judgment or to pursue a guarantor following foreclosure) and ORS 88.103 (expiration of remedies on purchase money mortgages following foreclosure sale).

[81] *See also Carey v. Lincoln Loan Co.*, 165 Or App 657, 998 P2d 724 (2000) (holding that a consent-to-assignment clause was valid and did not impose an impermissible restraint on alienation); *United Savings Bank Mutual v. Barnette*, 72 Or App 46, 52, 695 P2d 73 (1984), *rev. denied*, 299 Or 203, 700 P2d 252 (1985) (holding that the restraint on alienation created by a due-on-sale clause, if any, was reasonable). This qualification substantively conforms to the other transaction related qualifications provided in the 2012 ABA/ACREL Opinion.

[82] The 1997 Oregon Legislature amended ORS 86.797 (formerly ORS 86.770; renumbered in 2013) by eliminating references to sureties and guarantees; however, this did not change the prohibition against bringing actions on the debt following a judicial or nonjudicial foreclosure. Before 1997, the prohibition was limited to nonjudicial foreclosures: pursuant to the former ORS 86.770(2), no action on a guaranty could be brought following a nonjudicial foreclosure, or while such a foreclosure was pending.

[83] Loan documents frequently require the borrower to pay the lender's actual attorney fees. However, ORS 20.096 makes attorney fee provisions reciprocal by providing that the prevailing party will be entitled to attorney fees if a suit or an action is filed on a contract providing for attorney fees to only one named party. Furthermore, ORS 86.778(1) limits the lender's attorney fees (and trustee's fees) in the event of reinstatement during a nonjudicial foreclosure. In judicial foreclosures, the court will exercise its discretion and award only attorney fees that it determines to be "reasonable" regardless of contractual provisions to the contrary.

(i) provisions pertaining to jurisdiction, venue, or choice of law;[84]

(j) provisions purporting to appoint Lender or the trustee as attorney-in-fact for Borrower;

(k) limitations on the liability of Lender or the trustee named in the Trust Deed, or for their indemnification for their own negligence or misconduct;[85]

(l) provisions that purport to establish or maintain priority of a lien or security interest created by the Loan Documents;[86]

(m) provisions purporting to impose continued liability following non-judicial foreclosure, such as environmental or access laws or building code indemnity provisions;[87]

(n) provisions purporting to allow Lender to determine the method or order of sale of property in a foreclosure action;[88]

(o) severability clauses of the Loan Documents;

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[84] Choice of law provisions may be enforceable if the chosen state has a reasonable relationship to the transaction or the parties, unless the selected state law is contrary to Oregon public policy. *See Young v. Mobil Oil Corp.*, 85 Or App 64, 69, 735 P2d 654 (1987) (holding that an indemnity provision was void as being contrary to Oregon's fundamental public policy, even though permitted under the selected state law); *see also Machado-Miller v. Mersereau & Shannon, LLP*, 180 Or App 586, 592-593, 43 P3d 1207 (2002) (the selected state's interest must be materially greater than Oregon's interest in order to override Oregon's fundamental public policy interest). Note that if the choice of law opinion is given (*see* Opinion 10 and accompanying footnotes), this assumption should be modified accordingly.

[85] Loan documents may attempt to exonerate the Lender from liability for its own conduct, such as when the Lender is acting as a mortgagee in possession. In Oregon, absent a contrary statutory provision, one party can contract with another for indemnification against its own conduct if that conduct is not wanton or criminal in nature; provided, however, that the court may look to the relative bargaining power and sophistication of the parties, as well as other factors, in deciding to uphold such indemnification. *See, e.g., Southern Pac. Co. v. Layman*, 173 Or 275, 282, 145 P2d 295 (1944) (indemnity provisions will be enforced if they are not detrimental to the indemnitor to an extent that the parties could not reasonably have intended); *Waggoner v. Oregon Auto Ins Co*, 270 Or 93, 98, 526 P2d 578 (1974) (where an agreement provided for indemnification from liability for all personal injuries resulting from "any" condition of leased premises, where there was no evidence of "any great disparity between the parties in the financial sense," and where the benefit conferred on the indemnitor was not inconsequential, the indemnity provision was enforceable even as to losses resulting from the indemnitee's own negligence); *but see Hays v. Centennial Floors*, 133 Ore. App. 689, 893 P2d 564 (1995) (holding that ORS 30.140(2), voiding certain indemnity provisions in construction agreements, supersedes the holding in *Waggoner v. Oregon Auto Ins Co.*).

[86] The enforceability opinion does not opine, and should not be read to imply, that the mortgage has actually encumbered the specific property (actual creation of a lien), that the lien has been perfected, and that it has actual priority over other liens. *See* ABA/ACREL Report §§ 3.5(b) and 3.6. With respect to future advances, ORS 86.155 provides that advances secured by a "line of credit instrument" shall have the same priority whether the advances are obligatory or optional. If the trust deed does not strictly comply with ORS 86.155, the lawyer should not give any opinion on the priority afforded any future advance.

[87] See also the discussion at Footnote 80 *supra*. It is not clear whether any liability secured by a trust deed can continue after foreclosure in light of ORS 86.797.

[88] There is no current case law in Oregon addressing an attempt to modify the statutory method or order of sale on foreclosure as set forth in, e.g., ORS 86.755.

(p) provisions that purport to prevent any party from becoming a mortgagee-in-possession, notwithstanding any enforcement actions taken under the Loan Documents;

(q) provisions that purport to require waiver of the obligations of good faith and fair dealing;

(r) provisions that preclude a party who has materially failed to render or offer performance required by the Loan Documents to cure that failure, unless (i) permitting a cure would unreasonably hinder the aggrieved party from making substitute arrangements for performance, or (ii) it was important in the circumstances to the aggrieved party that performance occur by the date stated in the Loan Documents;

(s) provisions that provide for the application of insurance and condemnation proceeds to the indebtedness;[89]

(t) provisions waiving trial by jury;

(u) provisions which provide for service of process in a manner not authorized under the laws of the State of Oregon;

(v) provisions in any documents executed and delivered by Borrower [or Guarantor] in connection with the Loan not expressly set forth herein;

(w) provisions in the Loan Documents which provide that the assignment of leases and rents is in a form to create an assignment other than for collateral purposes, including but not limited to provisions that purport to assign the leases and rents absolutely; and

(x) provisions in the Loan Documents assigning to Lender or otherwise prohibiting or restricting Borrower's [or Guarantor's] rights under the U.S. Bankruptcy Code.

LIMITATIONS

None of the opinions herein expressed include any implied opinion[90] and the opinions are specifically subject to and qualified by the following:

1. Regardless of the states in which members of this firm are licensed to practice, our opinion is limited to the laws of Oregon.[91]

[89] This qualification substantively conforms to the general qualifications provided in the ABA/ACREL Local Counsel Report.

[90] See Section 1.5.a of 2003 Guidelines.

[91] 2012 ABA/ACREL Report §1.3(b) provides: "There appears to be a trend in real estate secured financing opinion letter practice to specifically *exclude* coverage of federal law except where expressly identified federal law is relevant to the transaction or the parties." Federal law sometimes is stated to be included in opinion letters even though, after taking account of exclusions of the kind set forth in Section 4.6 of the 2012 ABA/ACREL Opinion, it is difficult to identify any federal law that would be relevant in opinion letters given in most real estate secured transactions. If any federal law is to be considered, it should be identified and covered expressly; otherwise, no coverage of federal law should be implied or generally referred to. Federal law should be covered only if there is a reason to do so, such as if a federal issue is material to the transaction. To avoid any risk of misunderstanding, however, the 2012

2. This opinion is provided solely for the Lender's use in connection with the Loan transaction for the purposes contemplated by the Loan Documents[92], and not as a guaranty or warranty of the matters discussed herein. Our opinion is limited to the matters expressly stated herein, and no other opinions may be implied or inferred.

3. Without limiting any other disclaimers or limitations contained in this opinion, we express no opinion as to any matter whatsoever relating to:

(a) the value of the collateral;

(b) the adequacy of the consideration for the Loan [or Guaranty];

(c) the accuracy or completeness of any financial, accounting, or statistical information furnished to Lender [or Guarantor];

(d) the accuracy or completeness of any representations made by Borrower [or Guarantor] to Lender;

(e) the ability of Borrower [or Guarantor] to meet [its] [their] obligations under the Loan Documents;

(f) the state of the title to the Real Property and personal property or the attachment, perfection, or priority of any liens thereon or security interest therein;[93]

(g) the adequacy or accuracy of descriptions of real or personal property;

(h) compliance with securities, labor, pension and employee benefits (e.g. ERISA), zoning, land use, building, health and safety, or environmental rules, regulations, laws, ordinances, or directives;

(i) compliance with fiduciary duty and disclosure requirements, antitrust and unfair competition laws and regulations, tax laws and regulations;[94]

(j) patent, copyright and trademark, state trademark, and other intellectual property law;[95]

ABA/ACREL Opinion language follows the general practice of expressly excluding bankruptcy and similar law pertaining to creditors' rights even though many are federal and excluded already.

[92] *See* 2012 ABA/ACREL Opinion §5.1 (Use).

[93] *See* Sections 4.0.c and 4.0.d of the 2003 Guidelines.

[94] *See* Section 4.6(d) and (f) of the 2012 ABA/ACREL Opinion.

[95] *See* Section 4.6(m) of the 2012 ABA/ACREL Opinion.

(k) laws concerning international treaties or conventions, national and local emergency, possible deference to acts of sovereign states, criminal forfeiture and criminal prosecution (including mail fraud and wire fraud statutes) and racketeering; [96]

(l) whether the Lender is doing business in the state of Oregon; [97] and

(m) the statutes and ordinances, the administrative decisions, and the rules and regulations of counties, towns, municipalities, and special political subdivisions, and judicial decisions to the extent that they deal with any of the foregoing matters in this paragraph (collectively, "**Local Law**"). [98]

[(n) the enforceability of any provision in the Loan Documents that excludes, waives or limits the liability of any party for matters set forth in Section 9-602 of the Oregon UCC.] [99]

4. Whenever the phrase "knowledge", "our actual knowledge" or any variation thereof is used in this opinion, the subject modified by such phrase is limited to matters within the present actual knowledge of _____ and _____, the lawyer(s) in this firm actively engaged in the representation of Borrower, shall mean only the conscious awareness of facts or other information by such lawyer(s), and shall not include any knowledge that may be imputed to such individual(s) by constructive notice or other means or imply that any inquiry has been undertaken by such individual(s) with respect to any of such matters except to the extent that facts and circumstances presented to such individual(s) would compel a prudent lawyer to make further inquiry when presented with the same facts and circumstances. [100]

5. This opinion is rendered at the request of Borrower as a requirement for closing. This opinion does not establish any attorney-client relationship between this firm and any addressee. Nothing contained in this opinion shall be deemed to constitute a waiver of the attorney-client privilege between this firm and Borrower [or Guarantor].

6. We have reviewed copies or originals of the Loan Documents and the Authority Documents, and we have given consideration to such matters of law [and facts], as we have deemed appropriate, in our professional judgment, to render such opinions.

This opinion is rendered as of the date set forth above, and we disclaim any obligation to advise you of any changes in the circumstances, laws, or events that may occur after this date or to otherwise update this opinion.

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[96] *See* Section 4.6(q) and (r) of the 2012 ABA/ACREL Opinion.

[97] *See* Section 4.1.a of the 2003 Guidelines for a discussion of the reasons Borrower's counsel is generally not in a position to opine as to the necessity of Lender's qualification to do business in the state where the Collateral is located.

[98] *See* Section 4.6(g) of the 2012 ABA/ACREL Opinion for a further discussion of Local Law.

[99] ORS 79.0602 makes unenforceable the purported waiver of certain rights and obligations. Use this limitation only if giving UCC perfection opinions.

[100] *See also,* Section 3.4.a of the 2003 Guidelines. This limitation should only be included when an opinion based on the opinion giver's knowledge is referenced in one or more opinions.

The opinions expressed in this letter are solely for the benefit of the Lender and may not be relied upon by any other person or disclosed, quoted or provided to any other person or entity without our written consent; however, we consent to reliance on the opinions expressed herein by any party that becomes a successor lender subsequent to the date of this opinion letter by acquiring the Loan or an interest in the Loan for value, in good faith, and in accordance with the provisions of the Loan Documents (each a "**Successor Lender**") as if this opinion letter were addressed and delivered to such Successor Lender on the date hereof, on the condition and understanding that: (i) in no event shall any Successor Lender have any greater rights with respect to this opinion than the original addressees of this opinion on the date hereof, nor any greater rights than those possessed by the assignor of the interest in the Loan acquired by the Successor Lender; (ii) our consent to such reliance shall not constitute a reissuance or update of the opinions expressed herein or extend any statute of limitations period applicable to this opinion on the date hereof; (iii) we have no responsibility to consider the applicability of any provisions of this opinion to any Successor Lender; and (iv) any such reliance must be actual and reasonable under the circumstances existing at the time such Successor Lender becomes a Successor Lender, including any circumstances relating to changes in law or facts known to or reasonably knowable by such Successor Lender at such time. [101]

This opinion letter may be delivered to the following parties for review, but such parties shall have no recourse against the undersigned law firm in connection with any opinion rendered herein: (a) to a regulatory agency having supervisory authority over the Lender for the purpose of confirming the existence of this opinion letter; (b) to nationally recognized statistical rating organizations rating an issuance involving the Loan or otherwise entitled to access under Rule 17G-5 under the Securities and Exchange Act of 1934, as amended, by providing a copy of this opinion letter to the appropriate 17G-5 information provider for the securitization into which the Loan or a component of the Loan is deposited or as otherwise permitted by the applicable pooling and servicing agreement or trust and servicing agreement, as the case may be; (c) to a court or arbitrator and parties to a litigation or arbitration in connection with the assertion of a defense as to which this opinion letter is relevant and necessary; and (d) to other parties as required by the order of a court of competent jurisdiction in the United States.

Very truly yours,

_____

[*Firm name only; not an individual*] [102]

[101] If others (i.e. participating lenders or rating agencies) are to receive a copy of the opinion, they should be included in this paragraph. *See also* Section 1.7 of the 2003 Guidelines. A shorter form of this reliance paragraph, limited only to the named lender as addressee, would be the following: "*This opinion letter is rendered only to you and is solely for your benefit in connection with the transactions contemplated by the Loan Documents."*

[102] Consistent with customary opinion practice and the 2012 ABA/ACREL Report, the recommended practice in Oregon is for opinion letters to be signed in the firm's name rather than in the name of an individual lawyer.

ADDENDUM A

2022 Oregon Model Opinion

[Date]

[Name and Address of Opinion Recipient]

Re: $_____ Loan to _____ (the "**Loan**")

Ladies and Gentlemen:

INTRODUCTION

We have acted as Oregon counsel to _____ ("**Borrower**") in connection with that certain Loan Agreement ("**Loan Agreement**") dated _____, ___, between _____ ("**Lender**") and Borrower.

We have also acted as Oregon counsel to _____ ("**Guarantor**").

[*Alternate clause*: We are not Borrower's [or Guarantor's] general counsel, we have not previously represented Borrower [or Guarantor], and we have made no investigation of Borrower's [or Guarantor's] legal affairs except as expressly set forth in this letter.]

In this capacity, Borrower [and Guarantor] [has] [have] requested that we deliver to you our opinion as to certain matters relating to the Loan. This opinion is delivered to you pursuant to Section ___ of the Loan Agreement.

DOCUMENTS REVIEWED

In rendering our opinion, we have examined originals, copies identified to our satisfaction as true copies of the originals, or copies certified to us as being execution copies of the following documents, provided to us [via email][under cover of a letter dated] _____ from _____, all bearing the date of _____, 20__, unless otherwise indicated:

2. [The Loan Agreement dated as of _____ executed by Borrower and Lender;]

3. Promissory Note ("**Note**") dated as of _____ executed by Borrower and payable to the order of Lender in the sum of $_____;

4. Deed of Trust ("**Trust Deed**") dated as of _____ executed by Borrower as grantor, in favor of Lender as beneficiary, securing the Note, encumbering certain property including real property located in _____, County in the state of Oregon (the "**Real Property**");

5. [Assignment of Rents and Leases ("**Lease Assignment**") dated as of _____ executed by Borrower, as Assignor, for the benefit to Lender, as Assignee;]

6. [Security Agreement ("**Security Agreement**") dated as of _____ executed by Borrower, as debtor, and naming Lender as secured party;]

7. [Guaranty Agreement ("**Guaranty**") dated as of _____ executed by Guarantor as Guarantor in favor of Lender;]

8. [Hazardous Material Indemnification Agreement ("**Indemnification Agreement**") dated as of _____ executed by Borrower [and Guarantor] in favor of Lender;] and

9. [UCC Financing Statement ("**Financing Statement**") naming Borrower as debtor and Lender as secured party.]

The documents listed as 1 through 7 above are collectively referred to herein as the "**Loan Documents**." All property described in any of the Loan Documents in respect of which provision is made by the Loan Documents for a lien or security interest is referred to herein as the "**Collateral**."

In addition to the Loan Documents, we also have been furnished with and have examined the following:

A. A Borrower's Certificate [*and Guarantor's Certificate*] dated _____, 20___ [a copy of which is attached hereto and by this reference incorporated herein]("**Borrower's Certificate**");

B. A Certificate issued by the Oregon Secretary of State, Corporation Division, with respect to Borrower, dated _____, _____, ("**Authority Certificate**" a copy of which is attached hereto and by this reference incorporated herein; and

C. The following with respect to the Borrower: (i) Articles of Organization as filed with the Oregon Secretary of State; and (ii) Operating Agreement dated [_____] (collectively, the "**Borrower Entity Documents**").

D. [*Consent/Resolution*] of the [members][manager] of the Borrower.

E. [The following with respect to the Guarantor: (i) Articles of Organization as filed with the Oregon Secretary of State; and (ii) Operating Agreement dated [_____] (collectively, the "**Guarantor Entity Documents**").]

F. [*Consent/Resolution*] of [members or managers] of the Guarantor.

The Borrower's Certificate and the Authority Certificate are collectively referred to herein as the "**Certificates**". The Borrower Entity Documents [and Guarantor Entity Documents] are collectively referred to as the "**Authority Documents**."

RELIANCE WITHOUT INVESTIGATION

We disclaim any responsibility for any changes that may have occurred with respect to the status of Borrower [or Guarantor] from and after the respective dates of the Certificates mentioned

above. We also assume that the Certificates and the public records upon which they are based are accurate and complete.

Except to the extent the information constitutes a statement, directly or in practical effect, of any legal conclusion at issue, we have relied without investigation or analysis upon the information contained in representations by the Borrower [or Guarantor] in the Loan Documents and in the Borrower's Certificate [and Guarantor's Certificate] and public officials. We have made no independent investigation with regard to such matters or with regard to the warranties and representations made by Borrower [or Guarantor] in the Loan Documents or of any related matters. Except as specifically identified herein, we have not been retained or engaged to perform, and we have not performed, any independent review or investigation of (1) any agreement or instrument to which Borrower [or Guarantor] may be a party or by which Borrower [or Guarantor] or any property owned by Borrower [or Guarantor] may be bound, or (2) any order of any governmental or public body or authority to which Borrower [or Guarantor] may be subject.

ASSUMPTIONS

In issuing this opinion, we assume:

a. that Lender and all other parties to the Loan Documents (other than Borrower [and Guarantor]) have satisfied all necessary legal requirements applicable to it and that Lender has all necessary corporate authority to enter into the Loan Documents and consummate the Loan;

b. the legal capacity of all natural persons to enter into and perform their respective obligations under the Loan Documents;

c. the authenticity and completeness of all documents submitted to us for review, that each such document that is a copy conforms to an authentic original, and that all signatures on each such document are genuine;

d. that Borrower is a general business entity of a type that is not regulated by governmental authority in a manner that restricts its ability to alienate or encumber its property to secure indebtedness or to enter into the Loan Documents;

e. the due execution and delivery of the Loan Documents by all parties [except Borrower] [and Guarantor] in accordance with the laws of their governing jurisdictions;

f. that the signatures of the Borrower on the [Trust Deed] [and the Lease Assignment] have been properly acknowledged according to applicable law;

g. the vesting of fee title to the Real Property in Borrower at the time the Loan Documents are executed and recorded or filed and that Borrower has good and sufficient rights in and title to the Collateral;

h. the accuracy and sufficiency of the description of the Collateral to provide notice to third parties of the liens and security interests created by the Loan Documents and to create an effective contractual obligation under the laws of the State of Oregon;

i. that the trustee named in the Trust Deed is validly existing, and has full power and authority to act as trustee;

j. the due recording of the Trust Deed [and the Lease Assignment] in the Official Records of _____ County, Oregon;

k. the due filing and indexing of the Financing Statement or the Security Agreement in the Office of the Secretary of State of Oregon [and the proper filing and indexing of a UCC Financing Statement or the Security Agreement in the Official Records of _____ County, Oregon,] so as to give constructive notice of the security interests described therein;

l. the funding of the Loan to Borrower and that value has been given in accordance with Article 9 of the Uniform Commercial Code as adopted in the State of Oregon and codified under ORS Chapter 79 ("**Oregon UCC**");

m. that Lender has negotiated the Loan transaction and will exercise its rights and remedies under the Loan Documents and applicable law in good faith, with fair dealing and in a commercially reasonable manner;

n. that Lender has no notice of any defense against the enforcement of the Loan Documents;

o. that there has not been any mutual mistake of fact or misunderstanding, fraud, duress, or undue influence with respect to the Loan Documents;

p. that Oregon law (without regard to Oregon law regarding conflicts of law) will apply to the interpretation, validity, and enforceability of the Loan Documents;

q. that all statutes, judicial and administrative decisions, and rules and regulations of governmental agencies, constituting the law of the State of Oregon are generally available (i.e., in terms of access and distribution following publication or other release) to lawyers practicing in the State of Oregon, and are in a format that makes legal research reasonably feasible;

r. that the constitutionality or validity of a relevant statute, rule, regulation or agency action is not in issue unless a reported decision in the State of Oregon has specifically addressed but not resolved, or has established, its unconstitutionality or invalidity;

s. that Borrower (and Guarantor) has or will obtain all permits and governmental approvals required in the future, and take all actions similarly required subsequent to consummation of the Loan or relevant to performance of the Loan Documents;

t. that there are no agreements or understandings among the parties, written or oral, and there is no usage of trade or course of prior dealing among the parties that would in either case, define, supplement, or qualify the terms of the Loan Documents;

u. that the beneficiary prosecuting a non-judicial foreclosure of the Trust Deed and the plaintiff in a judicial foreclosure of the Trust Deed or other legal action enforcing the Trust Deed will be able to establish, to the satisfaction of any applicable court, that it is the holder of the Note and other obligations secured by the Trust Deed ("**Holder**"), or is authorized to act on behalf

of the Holder, which (for a non-judicial foreclosure) may require recordation of modifications of the Trust Deed or assignments of the beneficiary's interest; and

v. that in any foreclosure or other enforcement action under the Trust Deed, (i) the plaintiff in such action will be the true and lawful owner and holder of the Loan and will be able to demonstrate such ownership to the satisfaction of any applicable court, or (ii) the plaintiff is authorized to bring such action pursuant to applicable law and will be able to demonstrate such authorization to the satisfaction of any applicable court.

[if UCC Opinions are given, then include the following Assumptions in this letter]

w. Borrower has rights in the Collateral or the power to transfer rights in the Collateral to a secured party;

x. the Possessory Collateral (defined below) is located, within the meaning of Sections 9-301 and 9-305(a)(1) of the Oregon UCC, only in the State of [Oregon] (the "**Possessory Collateral State**");

y. each Intermediary (defined below) is located, within the meaning of Sections 9-304, 9-305 and 9-306 of the Oregon UCC, only in the State of [Oregon] (the "**Control Collateral State**").

OPINIONS

Subject to the assumptions and qualifications stated herein, we are of the opinion that:

1. Borrower is a limited liability company [or other applicable entity] validly existing under the laws of the State of Oregon.

[*Alternate clause if the Borrower is not organized under Oregon law: "*Based solely on the Authority Certificate(s), the Borrower is qualified to do business in Oregon."]

2. [Guarantor is a limited liability company [or other applicable entity] validly existing under the laws of the State of Oregon.]

[*Alternate clause if the Guarantor is not organized under Oregon law: "*Based solely on the Authority Certificate(s), the Guarantor is qualified to do business in Oregon."]

3. All actions or approvals by Borrower, and its [members] [managers or other applicable parties] necessary to bind Borrower under the Loan Documents have been taken or obtained.

4. Borrower has all requisite [*insert applicable entity*] power to execute, deliver and perform the obligations of Borrower under the Loan Documents.

5. The Loan Documents are enforceable against Borrower [and Guarantor, as applicable,] in accordance with their terms, except that the foregoing may be limited by bankruptcy, insolvency, reorganization, fraudulent transfer, civil forfeiture, and moratorium laws, or similar laws relating to or limiting the rights of creditors generally, or by equitable principles (regardless of whether such enforcement is considered in a proceeding in equity or at law). The

use of the term "enforceable" does not imply any opinion on the availability of equitable remedies other than the foreclosure of the liens created by the Loan Documents in accordance with Oregon law. In giving this opinion number [__], we advise you that an Oregon court may not enforce certain provisions contained in the Loan Documents or allow acceleration of the maturity of the indebtedness. Nevertheless, subject to the other qualifications and limitations set forth in this opinion, (i) upon a material breach by Borrower [or Guarantor; as applicable] of a material provision of the Loan Documents or maturity of the Loan, there will be available to Lender the judicial enforcement of the obligation of Borrower [and Guarantor, as applicable] to repay the Loan principal together with interest thereon to the extent provided in the Loan Documents; (ii) upon a material breach by Borrower of a material provision of the Loan Documents, Lender will have the right to accelerate the obligation of Borrower [and Guarantor, as applicable] to repay such principal, together with interest to the extent provided in the Loan Documents; and (iii) upon maturity of the Loan or upon acceleration pursuant to clause (ii) above, Lender will have the right to foreclose the liens created by the Loan Documents in accordance with Oregon law.

6. The Loan is not usurious under the laws of Oregon.

[Alternate clause: The payment of interest as set forth in the [Note] will not violate the usury laws or other applicable laws of the State of Oregon regulating the use or forbearance of money.]

[The following additional opinions should only be given if applicable in exceptional circumstances. The opinion giver should conduct thorough due diligence and careful review before giving any of the following opinions.]

7. [*Execution and Delivery*] Based on the attached Certificate of Escrow Officer, Borrower has executed [and delivered] the Loan Documents[, and Guarantor has executed [and delivered] the Guaranty].

8. [*No Violation or Breach*] The borrowing of the Loan, and the execution and delivery by the Borrower of, and performance of its payment obligations in, the Loan Documents, do not: (i) violate the Authority Documents [or (ii) breach any existing obligation of the Borrower under any of the agreements and documents specified in Attachment **[__]** hereto (collectively, the "**Specified Agreements**")]. [Execution and delivery by the Guarantor of, and performance of its payment obligations in, the Guaranty, do not: (x) violate the Authority Documents [or (y) breach any existing obligation of the Guarantor under any of the agreements and documents specified in Attachment [__] hereto].] Our opinions in this paragraph do not extend to any action or conduct of [either the] Borrower [or the Guarantor] that an agreement or document may permit but does not require.

9. [*No Violation of Law*] The execution and delivery by the Borrower of, and performance by the Borrower of its payment obligations in, the Loan Documents, neither are prohibited by applicable provisions of law comprising published statutes of the State of Oregon, administrative rules and regulations of agencies of the State of Oregon, as contained in the published administrative rules compilation, as duly enacted or promulgated by the State of Oregon ("**Statutes or Regulations**") nor subject the Borrower to a fine, penalty, or other similar sanctions, under any Statutes or Regulations. [Execution and delivery by the Guarantor of, and performance by the Guarantor of its payment obligations in, the Guaranty, neither are prohibited by applicable provisions of Statutes or Regulations nor subject the Guarantor to a fine, penalty, or other similar

sanctions, under any Statutes or Regulations.] Our opinions in this paragraph do not extend to any action or conduct of [either] the Borrower [or the Guarantor] that a Loan Document may permit but does not require.

10. [*Choice of Law*] Except as expressly stated below in this paragraph, this letter does not express any opinion as to the enforceability of any choice-of-law or analogous provisions in the Loan Documents. Section ___ of the [*identify specific Loan Document*] (the "**Choice-of-Law Clause**") provides that for most purposes, the parties thereto select the laws of the State of [_____] ("**Selected Jurisdiction**"), and not Oregon law, to govern the parties' contractual rights and duties under the Loan Documents. For purposes of this opinion, we assume that the Collateral described in the Trust Deed is situated in the state of Oregon and that one or more parties involved in this Loan were domiciled in or conducting business in a state other than the state of Oregon when this Loan was negotiated or that the Loan is otherwise reasonably connected with a state other than Oregon. Based on the foregoing and the assumptions and qualifications stated elsewhere herein, we are of the opinion that an Oregon state court applying ORS 15.300 et seq. would enforce the parties' selection of the law of Selected Jurisdiction to govern the contractual rights and duties of the parties under the Loan Documents to the extent provided in the Choice-of-Law Clause, except to the extent that the application of the law of the Selected Jurisdiction would: (a) require a party to perform an act prohibited by the law of the state where the act is to be performed; (b) prohibit a party from performing an act required by the law of the state where it is to be performed; or (c) contravene an established fundamental policy embodied in the law of the state that would otherwise govern the issue in dispute under ORS 15.360. Notwithstanding the foregoing, (i) the law of the Selected Jurisdiction will not govern the creation, recording, priority, and enforcement of a lien on real property that is located in the State of Oregon, (ii) to the extent otherwise provided in the Uniform Commercial Code as adopted in any applicable jurisdiction with respect to the perfection or non-perfection of security interests, the effect of perfection or non-perfection of security interests, and the priority of security interests, the law of jurisdictions other than the Selected Jurisdiction may govern such matters, and (iii) matters that are procedural rather than substantive may be governed by the law of the forum in which a legal proceeding is pending rather than the law of the Selected Jurisdiction. We express no opinion as to whether any Loan Document constitutes valid and legally binding obligations of any person or are enforceable against any person under laws of the Selected Jurisdiction.

11. [*Form of Security Documents*] The Trust Deed is in a form sufficient to create a lien on all right, title, and interest of the Borrower in and to the Real Property.

[Alternatively, in place of above sentence, use the following sentence when appropriate: "The Trust Deed is in form sufficient to create a lien (i) on all right, title, and interest of the Borrower in and to the Real Property, including the Borrower's interest in the leases of the Real Property, and (ii) on the Borrower's interest in the unpaid rents of the Real Property."]

Note that if a separate Security Agreement that is governed by Oregon law is included as one of the Loan Documents, then add the following: The Security Agreement is in a form sufficient to create a security interest in those items of the personal property stated as constituting part of the Collateral in which a security interest can be created under Article 9 of the Oregon UCC.

12. [*Form of Assignment of Leases and Rents*] The Lease Assignment is in form sufficient (i) to create a lien on the Borrower's interest in the unpaid rents of the Real Property and (ii) for recording in the real property records of county in which the Real Property is located.

13. [*Litigation*] To our knowledge, there are no suits, actions or proceedings at law or in equity before any court, governmental instrumentality or agency now pending or threatened against Borrower [or Guarantor] which seek to enjoin the performance of the Loan Documents or to declare the Loan Documents invalid or subordinated.

14. [*UCC Opinions*]

a. The Security Agreement is effective to create a security interest in the Collateral in favor of the Lender in those items of Collateral consisting of personal property in which a security interest can be created under Article 9 of the Oregon UCC.

b. The Financing Statement is in proper form for filing with the Central Filing Office (defined below), and upon filing and proper indexing of the Financing Statement in the Central Filing Office, the Lender will have a perfected security interest in those portions of the Article 9 Collateral that are described in both the Financing Statement and the Security Agreement and in which a security interest can be perfected under Article 9 of the Oregon UCC by the filing of a financing statement in the Central Filing Office.

c. The Fixture Filing is in proper form for filing with the Local Filing Office (defined below), and upon filing and proper indexing of the Fixture Filing in the Local Filing Office, the Lender will have a perfected security interest in the Local Filing Collateral located at the Real Property.

d. The security interest in the Possessory Collateral will be perfected upon: (i) execution of the Security Agreement by all parties thereto; and (ii) the Lender taking possession of the Possessory Collateral.

e. The security interest in the Control Collateral described in the Control Agreement will be perfected upon: (i) execution of the Security Agreement by all parties thereto; (ii) the execution of the Control Agreements by all parties thereto [*Alternate clause*: (ii) the Lender becoming the depository bank's customer with respect to deposit accounts], (iii) the Lender becoming the entitlement holder with respect to security entitlements; (iv) the Lender becoming the commodity intermediary with which the commodity contract is carried; and/or (v) with respect to uncertificated securities, such securities being registered in the name of the Lender by the issuer.

f. Certain UCC Definitions. *[If any of the above UCC Opinions are given, then some or all of the following definitions need to be included here]* Terms used herein that are defined in the Oregon UCC shall have the meanings set forth in the Oregon UCC. The following terms shall have the following meanings:

> "**Article 9 Collateral**" means the Collateral described in the Security Agreement in which the Borrower has rights and as to which the creation of a security interest is governed by Article 9 of the Oregon UCC.

"**Central Filing Office**" means the office of the Secretary of State of the State of Oregon.

"**Collateral**" has the meaning ascribed to such term in the Loan Documents.

"**Control Collateral**" means Collateral that is investment property, deposit accounts, electronic chattel paper and letter-of-credit rights as defined in the Oregon UCC.

"**Intermediary**" means the depositary bank for a deposit account, the securities intermediary for a security entitlement, the commodity intermediary for a commodity account, the issuer of uncertificated securities or the issuer or nominated person of a letter of credit.

"**Local Filing Collateral**" means Collateral located at the Real Property that consists of goods that are or become fixtures, timber to be cut, or as-extracted collateral.

"**Local Filing Office**" means the office of the recorder of the County of [_____], State of Oregon.

"**Possessory Collateral**" means Collateral that is money, instruments, certificated securities, tangible chattel paper, and negotiable documents as defined in the Oregon UCC.

QUALIFICATIONS

Although the following list is not a complete recitation of matters as to which no opinion is expressed, and this list is not intended to supersede or diminish other limitations set forth or incorporated by reference in the opinion, we wish to specifically emphasize and advise you that we express no opinion as to the enforceability of:

(a) provisions of the Loan Documents that grant rights of self-help, rights of setoff, or the right to possession of the real or personal property or collection of rental or other income without (i) appointment of a receiver, or acquisition of the Real Property through foreclosure or other means, (ii) complying with the procedural requirements for appointment of a receiver, and (iii) complying with the limitations applicable to the rights and powers of a receiver at law or in equity;

(b) provisions purporting to establish evidentiary standards;

(c) provisions relating to the waiver of rights, remedies, and defenses, including without limitation those purporting to waive the right of redemption or the statutory provisions of the Oregon Trust Deed Act that permit Borrower to reinstate a trust deed during a non-judicial foreclosure proceeding;

(d) provisions that permit Lender to collect a late charge, increased interest rate after default or maturity, a yield maintenance charge or prepayment premium, acceleration of future amounts due (other than principal) without appropriate discount to present value, liquidated damages, penalties, or interest on interest;

(e) any reservation of the right to pursue inconsistent or cumulative remedies;

(f) provisions providing that the maturity date of the Loan may be accelerated upon a sale, other transfer, or encumbrance of the Real Property or Collateral, or a change in control, ownership, or management of any party;

(g) provisions impacting "one-action" and "anti-deficiency" protections contained in the Oregon Trust Deed Act, including without limitation, the statutory restrictions on deficiency judgments after a non-judicial foreclosure;

(h) provisions for payment of damages, reimbursement of costs and expenses, or indemnification for claims, losses, or liabilities (including, without limitation, attorney fees) in excess of statutory limits or an amount determined to be reasonable by any court or other tribunal, and any provision for attorney fees other than to the prevailing party;

(i) provisions pertaining to jurisdiction, venue, or choice of law;

(j) provisions purporting to appoint Lender or the trustee as attorney-in-fact for Borrower;

(k) limitations on the liability of Lender or the trustee named in the Trust Deed, or for their indemnification for their own negligence or misconduct;

(l) provisions that purport to establish or maintain priority of a lien or security interest created by the Loan Documents;

(m) provisions purporting to impose continued liability following non-judicial foreclosure, such as environmental or access laws or building code indemnity provisions;

(n) provisions purporting to allow Lender to determine the method or order of sale of property in a foreclosure action;

(o) severability clauses of the Loan Documents;

(p) provisions that purport to prevent any party from becoming a mortgagee-in-possession, notwithstanding any enforcement actions taken under the Loan Documents;

(q) provisions that purport to require waiver of the obligations of good faith and fair dealing;

(r) provisions that preclude a party who has materially failed to render or offer performance required by the Loan Documents to cure that failure, unless (i) permitting a cure would unreasonably hinder the aggrieved party from making substitute arrangements for performance, or (ii) it was important in the circumstances to the aggrieved party that performance occur by the date stated in the Loan Documents;

(s) provisions that provide for the application of insurance and condemnation proceeds to the indebtedness;

(t) provisions waiving trial by jury;

(u) provisions which provide for service of process in a manner not authorized under the laws of the State of Oregon;

(v) provisions in any documents executed and delivered by Borrower [or Guarantor] in connection with the Loan not expressly set forth herein;

(w) provisions in the Loan Documents which provide that the assignment of leases and rents is in a form to create an assignment other than for collateral purposes, including but not limited to provisions that purport to assign the leases and rents absolutely; and

(x) provisions in the Loan Documents assigning to Lender or otherwise prohibiting or restricting Borrower's [or Guarantor's] rights under the U.S. Bankruptcy Code.

LIMITATIONS

None of the opinions herein expressed include any implied opinion and the opinions are specifically subject to and qualified by the following:

1. Regardless of the states in which members of this firm are licensed to practice, our opinion is limited to the laws of Oregon.

2. This opinion is provided solely for the Lender's use in connection with the Loan transaction for the purposes contemplated by the Loan Documents, and not as a guaranty or warranty of the matters discussed herein. Our opinion is limited to the matters expressly stated herein, and no other opinions may be implied or inferred.

3. Without limiting any other disclaimers or limitations contained in this opinion, we express no opinion as to any matter whatsoever relating to:

(a) the value of the collateral;

(b) the adequacy of the consideration for the Loan [or Guaranty];

(c) the accuracy or completeness of any financial, accounting, or statistical information furnished to Lender [or Guarantor];

(d) the accuracy or completeness of any representations made by Borrower [or Guarantor] to Lender;

(e) the ability of Borrower [or Guarantor] to meet [its] [their] obligations under the Loan Documents;

(f) the state of the title to the Real Property and personal property or the attachment, perfection, or priority of any liens thereon or security interest therein;

(g) the adequacy or accuracy of descriptions of real or personal property;

(h) compliance with securities, labor, pension and employee benefits (e.g. ERISA), zoning, land use, building, health and safety, or environmental rules, regulations, laws, ordinances, or directives;

(i) compliance with fiduciary duty and disclosure requirements, antitrust and unfair competition laws and regulations, tax laws and regulations;

(j) patent, copyright and trademark, state trademark, and other intellectual property law;

(k) laws concerning international treaties or conventions, national and local emergency, possible deference to acts of sovereign states, criminal forfeiture and criminal prosecution (including mail fraud and wire fraud statutes) and racketeering;

(l) whether the Lender is doing business in the state of Oregon; and

(m) the statutes and ordinances, the administrative decisions, and the rules and regulations of counties, towns, municipalities, and special political subdivisions, and judicial decisions to the extent that they deal with any of the foregoing matters in this paragraph (collectively, "**Local Law**").

[(n) the enforceability of any provision in the Loan Documents that excludes, waives or limits the liability of any party for matters set forth in Section 9-602 of the Oregon UCC.]

4. Whenever the phrase "knowledge", "our actual knowledge" or any variation thereof is used in this opinion, the subject modified by such phrase is limited to matters within the present actual knowledge of _____ and _____, the lawyer(s) in this firm actively engaged in the representation of Borrower, shall mean only the conscious awareness of facts or other information by such lawyer(s), and shall not include any knowledge that may be imputed to such individual(s) by constructive notice or other means or imply that any inquiry has been undertaken by such individual(s) with respect to any of such matters except to the extent that facts and circumstances presented to such individual(s) would compel a prudent lawyer to make further inquiry when presented with the same facts and circumstances.

5. This opinion is rendered at the request of Borrower as a requirement for closing. This opinion does not establish any attorney-client relationship between this firm and any addressee. Nothing contained in this opinion shall be deemed to constitute a waiver of the attorney-client privilege between this firm and Borrower [or Guarantor].

6. We have reviewed copies or originals of the Loan Documents and the Authority Documents, and we have given consideration to such matters of law [and facts], as we have deemed appropriate, in our professional judgment, to render such opinions.

This opinion is rendered as of the date set forth above, and we disclaim any obligation to advise you of any changes in the circumstances, laws, or events that may occur after this date or to otherwise update this opinion.

The opinions expressed in this letter are solely for the benefit of the Lender and may not be relied upon by any other person or disclosed, quoted or provided to any other person or entity without our written consent; however, we consent to reliance on the opinions expressed herein by any party that becomes a successor lender subsequent to the date of this opinion letter by acquiring the Loan or an interest in the Loan for value, in good faith, and in accordance with the provisions of the Loan Documents (each a "**Successor Lender**") as if this opinion letter were addressed and delivered to such Successor Lender on the date hereof, on the condition and understanding that: (i) in no event shall any Successor Lender have any greater rights with respect to this opinion than the original addressees of this opinion on the date hereof, nor any greater rights than those possessed by the assignor of the interest in the Loan acquired by the Successor Lender; (ii) our consent to such reliance shall not constitute a reissuance or update of the opinions expressed herein or extend any statute of limitations period applicable to this opinion on the date hereof; (iii) we have no responsibility to consider the applicability of any provisions of this opinion to any Successor Lender; and (iv) any such reliance must be actual and reasonable under the circumstances existing at the time such Successor Lender becomes a Successor Lender, including any circumstances relating to changes in law or facts known to or reasonably knowable by such Successor Lender at such time.

This opinion letter may be delivered to the following parties for review, but such parties shall have no recourse against the undersigned law firm in connection with any opinion rendered herein: (a) to a regulatory agency having supervisory authority over the Lender for the purpose of confirming the existence of this opinion letter; (b) to nationally recognized statistical rating organizations rating an issuance involving the Loan or otherwise entitled to access under Rule 17G-5 under the Securities and Exchange Act of 1934, as amended, by providing a copy of this opinion letter to the appropriate 17G-5 information provider for the securitization into which the Loan or a component of the Loan is deposited or as otherwise permitted by the applicable pooling and servicing agreement or trust and servicing agreement, as the case may be; (c) to a court or arbitrator and parties to a litigation or arbitration in connection with the assertion of a defense as to which this opinion letter is relevant and necessary; and (d) to other parties as required by the order of a court of competent jurisdiction in the United States.

Very truly yours,

_____

[*Firm name only; not an individual*]

ADDENDUM B

BORROWER'S [103] CERTIFICATE

Re: $_____ (loan from _____ ("**Lender**")
to _____ ("**Borrower**")

The undersigned _____ being the _____ [person from whom the Certificate is obtained, e.g., officers of a corporation, members or managers of an LLC, or partners of a partnership] of Borrower makes this Certificate in connection with the Loan by Lender evidenced by:

[*List the relevant Loan Documents – same list as in the Opinion Letter*.]

All of the foregoing, together with such other instruments and certificates and all other documents executed or delivered by or on behalf of Borrower and pertaining to the Loan, are collectively the "Loan Documents."

This Certificate is made in connection with the submission by _____, counsel for Borrower ("Counsel"), of a legal opinion in accordance with the requirements of the Loan Documents. The undersigned hereby acknowledges that, in making this Certificate, Counsel is relying on the truthfulness and accuracy of the statements contained herein and that Counsel would not be able to render its legal opinion without this information. Borrower intends that Counsel rely on this Certificate.

The undersigned hereby represents, warrants, and certifies to Counsel as follows:

1. Borrower is a _____ [type of entity]. Attached hereto and by this reference incorporated herein is a true, accurate and complete copy of the _____ [*list organizational documents*, e.g., Articles of Incorporation and Bylaws; or Articles of Organization and Operating Agreement; or Partnership Agreement] of Borrower.

2. The _____ [*list organizational documents*, e.g., Articles of Incorporation and Bylaws; or Articles of Organization and Operating Agreement; or Partnership Agreement] [are][is] in full force and effect and [has][have] not been modified or amended. No action has been filed or threatened to dissolve Borrower. [No member has sought to withdraw from the Borrower and the undersigned are all of the members [and managers] of Borrower.]

3. Borrower has the legal capacity to own the property encumbered by the Trust Deed (the "Property") and to carry on its business as now being conducted, and to the best of the knowledge of the undersigned, Borrower is in compliance with all applicable laws, regulations, ordinances, and orders of public authority as applicable.

4. The execution and delivery by Borrower of the Loan Documents does not conflict with or result in the violation of any of Borrower's organizational documents as set forth in

[103] Under appropriate factual circumstances, a separate Guarantor's Certificate should be obtained from the Guarantor or its authorized representative.

paragraph 1 above, nor does the execution and delivery by Borrower of the Loan Documents conflict with or result in the violation of any law, rule, or regulation, or any order, writ, judgment, decree, indenture, instrument, or agreement to which Borrower is a party.

5. No authorization, approval, or other action by and notice to or filing with any governmental authority or regulatory body is required for the execution, delivery, and performance by Borrower of the Loan Documents.

6. There are no threatened or outstanding liens, taxes, judgments, actions, or proceedings concerning Borrower or the Property pending before any court or governmental authority, bureau, or agency.

7. The representations and warranties of Borrower in the Loan Documents and any other documents submitted to Lender to induce Lender to make the Loan are correct on their date of submission and as of the date of this Certificate, before and after giving effect to the closing of the Loan, as though made on and as of the date of the closing of the Loan.

8. No event has occurred or is continuing, or would result from the closing of the Loan, which constitutes an event of default, or would constitute an event of default but for the requirement that notice be given or time elapse, or both, under the Loan Documents, or under any other contract, agreement, indenture, or instrument to which Borrower is a party or by which Borrower is bound.

9. No proceedings by or against Borrower have been commenced in bankruptcy or for reorganization, liquidation, or the readjustment of debts under the Bankruptcy Code or any other law, whether state or federal, nor has Borrower made an assignment for the benefit of creditors, admitted in writing any inability to pay debts generally as they become due, or filed or had filed against it any actions seeking an order appointing a trustee or receiver of all or a substantial part of the property of Borrower.

10. Attached hereto is a copy of the _____ [e.g., Action by Directors/Manager] of Borrower authorizing the execution, delivery, and performance of the Loan Documents.[104] The resolutions evidenced by that attachment have not been modified or rescinded and there are no other _____ [type of entity] actions relating to the Loan Documents.

[11. Borrower has executed each Loan Document to which it is a party and has delivered the Loan Documents (i) directly to Lender, (ii) to Counsel with instructions to Counsel to deliver such documents to Lender or escrow, or (iii) directly to escrow.]

12. By executing this Certificate, the undersigned acknowledges that Borrower has requested that Counsel deliver to Lender the opinion required by the Loan Documents. The undersigned individually and on behalf of Borrower further acknowledges that by consenting to the delivery of the opinion, the undersigned and Borrower may be waiving their attorney-client privilege in whole or in part in connection with the matters set forth in this Certificate and the opinion. The undersigned and Borrower have been advised by Counsel not to execute this

[104] By way of example, *see Proforma Action Authorizing Loan* attached to this Report as Addendum C.

Certificate and the potential waiver of the attorney-client privilege without "Informed Consent". Oregon Rule of Professional Conduct 1(g) states:

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

Borrower acknowledges that the execution of this Certificate is based on Full Disclosure.

DATED: _____, _____.

_____

By: _____

Name: _____

Title: _____

ADDENDUM C

PROFORMA ACTION AUTHORIZING LOAN

ACTION BY _____ [type of parties taking action]

OF

_____ [name of Borrower]

WHEREAS, ORS _____ [appropriate statutory reference] provides that any action that may be taken at a meeting of the _____ [type of parties taking action] may be taken without a meeting if a consent in writing setting forth the action so taken shall be signed by all of the _____ [type of parties taking action] entitled to vote thereon; and

WHEREAS, _____ [name of Borrower] desires to borrow the sum of $_____ [loan amount] from _____ [name of lender] for the purpose of _____ [description of the project]; and

WHEREAS, it is in the best interest of _____ [name of Borrower] to execute the "Loan Documents" (as described on Exhibit A attached hereto and by this reference incorporated herein) in favor of _____ [name of lender] to carry out the purposes set forth above;

NOW, THEREFORE, the _____ [type of parties taking action] of _____ [name of Borrower] hereby take(s) the following action(s):

1. RESOLVED, that _____ [name of Borrower] shall execute any and all notes, trust deeds, security agreements, assignments, indemnities, financing statements, affidavits, and other instruments or documents necessary to borrow the sum of $_____ [loan amount] from _____ [name of lender] for the purpose of _____ [description of the project].

2. RESOLVED, that _____ [person(s) authorized to execute the Loan Documents], _____ [title or office of authorized signer(s)] of _____ [name of Borrower], be and is hereby authorized and directed to execute the aforementioned documents, together with each and every other document necessary to carry out the purposes set forth in these resolutions.

3. The undersigned being all of the _____ [type of parties taking action] of _____ [name of Borrower] hereby consent to the foregoing action(s).

DATED: _____, _____.

_____

_____

ADDENDUM D [105]

CERTIFICATE OF ESCROW OFFICER

The undersigned Escrow Officer hereby certifies that:

(1) The undersigned verified the identities of _____ (collectively the "**Signing Parties**"), the individual(s) executing those "Loan Documents" described on Exhibit A attached hereto and by this reference incorporated herein in connection with the $_____ loan from _____ ("**Lender**") to _____ ("**Borrower**").

(a) The undersigned witnessed the signatures of the Signing Parties and completed any notarial acknowledgements as necessary.

(b) At the direction of Borrower, the undersigned: (i) has delivered the original unrecorded Loan Documents to Lender [106]; (ii) will cause to be recorded or filed as necessary those Loan Documents that are to be recorded or filed; and (iii) has delivered duplicate originals or copies of the Loan Documents to be recorded or filed to Lender or Lender's counsel.

(2) _____, counsel to Borrower, is relying on this Certificate in issuing its Opinion Letter to Lender.

DATED this _____ day of _____, 20___.

_____ (Title Insurance Company)

By:_____
Title:_____

[105] Only use this Certificate of Escrow Officer if an execution and delivery opinion is given. *See* Opinion 7 and Footnote 53 above.

[106] Remove (i) if the Loan Documents have already been delivered to Lender.

COMPARISON OF 2004 AND 2022 MODEL OPINIONS

ADDENDUM A

2022 Oregon Model Opinion

[Date]

~~[Addressee and address]~~

[Name and Address of Opinion Recipient]

Re: $_____ Loan to _____ (the "Loan")

Ladies and Gentlemen:

INTRODUCTION

We have acted as Oregon counsel to _____ ("Borrower") in connection with that certain Loan Agreement ("Loan Agreement") dated _____, ___, between _____ ("Lender") and Borrower.

We have also acted as Oregon counsel to _____ ("Guarantor").

[Alternate clause: We are not Borrower's [or Guarantor's] general counsel, we have not previously represented Borrower [or Guarantor], and we have made no investigation of Borrower's [or Guarantor's] legal affairs except as expressly set forth in this letter.]

~~[Alternate clause: Although we represent Borrower [or Guarantor] from time to time in connection with specific transactions, we are not general counsel to Borrower [or Guarantor], and we did not participate in the formation or organization of Borrower.]~~

In this capacity, Borrower [and Guarantor] [has] [have] requested that we deliver to you our opinion as to certain matters relating to the Loan. This opinion is delivered to you pursuant to Section ___ of the Loan Agreement.

DOCUMENTS REVIEWED

In rendering our opinion, we have examined originals, copies identified to our satisfaction as true copies of the originals, or copies certified to us as being execution copies of the following documents, provided to us [via email][under cover of a letter dated] _____ from _____, all bearing the date of _____, 20__, unless otherwise indicated:

~~1. The Loan Agreement dated as of _____ executed by Borrower and Lender [where necessary];~~

i)2. Promissory Note ("Note")[The Loan Agreement dated as of _____ executed by Borrower and Lender;]

ii) Promissory Note ("**Note**") dated as of _____ executed by Borrower and payable to the order of Lender in the sum of $_____;

3.iii) Deed of Trust ("Trust Deed") dated as of _____ executed by Borrower as grantor, in favor of Lender as beneficiary, securing the Note, encumbering certain property including real property located atin _____, County in the state of Oregon (the "Real Property");

iv)[4. Assignment of Rents and Leases ("Lease Assignment") dated as of _____ executed by Borrower, as Assignor, for the benefit to Lender, as Assignee;]

v) [5. Security Agreement ("Security Agreement") dated as of _____ executed by Borrower, as debtor, and naming Lender as secured party;]

vi) [6. Guaranty Agreement ("Guaranty") dated as of _____ executed by Guarantor as Guarantor in favor of Lender;]

vii) [7. Hazardous Material Indemnification Agreement ("Hazardous Material Indemnification Agreement") dated as of _____ executed by Borrower [and Guarantor] in favor of Lender;] and

8. viii) [unfiled UCC Financing Statement ("Financing Statement") naming Borrower as debtor and Lender as secured party.]

The documents listed as 1 through 87 above are collectively referred to herein as the "Loan Documents." All property described in any of the Loan Documents in respect of which provision is made by the Loan Documents for a lien or security interest is referred to herein as the "Collateral.".

In addition to the Loan Documents, we also have been furnished with and have examined the following:

1.a) A Certificate of Borrower's [appropriate partyCertificate [*and Guarantor's Certificate*] dated _____, 20___ ([a copy of which is attached hereto and by this reference incorporated herein]("**Borrower's Certificate**");

2.b) A Certificate issued by the State of Oregon, Office of the Secretary of State, Corporation Division, with respect to Borrower, dated _____, ("**Authority Certificate**" a copy of which is attached hereto and by this reference incorporated herein.; and

3. Other documents and instruments described in these Certificates.

c) The following with respect to the Borrower: (i) Articles of Organization as filed with the Oregon Secretary of State; and (ii) Operating Agreement dated [_____] (collectively, the "**Borrower Entity Documents**").

D. [*Consent/Resolution*] of the [members][manager] of the Borrower.

E. [The following with respect to the Guarantor: (i) Articles of Organization as filed with the Oregon Secretary of State; and (ii) Operating Agreement dated [_____] (collectively, the "**Guarantor Entity Documents**").]

F. [*Consent/Resolution*] of [members or managers] of the Guarantor.

The Borrower's Certificate and the Authority Certificate are collectively referred to herein as the "**Certificates**". The Borrower Entity Documents [and Guarantor Entity Documents] are collectively referred to as the "**Authority Documents**."

RELIANCE WITHOUT INVESTIGATION

We disclaim any responsibility for any changes that may have occurred with respect to the status of Borrower ~~([~~or Guarantor~~)~~] from and after the respective dates of the Certificates mentioned above. We also assume that the Certificates and the public records upon which they are based are accurate and complete.

Except to the extent the information constitutes a statement, directly or in practical effect, of any legal conclusion at issue, we have relied without investigation or analysis upon the information contained in representations by the Borrower ~~([~~or Guarantor~~)~~] in the Loan Documents and in the Borrower's Certificate ~~of Borrower (or~~[and Guarantor~~)~~'s Certificate] and public officials. We have made no independent investigation with regard to such matters or with regard to the warranties and representations made by Borrower ~~([~~or Guarantor~~)~~] in the Loan Documents or of any related matters. Except as specifically identified herein, we have not been retained or engaged to perform, and we have not performed, any independent review or investigation of (1) any agreement or instrument to which Borrower ~~([~~or Guarantor~~)~~] may be a party or by which Borrower ~~([~~or Guarantor~~)~~] or any property owned by Borrower ~~([~~or Guarantor~~)~~] may be bound, or (2) any order of any governmental or public body or authority to which Borrower ~~([~~or Guarantor~~)~~] may be subject.

ASSUMPTIONS

~~This~~In issuing this opinion ~~letter assumes~~, we assume:

a. ~~(i)~~ that Lender ~~has~~and all other parties to the Loan Documents (other than Borrower [and Guarantor]) have satisfied all necessary legal requirements applicable to it and that Lender has all necessary corporate authority to enter into the Loan Documents and consummate the Loan;

b. ~~(ii)~~ the legal capacity of all natural persons to enter into and perform their respective obligations under the Loan Documents;

c. ~~(iii)~~ the authenticity and completeness of all documents submitted to us for review, that each such document that is a copy conforms to an authentic original, and that all signatures on each such document are genuine;

~~[(iv) that Borrower (or Guarantor) is duly organized and validly existing as a _____ under the laws of the State of _____, and has taken all action required to authorize Borrower (or Guarantor) to enter into and execute the Loan Documents and perform all obligations of Borrower (or Guarantor) under the Loan Documents;~~

d. that Borrower is a general business entity of a type that is not regulated by governmental authority in a manner that restricts its ability to alienate or encumber its property to secure indebtedness or to enter into the Loan Documents;

e. the due execution and delivery of the Loan Documents by all parties [except Borrower] [and Guarantor] in accordance with the laws of their governing jurisdictions;

f. that the signatures of the Borrower on the [Trust Deed] [and the Lease Assignment] have been properly acknowledged according to applicable law;

g. ~~(vi)~~ the vesting of fee title to the Real Property in Borrower at the time the Loan Documents are executed and recorded or filed and that Borrower has good and sufficient rights in and title to the Collateral;

h. ~~(vii)~~ the accuracy and sufficiency of the description of the Collateral to provide notice to third parties of the liens and security interests created by the Loan Documents and to create an effective contractual obligation under the laws of the State of Oregon;

i. ~~(viii)~~ that the trustee named in the Trust Deed is validly existing, and has full power and authority to act as trustee;

j. ~~(ix)~~ the due recording of the Trust Deed ~~of Trust~~[and the Lease Assignment] in the Official Records of _____ County, Oregon;

k. ~~(x)~~ the ~~proper~~due filing and indexing of ~~a UCC~~the Financing Statement or the Security Agreement in the Office of the Secretary of State of Oregon [and the proper filing and indexing of a UCC Financing Statement or the Security Agreement in the Official Records of _____ County, Oregon,] so as to give constructive notice of the security interests described therein;

l. ~~(xi)~~ the funding of the Loan to Borrower and that value has been given in accordance with Article 9 of the Uniform Commercial Code as adopted in the State of Oregon and codified under ORS Chapter 79 ("**Oregon UCC**");

m. ~~(xii)~~ that Lender has negotiated the Loan transaction and will exercise its rights and remedies under the Loan Documents and applicable law in good faith, with fair dealing and in a commercially reasonable manner;

n. ~~(xiii)~~ that Lender has no notice of any defense against the enforcement of the Loan Documents;

o. ~~(xiv)~~ that there has not been any mutual mistake of fact or misunderstanding, fraud, duress, or undue influence with respect to the Loan Documents;

p. ~~(xv)~~ that Oregon law (without regard to Oregon law regarding conflicts of law) will apply to the interpretation, validity, and enforceability of the Loan Documents;

q. ~~(xvi)~~ that all statutes, judicial and administrative decisions, and rules and regulations of governmental agencies, constituting the law of the State of Oregon are generally available (i.e., in terms of access and distribution following publication or other release) to lawyers practicing in the State of Oregon, and are in a format that makes legal research reasonably feasible;

r. ~~(xvii)~~ that the constitutionality or validity of a relevant statute, rule, regulation or agency action is not in issue unless a reported decision in the State of Oregon has specifically addressed but not resolved, or has established, its unconstitutionality or invalidity;

~~(xviii)~~ that Borrower (and Guarantor) has or will obtain all permits and governmental approvals required in the future, and take all actions similarly required~~, relevant to~~ subsequent to consummation of the Loan or relevant to performance of the Loan Documents;~~ and~~

s. ~~(xix)~~ that there are no agreements or understandings among the parties, written or oral, and there is no usage of trade or course of prior dealing among the parties that would in either case, define, supplement, or qualify the terms of the Loan Documents; and

t. that the beneficiary prosecuting a non-judicial foreclosure of the Trust Deed and the plaintiff in a judicial foreclosure of the Trust Deed or other legal action enforcing the Trust Deed will be able to establish, to the satisfaction of any applicable court, that it is the holder of the Note and other obligations secured by the Trust Deed ("**Holder**"), or is authorized to act on behalf of the Holder, which (for a non-judicial foreclosure) may require recordation of modifications of the Trust Deed or assignments of the beneficiary's interest.

[if UCC Opinions are given, then include the following Assumptions in this letter]

u. Borrower has rights in the Collateral or the power to transfer rights in the Collateral to a secured party;

v. the Possessory Collateral (defined below) is located, within the meaning of Sections 9-301 and 9-305(a)(1) of the Oregon UCC, only in the State of [Oregon] (the "**Possessory Collateral State**");

w. each Intermediary (defined below) is located, within the meaning of Sections 9-304, 9-305 and 9-306 of the Oregon UCC, only in the State of [Oregon] (the "**Control Collateral State**").

OPINIONS

Subject to the assumptions and qualifications stated herein, we are of the opinion that:

1. Borrower is a limited liability company [or other applicable entity] validly existing under the laws of the State of Oregon.

[*Alternate clause if the Borrower is **not** organized under Oregon law:* "Based solely on the Authority Certificate(s), the Borrower is qualified to do business in Oregon."]

2. [Guarantor is a limited liability company [or other applicable entity] validly existing under the laws of the State of Oregon.]

[*Alternate clause if the Guarantor is not organized under Oregon law:* "Based solely on the Authority Certificate(s), the Guarantor is qualified to do business in Oregon."]

3. All actions or approvals by Borrower, and its [members ~~(or~~] [managers or other applicable parties] necessary ~~parties]~~ to bind Borrower under the Loan Documents have been taken or obtained.

4. Borrower has all requisite [insert applicable entity] ~~authority~~power to ~~undertake~~execute, deliver and perform the obligations of Borrower under the Loan Documents.

5. The Loan Documents ~~are the legal, valid, and binding obligations of Borrower [and Guarantor, as applicable,] and~~ are enforceable against Borrower [and Guarantor, as applicable,] in accordance with their terms, except that the foregoing may be limited by bankruptcy, insolvency, reorganization, fraudulent transfer, civil forfeiture, and moratorium laws, or similar laws relating to or limiting the rights of creditors generally, or by equitable principles (regardless of whether such enforcement is considered in a proceeding in equity or at law). The use of the term "enforceable" does not imply any opinion on the availability of equitable remedies other than the foreclosure of the liens created by the Loan Documents in accordance with Oregon law.

In giving this opinion number 4[ ], we advise you that an Oregon court may not enforce certain provisions contained in the Loan Documents or allow acceleration of the maturity of the indebtedness ~~if it concludes that such enforcement or acceleration would be unreasonable under the then existing circumstances; nevertheless~~. Nevertheless, subject to the other qualifications and limitations set forth in this opinion, (i) upon a material breach by Borrower [or Guarantor, as applicable] of a material provision of the Loan Documents or maturity of the Loan, there will be available to Lender ~~(i)~~ the judicial enforcement of the obligation of ~~the~~ Borrower [and Guarantor, as applicable] to repay the Loan principal together with interest thereon ~~(to the extent not deemed a penalty)~~ to the extent provided in the ~~Note~~Loan Documents; (ii) ~~acceleration of~~upon a material breach by Borrower of a material provision of the Loan Documents, Lender will have the right to accelerate the obligation of Borrower [and Guarantor, as applicable] to repay such principal,

together with interest to the extent provided in the Loan Documents; and (iii) ~~the foreclosure of the liens created by the Loan Documents~~ upon maturity of the Loan or upon acceleration pursuant to clause (ii) above, Lender will have the right to foreclose the liens created by the Loan Documents in accordance with Oregon law.

6. The Loan is not usurious under the laws of Oregon.

[Alternate clause: The payment of interest as set forth in the [Note] will not violate the usury laws or other applicable laws of the State of Oregon regulating the use or forbearance of money.]

[The following additional opinions should only be given if applicable in exceptional circumstances. The opinion giver should conduct thorough due diligence and careful review before giving any of the following opinions.]

7. [*Execution and Delivery*] Based on the attached Certificate of Escrow Officer, Borrower has executed [and delivered] the Loan Documents[, and Guarantor has executed [and delivered] the Guaranty].

8. [*No Violation or Breach*] The borrowing of the Loan, and the execution and delivery by the Borrower of, and performance of its payment obligations in, the Loan Documents, do not: (i) violate the Authority Documents [or (ii) breach any existing obligation of the Borrower under any of the agreements and documents specified in Attachment [__] hereto (collectively, the "**Specified Agreements**")]. [Execution and delivery by the Guarantor of, and performance of its payment obligations in, the Guaranty, do not: (x) violate the Authority Documents [or (y) breach any existing obligation of the Guarantor under any of the agreements and documents specified in Attachment [__] hereto].] Our opinions in this paragraph do not extend to any action or conduct of [either the] Borrower [or the Guarantor] that an agreement or document may permit but does not require.

9. [*No Violation of Law*] The execution and delivery by the Borrower of, and performance by the Borrower of its payment obligations in, the Loan Documents, neither are prohibited by applicable provisions of law comprising published statutes of the State of Oregon, administrative rules and regulations of agencies of the State of Oregon, as contained in the published administrative rules compilation, as duly enacted or promulgated by the State of Oregon ("**Statutes or Regulations**") nor subject the Borrower to a fine, penalty, or other similar sanctions, under any Statutes or Regulations. [Execution and delivery by the Guarantor of, and performance by the Guarantor of its payment obligations in, the Guaranty, neither are prohibited by applicable provisions of Statutes or Regulations nor subject the Guarantor to a fine, penalty, or other similar sanctions, under any Statutes or Regulations.] Our opinions in this paragraph do not extend to any action or conduct of [either] the Borrower [or the Guarantor] that a Loan Document may permit but does not require.

10. [*Choice of Law*] Except as expressly stated below in this paragraph, this letter does not express any opinion as to the enforceability of any choice-of-law or analogous provisions in the Loan Documents. Section ___ of the [*identify specific Loan Document*] (the "**Choice-of-Law Clause**") provides that for most purposes, the parties thereto select the laws of the State of

[_____] ("**Selected Jurisdiction**"), and not Oregon law, to govern the parties' contractual rights and duties under the Loan Documents. For purposes of this opinion, we assume that the Collateral described in the Trust Deed is situated in the state of Oregon and that one or more parties involved in this Loan were domiciled in or conducting business in a state other than the state of Oregon when this Loan was negotiated or that the Loan is otherwise reasonably connected with a state other than Oregon. Based on the foregoing and the assumptions and qualifications stated elsewhere herein, we are of the opinion that an Oregon state court applying ORS 15.300 et seq. would enforce the parties' selection of the law of Selected Jurisdiction to govern the contractual rights and duties of the parties under the Loan Documents to the extent provided in the Choice-of-Law Clause, except to the extent that the application of the law of the Selected Jurisdiction would: (a) require a party to perform an act prohibited by the law of the state where the act is to be performed; (b) prohibit a party from performing an act required by the law of the state where it is to be performed; or (c) contravene an established fundamental policy embodied in the law of the state that would otherwise govern the issue in dispute under ORS 15.360. Notwithstanding the foregoing, (i) the law of the Selected Jurisdiction will not govern the creation, recording, priority, and enforcement of a lien on real property that is located in the State of Oregon, (ii) to the extent otherwise provided in the Uniform Commercial Code as adopted in any applicable jurisdiction with respect to the perfection or non-perfection of security interests, the effect of perfection or non-perfection of security interests, and the priority of security interests, the law of jurisdictions other than the Selected Jurisdiction may govern such matters, and (iii) matters that are procedural rather than substantive may be governed by the law of the forum in which a legal proceeding is pending rather than the law of the Selected Jurisdiction. We express no opinion as to whether any Loan Document constitutes valid and legally binding obligations of any person or are enforceable against any person under laws of the Selected Jurisdiction.

11. [*Form of Security Documents*] The Trust Deed is in a form sufficient to create a lien on all right, title, and interest of the Borrower in and to the Real Property.

[Alternatively, in place of above sentence, use the following sentence when appropriate: "The Trust Deed is in form sufficient to create a lien (i) on all right, title, and interest of the Borrower in and to the Real Property, including the Borrower's interest in the leases of the Real Property, and (ii) on the Borrower's interest in the unpaid rents of the Real Property."]

Note that if a separate Security Agreement that is governed by Oregon law is included as one of the Loan Documents, then add the following: The Security Agreement is in a form sufficient to create a security interest in those items of the personal property stated as constituting part of the Collateral in which a security interest can be created under Article 9 of the Oregon UCC.

12. [*Form of Assignment of Leases and Rents*] The Lease Assignment is in form sufficient (i) to create a lien on the Borrower's interest in the unpaid rents of the Real Property and (ii) for recording in the real property records of county in which the Real Property is located.

13. [*Litigation*] To our knowledge, there are no suits, actions or proceedings at law or in equity before any court, governmental instrumentality or agency now pending or threatened against Borrower [or Guarantor] which seek to enjoin the performance of the Loan Documents or to declare the Loan Documents invalid or subordinated.

14. [*UCC Opinions*]

(1) The Security Agreement is effective to create a security interest in the Collateral in favor of the Lender in those items of Collateral consisting of personal property in which a security interest can be created under Article 9 of the Oregon UCC.

(2) The Financing Statement is in proper form for filing with the Central Filing Office (defined below), and upon filing and proper indexing of the Financing Statement in the Central Filing Office, the Lender will have a perfected security interest in those portions of the Article 9 Collateral that are described in both the Financing Statement and the Security Agreement and in which a security interest can be perfected under Article 9 of the Oregon UCC by the filing of a financing statement in the Central Filing Office.

(3) The Fixture Filing is in proper form for filing with the Local Filing Office (defined below), and upon filing and proper indexing of the Fixture Filing in the Local Filing Office, the Lender will have a perfected security interest in the Local Filing Collateral located at the Real Property.

(4) The security interest in the Possessory Collateral will be perfected upon: (i) execution of the Security Agreement by all parties thereto; and (ii) the Lender taking possession of the Possessory Collateral.

(5) The security interest in the Control Collateral described in the Control Agreement will be perfected upon: (i) execution of the Security Agreement by all parties thereto; (ii) the execution of the Control Agreements by all parties thereto [*Alternate clause*: (ii) the Lender becoming the depository bank's customer with respect to deposit accounts], (iii) the Lender becoming the entitlement holder with respect to security entitlements; (iv) the Lender becoming the commodity intermediary with which the commodity contract is carried; and/or (v) with respect to uncertificated securities, such securities being registered in the name of the Lender by the issuer.

(6) Certain UCC Definitions. *[If any of the above UCC Opinions are given, then some or all of the following definitions need to be included here]* Terms used herein that are defined in the Oregon UCC shall have the meanings set forth in the Oregon UCC. The following terms shall have the following meanings:

"**Article 9 Collateral**" means the Collateral described in the Security Agreement in which the Borrower has rights and as to which the creation of a security interest is governed by Article 9 of the Oregon UCC.

"**Central Filing Office**" means the office of the Secretary of State of the State of Oregon.

"**Collateral**" has the meaning ascribed to such term in the Loan Documents.

"**Control Collateral**" means Collateral that is investment property, deposit accounts, electronic chattel paper and letter-of-credit rights as defined in the Oregon UCC.

"**Intermediary**" means the depositary bank for a deposit account, the securities intermediary for a security entitlement, the commodity intermediary for a commodity account, the issuer of uncertificated securities or the issuer or nominated person of a letter of credit.

"**Local Filing Collateral**" means Collateral located at the Real Property that consists of goods that are or become fixtures, timber to be cut, or as-extracted collateral.

"**Local Filing Office**" means the office of the recorder of the County of [_____], State of Oregon.

"**Possessory Collateral**" means Collateral that is money, instruments, certificated securities, tangible chattel paper, and negotiable documents as defined in the Oregon UCC.

QUALIFICATIONS

Although ~~(i)~~ the following list is not a complete recitation of matters as to which no opinion is expressed, and ~~(ii)~~ this list is not intended to supersede or diminish other limitations set forth or incorporated by reference in the opinion, we wish to specifically emphasize and advise you that we express no opinion as to the enforceability of:

(a) provisions of the Loan Documents ~~which~~that grant rights of self-help, rights of setoff, or the right to possession of the real or personal property or collection of rental or other income without (i) appointment of a receiver, or acquisition of the Real Property through foreclosure or other means, (ii) complying with the procedural requirements for appointment of a receiver, and (iii) complying with the limitations applicable to the rights and powers of a receiver at law or in equity;

(b) provisions purporting to establish evidentiary standards;

(c) provisions relating to the waiver of rights, remedies, and defenses, including without limitation those purporting to waive the ~~extent such amounts exceed actual damages,~~ right of redemption or the statutory provisions of the Oregon Trust Deed Act that permit Borrower to reinstate a trust deed during a non-judicial foreclosure proceeding;

(d) provisions that permit Lender to collect a late charge, increased interest rate after default or maturity, a yield maintenance charge or ~~a~~ prepayment premium, acceleration of future amounts due (other than principal) without appropriate discount to present value, liquidated damages, penalties, or interest on interest;

(e) any reservation of the right to pursue inconsistent or cumulative remedies;

~~(f) any "due on sale" clause to the extent that enforcement is not mandated by applicable federal law and that the security for the Loan would not be impaired;~~

~~(g) any "due on encumbrance" clause in any circumstance in which the security for the Loan would not be impaired;~~

~~(h) the effect of any~~ provisions providing that the maturity date of the Loan may be accelerated upon a sale, other transfer, or encumbrance of the Real Property or Collateral, or a change in control, ownership, or management of any party;

(f) provisions impacting "one-action" ~~or~~and "anti-deficiency" pro~~vis~~tections contained in ~~applicable trust deed statutes~~the Oregon Trust Deed Act, including ~~any~~without limitation, the statutory restrictions on deficiency judgments after a non-judicial foreclosure~~, including, without limitation, the provisions of ORS 86.770~~;

(g) provisions for payment ~~or~~of damages, reimbursement of costs and expenses, or indemnification for claims, losses, or liabilities (including, without limitation, attorney fees) in excess of statutory limits or an amount determined to be reasonable by any court or other tribunal, and any provision for attorney fees other than to the prevailing party;

(h) provisions pertaining to jurisdiction, venue, or choice of law;

(i) provisions purporting to appoint Lender or the trustee as attorney-in-fact for Borrower;

(j) limitations on the liability of Lender or the trustee named in the Trust Deed, or for their indemnification for their own negligence or misconduct;

(k) provisions that purport to establish or maintain priority of a lien or security interest created by the Loan Documents;

~~(n) provisions for charging interest on interest;~~

(l) provisions purporting to impose continued liability following non-judicial foreclosure, such as environmental or access laws or building code indemnity provisions;

~~(p) provisions in conflict with statutory provisions which permit Borrower to reinstate a trust deed during a nonjudicial proceeding;~~

~~(q)~~ provisions purporting to allow Lender to determine the method or order of sale of property in a foreclosure action;~~ and~~

(m) ~~(r)~~ severability clauses of the Loan Documents~~.~~;

(n) provisions that purport to prevent any party from becoming a mortgagee-in-possession, notwithstanding any enforcement actions taken under the Loan Documents;

(o) provisions that purport to require waiver of the obligations of good faith and fair dealing;

(p) provisions that preclude a party who has materially failed to render or offer performance required by the Loan Documents to cure that failure, unless (i) permitting a cure would unreasonably hinder the aggrieved party from making substitute arrangements for performance, or (ii) it was important in the circumstances to the aggrieved party that performance occur by the date stated in the Loan Documents;

(q) provisions that provide for the application of insurance and condemnation proceeds to the indebtedness;

(r) provisions waiving trial by jury;

(s) provisions which provide for service of process in a manner not authorized under the laws of the State of Oregon;

(t) provisions in any documents executed and delivered by Borrower [or Guarantor] in connection with the Loan not expressly set forth herein;

(u) provisions in the Loan Documents which provide that the assignment of leases and rents is in a form to create an assignment other than for collateral purposes, including but not limited to provisions that purport to assign the leases and rents absolutely; and

(v) provisions in the Loan Documents assigning to Lender or otherwise prohibiting or restricting Borrower's [or Guarantor's] rights under the U.S. Bankruptcy Code.

LIMITATIONS

None of the opinions herein expressed include any implied opinion and the opinions are specifically subject to and qualified by the following:

1. Regardless of the states in which members of this firm are licensed to practice, our opinion is limited to the laws of Oregon ~~and to applicable federal laws~~.

2. This opinion is provided ~~to you as a legal opinion only~~solely for the Lender's use in connection with the Loan transaction for the purposes contemplated by the Loan Documents, and not as a guaranty or warranty of the matters discussed herein. Our opinion is limited to the matters expressly stated herein, and no other opinions may be implied or inferred.

3. Without limiting any other disclaimers or limitations contained in this opinion, we express no opinion as to any matter whatsoever relating to:

(a) the value of the collateral;

(b) the adequacy of the consideration for the Loan [or Guaranty];

(c) the accuracy or completeness of any financial, accounting, or statistical information furnished to Lender [or Guarantor];

(d) the accuracy or completeness of any representations made by Borrower [or Guarantor] to Lender;

(e) the ~~financial status~~ability of Borrower [or Guarantor]~~;~~

~~(f) the ability of Borrower [or Guarantor]~~ to meet [its] [their] obligations under the Loan Documents;

(~~g~~f) the state of the title to the Real Property and personal property or the attachment, perfection, or priority of any liens thereon or security interest therein;

(~~h~~g) the adequacy or accuracy of descriptions of real or personal property;

(~~i~~h) compliance with securities, labor, pension and employee ~~benefit laws and regulations~~benefits (e.g. ERISA), zoning, land use, building, health and safety, or environmental rules, regulations, laws, ordinances, or directives;

(~~j~~i) compliance with fiduciary duty and disclosure requirements, antitrust and unfair competition laws and regulations, tax laws and regulations; ~~or~~

(j) patent, copyright and trademark, state trademark, and other intellectual property law;

(k) laws concerning international treaties or conventions, national and local emergency, possible deference to acts of sovereign states, criminal forfeiture and criminal prosecution (including mail fraud and wire fraud statutes) and racketeering;

(~~k~~l) whether the Lender is doing business in the state of Oregon~~.~~; and

(m) the statutes and ordinances, the administrative decisions, and the rules and regulations of counties, towns, municipalities, and special political subdivisions, and judicial decisions to the extent that they deal with any of the foregoing matters in this paragraph (collectively, "**Local Law**").

[(n) the enforceability of any provision in the Loan Documents that excludes, waives or limits the liability of any party for matters set forth in Section 9-602 of the Oregon UCC.]

4. Whenever the phrase "knowledge", "our actual knowledge" or any variation thereof is used in this opinion, the subject modified by such phrase is limited to matters within the present actual knowledge of _____ and _____, the lawyer(s) in this firm actively engaged in the representation of Borrower, shall mean only the conscious awareness of facts or other information by such lawyer(s), and shall not include any knowledge that may be imputed to

such individual(s) by constructive notice or other means or imply that any inquiry has been undertaken by such individual(s) with respect to any of such matters except to the extent that facts and circumstances presented to such individual(s) would compel a prudent lawyer to make further inquiry when presented with the same facts and circumstances.

5. This opinion is rendered at the request of Borrower as a requirement for closing. This opinion does not establish any attorney-client relationship between this firm and any addressee. Nothing contained in this opinion shall be deemed to constitute a waiver of the attorney-client privilege between this firm and Borrower [or Guarantor].

6. We have reviewed copies or originals of the Loan Documents and the Authority Documents, and we have given consideration to such matters of law [and facts], as we have deemed appropriate, in our professional judgment, to render such opinions.

This opinion is rendered as of the date set forth above, and we disclaim any obligation to advise you of any changes in the circumstances, laws, or events that may occur after this date or to otherwise update this opinion.

~~This opinion has been rendered to you in connection with the transaction described herein solely for your information and is not to be quoted in whole or in part or otherwise referred to, used, delivered to, or relied upon by any person or entity other than you, your legal counsel, and the successive holders of the Loan.~~

The opinions expressed in this letter are solely for the benefit of the Lender and may not be relied upon by any other person or disclosed, quoted or provided to any other person or entity without our written consent; however, we consent to reliance on the opinions expressed herein by any party that becomes a successor lender subsequent to the date of this opinion letter by acquiring the Loan or an interest in the Loan for value, in good faith, and in accordance with the provisions of the Loan Documents (each a "**Successor Lender**") as if this opinion letter were addressed and delivered to such Successor Lender on the date hereof, on the condition and understanding that: (i) in no event shall any Successor Lender have any greater rights with respect to this opinion than the original addressees of this opinion on the date hereof, nor any greater rights than those possessed by the assignor of the interest in the Loan acquired by the Successor Lender; (ii) our consent to such reliance shall not constitute a reissuance or update of the opinions expressed herein or extend any statute of limitations period applicable to this opinion on the date hereof; (iii) we have no responsibility to consider the applicability of any provisions of this opinion to any Successor Lender; and (iv) any such reliance must be actual and reasonable under the circumstances existing at the time such Successor Lender becomes a Successor Lender, including any circumstances relating to changes in law or facts known to or reasonably knowable by such Successor Lender at such time.

This opinion letter may be delivered to the following parties for review, but such parties shall have no recourse against the undersigned law firm in connection with any opinion rendered herein: (a) to a regulatory agency having supervisory authority over the Lender for the purpose of confirming the existence of this opinion letter; (b) to nationally recognized statistical rating organizations rating an issuance involving the Loan or otherwise entitled to access under Rule

17G-5 under the Securities and Exchange Act of 1934, as amended, by providing a copy of this opinion letter to the appropriate 17G-5 information provider for the securitization into which the Loan or a component of the Loan is deposited or as otherwise permitted by the applicable pooling and servicing agreement or trust and servicing agreement, as the case may be; (c) to a court or arbitrator and parties to a litigation or arbitration in connection with the assertion of a defense as to which this opinion letter is relevant and necessary; and (d) to other parties as required by the order of a court of competent jurisdiction in the United States.

Very truly yours,

_____

[Firm name~~,~~ *only;* not *an* individual]

Chapter 8

Clear and Objective Standards

William Kabeiseman
Bateman Seidel Miner Blomgren Chellis & Gram PC
Portland, Oregon

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CLEAR AND OBJECTIVE STANDARDS

A standard is "clear" if it is easily understood and without obscurity or ambiguity. Ultimately, in the context of ORS 197.307(4), the degree of clarity required for standards, conditions, and procedures for housing development represents a balance between the need of applicants for an understandable route to approval of the applied-for development and the need of local governments for code-drafting requirements that are realistically achievable. *Roberts v. City of Cannon Beach*, 316 Or App 305, 312, 504 P3d 1249 (2021)

A standard is "objective" if it exists independent of mind. Standards are not objective if they impose subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on the property to be developed or the adjoining properties or community. Terms such as necessary and consistent are designed to balance or mitigate impacts from development and, therefore, are not objective. *Roberts v. City of Cannon Beach*, 316 Or App 305, 311 – 12, 504 P3d 1249 (2021).

Selected Statutes and Cases

1. 197.307 – Need for Housing
2. *Roberts v. City of Cannon Beach*, 316 Or App 305, 504 P3d 1249 (2021)
3. *Warren v. Washington County*, 296 Or App 595, 439 P3d 581 (2019)
4. *Group B. LLC v. City of Corvallis*, 72 Or LUBA 74 (2015)
5. *Home Builders v. City of Eugene*, 41 Or LUBA 370 (2002)
6. *Rogue Valley Assoc. of Realtor v. City of Ashland*, 35 Or LUBA 139 (1998)
7. *Robert Randall Company v. City of Wilsonville*, 15 Or LUBA 26 (1986)

ORS 197.307, Needed Housing Policy; Clear and Objective Standards for Housing; Siting of Manufactured Dwellings

197.307 Needed housing policy; clear and objective standards for housing; siting of manufactured dwellings. (1) The availability of affordable, decent, safe and sanitary housing opportunities for persons of lower, middle and fixed income, including housing for farmworkers, is a matter of statewide concern.

(2) Many persons of lower, middle and fixed income depend on government assisted housing as a source of affordable, decent, safe and sanitary housing.

(3) When a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, needed housing shall be permitted in one or more zoning districts or in zones described by some comprehensive plans as overlay zones with sufficient buildable land to satisfy that need.

(4) Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing. The standards, conditions and procedures:

(a) May include, but are not limited to, one or more provisions regulating the density or height of a development.

(b) May not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.

(5) The provisions of subsection (4) of this section do not apply to:

(a) An application or permit for residential development in an area identified in a formally adopted central city plan, or a regional center as defined by Metro, in a city with a population of 500,000 or more.

(b) An application or permit for residential development in historic areas designated for protection under a land use planning goal protecting historic areas.

(6) In addition to an approval process for needed housing based on clear and objective standards, conditions and procedures as provided in subsection (4) of this section, a local government may adopt and apply an alternative approval process for applications and permits for residential development based on approval criteria regulating, in whole or in part, appearance or aesthetics that are not clear and objective if:

(a) The applicant retains the option of proceeding under the approval process that meets the requirements of subsection (4) of this section;

(b) The approval criteria for the alternative approval process comply with applicable statewide land use planning goals and rules; and

(c) The approval criteria for the alternative approval process authorize a density at or above the density level authorized in the zone under the approval process provided in subsection (4) of this section.

(7) Subject to subsection (4) of this section, this section does not infringe on a local government's prerogative to:

(a) Set approval standards under which a particular housing type is permitted outright;

(b) Impose special conditions upon approval of a specific development proposal; or

(c) Establish approval procedures.

(8) In accordance with subsection (4) of this section and ORS 197.314, a jurisdiction may adopt any or all of the following placement standards, or any less restrictive standard, for the approval of manufactured homes located outside mobile home parks:

(a) The manufactured home shall be multisectional and enclose a space of not less than 1,000 square feet.

(b) The manufactured home shall be placed on an excavated and back-filled foundation and enclosed at the perimeter such that the manufactured home is located not more than 12 inches above grade.

(c) The manufactured home shall have a pitched roof, except that no standard shall require a slope of greater than a nominal three feet in height for each 12 feet in width.

(d) The manufactured home shall have exterior siding and roofing which in color, material and appearance is similar to the exterior siding and roofing material commonly used on residential dwellings within the community or which is comparable to the predominant materials used on surrounding dwellings as determined by the local permit approval authority.

(e) The manufactured home shall be certified by the manufacturer to have an exterior thermal envelope meeting performance standards which reduce levels equivalent to the performance standards required of single-family dwellings constructed under the Low-Rise Residential Dwelling Code as defined in ORS 455.010.

(f) The manufactured home shall have a garage or carport constructed of like materials. A jurisdiction may require an attached or detached garage in lieu of a carport where such is consistent with the predominant construction of immediately surrounding dwellings.

(g) In addition to the provisions in paragraphs (a) to (f) of this subsection, a city or county may subject a manufactured home and the lot upon which it is sited to any development standard, architectural requirement and minimum size requirement to which a conventional single-family residential dwelling on the same lot would be subject. [1981 c.884 §5; 1983 c.795 §3; 1989 c.380 §2; 1989 c.964 §6; 1993 c.184 §3; 1997 c.733 §2; 1999 c.357 §1; 2001 c.613 §2; 2011 c.354 §3; 2017 c.745 §5; 2019 c.401 §7]

Note: The amendments to 197.307 by section 14, chapter 401, Oregon Laws 2019, become operative January 2, 2026. See section 18, chapter 401, Oregon Laws 2019, as amended by section 1c, chapter 422, Oregon Laws 2019. The text that is operative on and after January 2, 2026, is set forth for the user’s convenience.

316 Or.App. 305
504 P.3d 1249

Stanley ROBERTS and Rebecca Roberts, Petitioners,
v.
CITY OF CANNON BEACH; Haystack Rock, LLC; and Oregon Coast Alliance, Respondents.

A176601
Court of Appeals of Oregon.

Argued and submitted October 4, 2021.
December 15, 2021

W. Michael Gillette, Portland, argued the cause for petitioners. Also on the brief were Schawabe Williamson & Wyatt, P.C., and Wendie L. Kellington, and Kellington Law Group, PC.

William K. Kabeiseman argued the cause for respondent City of Cannon Beach. Also on the brief were Carrie A. Richter and Bateman Seidel Miner Blomgren Chellis & Gram, P.C.

William L. Rasmussen, Portland, argued the cause for respondent Haystack Rock, LLC. Also on the brief were Steven G. Liday and Miller Nash, LLP.

Sean Malone filed the brief for respondent Oregon Coast Alliance.

Bryan W. Cavaness filed the brief amicus curiae for Stafford Land Company.

James D. Howsley filed the brief amicus curiae for Home Builders Association of Metropolitan Portland. Also on the brief was Jordan Ramis, PC.

Patricia M. Mulvihill filed the brief amicus curiae for League of Oregon Cities.

Before Armstrong, Presiding Judge, and Tookey, Judge, and Aoyagi, Judge.

ARMSTRONG, P.J.

[316 Or.App. 307]

Petitioners seek judicial review of a decision of the Land Use Board of Appeals (LUBA) affirming the City of Cannon Beach's denial of their application for a development permit to construct a residence. Petitioners raise two assignments of error in which they argue that LUBA's decision is unlawful in substance because it affirms the city's application of the oceanfront setback established in Cannon Beach Municipal Code (CBMC) section 17.42.050(A)(6) to their application.[1] As explained below, we conclude that the oceanfront setback is a clear and objective standard, ORS 197.307(4), and that ORS 227.175(4)(c) and (e) do not prohibit application of the oceanfront setback to petitioners' application. Accordingly, we affirm.

We begin by considering petitioners' first assignment of error. Before recounting the facts, we set out the relevant code provisions, which we take from LUBA's opinion:

"The purpose of the [oceanfront management (OM)] overlay zone

> "'is to regulate uses and activities in the affected areas in order to: ensure that development is consistent with the natural limitations of the oceanshore; to ensure that identified recreational, aesthetic, wildlife habitat and other resources are

[1] *Amici* Stafford Land Company and Homebuilders Association of Metropolitan Portland have filed briefs further addressing the assignments of error raised by petitioners. Because the three briefs present overlapping arguments, we do not distinguish among them for purposes of this opinion. Generally, we refer to the arguments raised by petitioners and their supporting *amici* as petitioners' arguments.

protected; to conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of beach and dune areas; and to reduce the hazards to property and human life resulting from both natural events and development activities.' Cannon Beach Municipal Code (CBMC) 17.42.010.

"The OM overlay zone includes all 'lots abutting the oceanshore.' CBMC 17.42.020(A)(1). '"Lot abutting the oceanshore" means a lot which abuts the Oregon Coordinate Line or a lot where there is no buildable lot between it and the Oregon Coordinate Line.' CBMC 17.04.320. CBMC 17.42.050(A)(6) provides the oceanfront setback standard

[316 Or.App. 308]

for lots abutting the oceanshore, establishing the 'ocean yard.' '"Ocean yard" means a yard measured horizontally at right angles from the most easterly of [the] Oregon Coordinate Line or the western property line, to the nearest point of a building. An ocean yard may be a front yard, a rear yard or a side yard.' CBMC 17.04.578. The only structures permitted in the ocean yard are fences, decks, or beach access stairs. CBMC 17.42.060(A)(9). Accordingly, a dwelling cannot be constructed in the ocean yard.

"The oceanfront setback and resulting ocean yard established by CBMC 17.42.050(A)(6) are at the center of the city's denial and petitioners' arguments in this appeal. CBMC l 7.42.050(A)(6) provides:

"'Oceanfront Setback. For all lots abutting the oceanshore, the ocean yard shall be determined by the oceanfront setback line.

"'a. The location of the oceanfront setback line for a given lot depends on the location of buildings on lots abutting the oceanshore in the vicinity of the proposed building site and upon the location and orientation of the Oregon Coordinate Line.

"'b. For the purpose of determining the oceanfront setback line, the term "building" refers to the residential or

[504 P.3d 1253]

commercial structures on a lot. The term "building" does not include accessory structures.

"'c. The oceanfront setback line for a parcel is determined as follows:

"'i. Determine the affected buildings; the affected buildings are those located one hundred feet north and one hundred feet south of the parcel's side lot lines.

"'ii. Determine the setback from the Oregon Coordinate Line for each building identified in subsection (A)(6)(c)(i) of this section.

"'iii. Calculate the average of the setbacks of each of the buildings identified in subsection (A)(6)(c)(ii) of this section.

"'d. If there are no buildings identified by subsection (A)(6)(c)(i) of this section, then the oceanfront setback line shall be determined by buildings that are located two hundred feet north and two hundred feet south of the parcel's side lot lines.

[316 Or.App. 309]

"'e. Where a building identified by either subsection (A)(6)(c)(i) of this section or subsection (A)(6)(d) of this section extends beyond one hundred feet of the lot in

> question, only that portion of the building within one hundred feet of the lot in question is used to calculate the oceanfront setback.
>
> "'f. The setback from the Oregon Coordinate Line is measured from the most oceanward point of a building which is thirty inches or higher above the grade at the point being measured. Projections into yards, which conform to Section 17.90.070, shall not be incorporated into the required measurements.
>
> "'g. The oceanfront setback line shall be parallel with the Oregon Coordinate Line and measurements from buildings shall be perpendicular to the Oregon Coordinate Line.
>
> "'h. The minimum ocean yard setback shall be fifteen feet.
>
> "'i. Notwithstanding the above provisions, the building official may require a greater oceanfront setback where information in a geologic site investigation report indicates a greater setback is required to protect the building from erosion hazard.
>
> "'j. As part of the approval of a subdivision, the city may approve the oceanfront setback for the lots contained in the subdivision. At the time of building construction, the oceanfront setback for such a lot shall be the setback established by the approved subdivision and not the oceanfront setback as it would be determined by subsections (A)(6)(a) through (i) of this section. Before granting a building permit, the building official shall receive assurance satisfactory to such official that the location of the oceanfront setback for said lot has been specified at the required location on the plat or has been incorporated into the deed restriction against the lot.'"

Roberts v. City of Cannon Beach, No. 2020-116, July 23, 2021) (slip op at 7-10) (brackets in LUBA opinion; internal footnotes omitted).

The subject property is a 5,394-square-foot lot on a steep hillside facing the Pacific Ocean in the Tolovana Park subdivision. Petitioners submitted an application to construct a new 2,712-square-foot residence on the property.

[316 Or.App. 310]

The city determined that petitioners' lot and the lot immediately to the north of petitioners' lot were both "lots abutting the oceanshore," CBMC 17.42.020(A)(1), and, consequently, that the oceanfront setback, CBMC 17.42.050(A)(6), applied. The city determined that the required method of determining the oceanfront setback was, as set out in CBMC 17.42.050(A)(6)(c), to identify the "affected buildings" and average the oceanfront setbacks of those buildings. The city determined that, in this case, there was only one affected building, the house on the lot to the north of petitioners' lot. Applying CBMC 17.42.050(A)(6)(c), the city averaged the setbacks of the "affected buildings" and concluded that the average was the same as the setback of the single affected building.

Ultimately, the city denied the permit on the ground that petitioners' proposed house did not comply with the oceanfront setback. Petitioners challenged the denial before LUBA, and LUBA affirmed the denial. On judicial review, petitioners contend that LUBA's decision is unlawful in substance because LUBA misapplied the statutory requirement that approval standards for housing be "clear and objective." ORS 197.307(4).[2]

[504 P.3d 1254]

[2] We reject without discussion petitioners' other arguments raised in the first assignment of error.

We review LUBA's construction of a statute for legal error. *Central Oregon LandWatch v. Deschutes County*, 285 Or.App.267, 276-77, 396 P.3d 968 (2017). As explained below, we reject petitioners' view that a standard is not "clear and objective" any time that one of its terms, considered apart from its context, has more than one plausible meaning, and we agree with LUBA that the challenged terms of the oceanfront setback are clear and objective.

Local governments have long been required to "adopt and apply only clear and objective standards, conditions and procedures regulating the development" of "needed housing." ORS 197.307(4); *see Nieto v. City of Talent*, — Or LUBA —, — (LUBA No. 2020-100, Mar 10, 2021) (slip op at 8) (explaining that the needed-housing statutes were enacted in 1981). When clear and objective standards are required for needed housing, "the local government

[316 Or.App. 311]

imposing the provisions of the ordinance shall demonstrate that the approval standards, conditions and procedures are capable of being imposed only in a clear and objective manner." ORS 197.831.

In 2017, the legislature extended the "clear and objective" requirement to the development of all housing. *See* Or Laws 2017, ch 754, § 5; *see also Warren v. Washington County*, 296 Or. App. 595, 598, 439 P.3d 581, *rev. den.*, 365 Or. 502, 451 P.3d 988 (2019) (after the 2017 amendments, ORS 197.307(4) "provides that local government can regulate the development of housing only through clear and objective standards, conditions, and procedures").[3] The legislature accomplished that change by simply amending the provision that formerly addressed only needed housing to apply to "housing, including needed housing." Or Laws 2017, ch 745, § 5 ("[A] local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of **housing, including** needed housing * * *." (Additions in bold.)). In our view, that change was meant to expand application of the existing "clear and objective" standard to all housing; it did not demonstrate any intention to change or reformulate the existing "clear and objective" standard.

LUBA, and, to a lesser extent, this court, have articulated and refined the "clear and objective" standard under ORS 197.307 over many years. We agree with petitioners that, fundamentally, the standard has two parts: First, a standard, condition, or procedure must be objective. As LUBA has explained, "objective" means "existing independent of mind." *Nieto*, — Or LUBA —, — (slip op at 9 n. 6). Standards are not objective "if they impose 'subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community.'"

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Legacy Dev. Grp., Inc. v. City of The Dalles, — Or LUBA —, — (LUBA No. 2020-099, Feb. 24, 2020) (slip op at 7) (quoting *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158 (1998), *aff'd*, 158 Or. App. 1, 970 P.2d 685, *rev. den.*, 328 Or. 594, 987 P.2d 514 (1999)); *id.* at — (slip op at 14) ("Terms such as 'necessary' and 'consistent' are designed to balance or mitigate impacts from development and, therefore, are not objective." (Some internal quotation marks and brackets omitted.)); *see also Rudell v. City of Bandon*, 249 Or. App. 309,

[3] The legislature has also provided that discretionary permit approvals must apply clear and objective standards. ORS 227.173(2). In this case, there has been some debate about whether this is a discretionary approval. As LUBA did, we observe that our resolution of petitioners' arguments applies with equal force under both ORS 197.307(4) and ORS 227.173(2). *Ruddell v. City of Bandon*, 249 Or. App. 309, 320, 275 P.3d 1010 (2012) ("[W]e conclude that our resolution of petitioners' arguments related to ORS 197.307(6) (2009) apply with equal force to their claims under ORS 227.173.").

319, 275 P.3d 1010 (2012) (quoting and applying the same standard from LUBA's opinion in *Rogue Valley Assoc. of Realtors*).

Second, as LUBA observed in this case, standards must also be clear. "[T]he term 'clear' means 'easily understood' and 'without obscurity or ambiguity.'" *Roberts*, — Or LUBA at — (slip op at 19) (quoting *Nieto*, — Or LUBA —, — (slip op at 9 n. 6)). This second prong of the analysis is better developed in LUBA's case law than in our own. *See, e.g.*, *Group B, LLC v. City of Corvallis*, — Or LUBA —, —

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(LUBA No. 2015-019, Aug. 25, 2015) (slip op. at 13-14), *aff'd*, 275 Or. App. 557, 364 P.3d 355 (2015), *rev. den.*, 359 Or. 667, 379 P.3d 528 (2016) (a condition that could be construed "to support either of two diametrically opposed conclusions" "is not a 'clear and objective' standard or condition within the meaning of ORS 197.307(4)"). Ultimately, in the context of ORS 197.307(4), the degree of clarity required for standards, conditions, and procedures for housing development represents a balance between the need of applicants for an understandable route to approval of the applied-for development and the need of local governments for code-drafting requirements that are realistically achievable. *See, e.g.*, Video Recording, House Committee on Human Services and Housing, HB 2007, Apr. 13, 2017, at 29:55 (statement of Rep. Tina Kotek), *available at* https://olis.oregonlegislature.gov (accessed Dec. 7, 2021) (indicating that it would be achievable for cities to apply only clear and objective standards to all housing).

Here, however, we need not delve into the details of the required degree of clarity, because, as explained below, we disagree with the basic premise of petitioners' argument. As we understand their view, a standard cannot be clear and objective if any of its terms, considered apart from their

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context, are capable of a meaning different from the one advanced by the local government. In support of that view, they rely on *Tirumali v. City of Portland*, 169 Or. App. 241, 7 P.3d 761 (2000), *rev. den.*, 331 Or. 674, 21 P.3d 96 (2001).

As explained below, we disagree with petitioners' characterization of our holding in *Tirumali*. At the outset, we observe that, in that case, we were construing ORS 197.015(10)(b)(B), which addresses LUBA's subject-matter jurisdiction. Although the statute at issue here, ORS 197.307(4), also refers to "clear and objective standards," we note that the two statutory contexts are, in some ways, different. *See generally Garcia-Solis v. Farmers' Ins. Co.*, 365 Or. 26, 35, 441 P.3d 573 (2019) ("[T]he assumption of consistency is only an assumption. The text and context of a statute can refute that assumption.").

However, granting that our holding in *Tirumali* is at least relevant in this context, our reasoning in that case does not support petitioners' argument in this case. In *Tirumali*, the parties disputed whether, under the Portland City Code, the height of a building built on a steep lot should be measured from the lowest original grade on the property, or whether it should be measured from the top of any fill that was added during construction. 169 Or. App. at 245-46, 7 P.3d 761. LUBA noted that the code's definition of "grade" referred to a "finished surface" and concluded that that reference demonstrated that the building should be measured from the "finished" grade, that is, the top of any fill that was added during construction. *Id.*

We explained that, in that context,

> "our inquiry *** is not to determine what the relevant terms in fact mean but only to determine whether they can plausibly be interpreted in more than one way. If so,

> they are ambiguous, and it would follow that the relevant city provisions are not 'clear and objective,' ORS 197.015(10)(b)(B) [.]"

Id. at 246, 7 P.3d 761. For purposes of that analysis, we noted that, although the term "finished surface" in the definition of "grade" was appropriate context to consider in resolving the ambiguity in the text of the provision itself, that term was also ambiguous. *Id.* One potential meaning of "finished" undercut the view that "finished surface" referred to the

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final grade, and the other supported it. *Id.* We particularly noted that "[n]o context of which we are aware resolves the ambiguity," nor had the parties provided persuasive legislative history. *Id.* Finally, canons of construction also led in conflicting directions. *Id.* at 246-47, 7 P.3d 761. Based on our conclusion that the city's standard was ambiguous, we held that it was not clear and objective for purposes of ORS 197.015(10)(b)(B), and, consequently, that LUBA had jurisdiction.

Here, petitioners rely on *Tirumali* as support for their view that, to meet the statutory requirement of a clear and objective standard, the city must show that none of the terms of the oceanfront setback provision are ambiguous, even when they are considered apart from their context and the purpose of the ordinance. But *Tirumali* does not stand for that proposition. Rather, in *Tirumali*, we considered the text of the ordinance,

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in the context of relevant definitions and all other relevant context (of which there was none); then we considered legislative history (of which there was also none); then we considered canons of construction. None of those steps yielded an answer. In short, we conducted a full construction of the ordinance and concluded that, even after that exercise, it remained ambiguous. *Tirumali*, 169 Or. App. at 246-47, 7 P.3d 761. For *that* reason, we concluded that the ordinance was not "clear and objective" for purposes of ORS 197.015(10)(b)(B). Our analysis in *Tirumali* does not support petitioners' view that we must consider only the individual terms of the ordinance and that it is immaterial whether reference to their context or the purpose of the ordinance resolves any ambiguity.

Nearly 20 years ago, LUBA rejected the view that petitioners assert:

> "In *Home Builders Assoc. v. City of Eugene*, [41 Or LUBA 370, 393 n. 20 (2002),] we explained that 'the ultimate question under ORS 197.307 [(4)] is whether the *standard* is clear and objective, viewed in context. That the standard may contain imprecise or ambiguous terms is a relevant and, depending on the terms and their function in the standard, perhaps sufficient, consideration in answering that ultimate question. However, the existence of imprecise or ambiguous terms in a standard does not *necessarily* resolve whether that standard violates ORS 197.307 [(4)]."

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Knoell v. City of Bend, — Or LUBA —, — (LUBA No. 2020-037, Aug 20, 2021) (slip op at 4) (emphases in *Home Builders Assoc.*; second and third brackets in *Knoell*); *see also Rudell*, 249 Or. App. at 320, 275 P.3d 1010 (relying on LUBA's construction of "clear and objective standards" in *Home Builders Assoc.*). That reasoning by LUBA is consistent with the statutory text, which provides that "a local government may adopt and apply only *clear and objective standards, conditions and procedures* regulating the development of housing," ORS 197.307(4) (emphasis added), and with our case law. We adopt that reasoning and, consequently, reject petitioners' proposed analysis for whether an approval standard is adequately clear.

Having done that, we agree with LUBA that each of petitioners' text-specific arguments fails. Petitioners argue that the term "average," which the oceanfront setback applies, in some circumstances, to a single number; the undefined term "Oregon Coordinate Line"; and the term "lot" are ambiguous. In light of our rejection of petitioners' argument that any ambiguous term, standing alone, prevents a standard from being clear and objective, the question is whether any ambiguity in those terms makes the oceanfront setback standard itself ambiguous in a way that cannot be resolved by reference to its context, its purpose, or some other appropriate consideration.

As we will briefly explain, we conclude that it does not. First, although petitioners are correct that an average is usually calculated based on a set containing more than one value, in context, it is clear that CBMC 17.42.050(A)(6)(c) contemplates that, in some cases—cases exactly like this one, where there is a single building within 100 feet of the side lot lines of the affected property—the average will be calculated from a set containing one number.[4]

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Second, regarding the Oregon Coordinate Line, LUBA explained that "a

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reasonable person reading CBMC 17.42.050, which is in the CBMC chapter governing the OM overlay zone, would understand that 'Oregon Coordinate Line' is the only statewide surveyed line that crosses the state of Oregon from north to south along the state's oceanfront." That line is the one identified in ORS 390.770 by reference to surveyed points. We agree with LUBA that, in the context of the oceanfront setback, the term "Oregon Coordinate Line" in CBMC 17.42.050(A)(6)(c) is neither ambiguous—because there is only one line to which it could reasonably refer—nor obscure.[5]

Finally, we consider the various arguments that petitioners advance about the term "lot" in CBMC 17.04.320, the provision that defines the group of lots—"lots abutting the oceanshore"—to which the oceanfront setback applies. As set out above, a "lot abutting the oceanshore" includes "a lot where there is no buildable lot between it and the Oregon Coordinate Line."

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[4] As set out above, the relevant text of CBMC17.42.050(A)(6) provides as follows:

> "c. The oceanfront setback line for a parcel is determined as follows:
>
> "i. Determine the affected buildings; the affected buildings are those located one hundred feet north and one hundred feet south of the parcel's side lot lines.
>
> "ii. Determine the setback from the Oregon Coordinate Line for each building identified in subsection (A)(6)(c)(i) of this section.
>
> "iii. Calculate the average of the setbacks of each of the buildings identified in subsection (A)(6)(c)(ii) of this section.
>
> "d. If there are no buildings identified by subsection (A)(6)(c)(i) of this section, then the oceanfront setback line shall be determined by buildings that are located two hundred feet north and two hundred feet south of the parcel's side lot lines."

CBMC 1.04.040 provides, in turn, that, unless it is apparent from the context that a different construction is intended, "[t]he singular number includes the plural and the plural includes the singular."

[5] We also reject petitioners' suggestion that even a clear reference to the statutorily established line in ORS 390.770 violates the requirement that the standard be clear and objective because the statutory line—established by a list of surveyed points along the ocean shore—is too difficult for an applicant to understand. The standard is required to be "clear and objective," ORS 197.307(4), not simplistic. For the same reason, we reject the arguments of *amicus* Homebuilders Association of Metropolitan Portland that the oceanfront setback standard is not clear and objective because it contains too many words in general and too many conjunctions in particular.

CBMC 17.04.320. Petitioners argue that the term "lot" in "buildable lot" is ambiguous because the definition of "lot" includes the term "plot," and a plot, according to a dictionary definition, is a measured piece of land. They point out that the neighboring property on which the city relied in calculating the oceanfront setback includes enough property to allow another house to be built on it sometime in the future. Thus, they

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argue, there is a buildable "plot" on the neighboring property, and, as a consequence, the oceanfront setback does not apply to the house that is currently on the neighboring property.

Petitioners' efforts to create ambiguity in the ordinance fail once again here. Accepting, for the sake of argument, petitioners' premise that a plot is a measured piece of land, their argument fails to account for the fact that the measured area must be a *piece* of land. Here, as LUBA observed, it is possible that, at some time in the future, the neighboring property could be divided so as to create a buildable piece of land between the neighboring house and the ocean. However, presently, there is no buildable plot between the neighboring house and the ocean.

Petitioners also contend that, for a variety of reasons, a platted right-of-way that runs between their property and the ocean is a "lot," and that that demonstrates ambiguity in the term "lot." However, in those arguments, petitioners have not addressed LUBA's conclusion that, regardless of the possible breadth of meanings of the term "lot," the right-of-way is not a "buildable lot" under the terms of the ordinance. That the term "lot," considered apart from its context, may be ambiguous is immaterial because, based on a part of LUBA's reasoning that petitioners do not dispute, the term "buildable lot," as used in CBMC 17.04.320, is clear and objective.

In short, petitioners' arguments rely on potential ambiguity in various terms when they are considered without reference to their context and the purpose of the ordinance. As explained above, that is not what the "clear and objective" standard requires. We reject petitioners' first assignment of error.

In petitioners' second assignment of error, they contend that ORS 227.175(4)(c) and (e) prohibit application of the oceanfront setback to their application because that statute prohibits cities from applying any setback or other clear and objective standard of any kind that has the effect of reducing the maximum density of development that is otherwise

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allowed by code.[6] We agree with LUBA

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[6] As discussed further below, ORS 227.175(4)(c) provides as follows:

> "A city may not condition an application for a housing development on a reduction in density if:
>
> "(A) The density applied for is at or below the authorized density level under the local land use regulations; and
>
> "(B) At least 75 percent of the floor area applied for is reserved for housing."

ORS 227.175(4)(e) provides as follows:

> "Notwithstanding paragraphs (c) and (d) of this subsection, a city may condition an application for a housing development on a reduction in density or height only if the reduction is necessary to resolve a health, safety or habitability issue or to comply with a protective measure adopted pursuant to a statewide land use planning goal. Notwithstanding ORS 197.350, the city must adopt findings supported by substantial evidence demonstrating the necessity of the reduction."

"Authorized density level" means "the maximum number of lots or dwelling units or the maximum floor area ratio that is permitted under local land use regulations." ORS 227.175(4)(f)(A).

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that ORS 227.175(4)(c) and (e) do not prohibit denial of an application based on noncompliance with a clear and objective standard that has the incidental effect of reducing the density of the development below the maximum density otherwise allowed in the zone.

We take the additional facts relevant to this assignment of error from LUBA's opinion. As explained above, petitioners applied for a development permit to build a 2,712-square-foot house on their lot. The proposed house had less than the maximum floor area allowed for the lot under the relevant code section. CMBC 17.10.040(D) ("The maximum gross floor area for a permitted or conditional use on a lot of more than five thousand square feet, but less than six thousand square feet, shall not exceed three thousand square feet.").

City planning staff approved the application, subject to the condition that the residence comply with the oceanfront setback. To comply with the oceanfront setback, the floor area of the residence would have had to be substantially less than 2,712 square feet. Petitioners appealed to the planning commission, arguing, among other things, that the oceanfront setback did not apply to their application in light of ORS 197.175(4)(c) and (e). The planning commission

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denied the application, reasoning that the oceanfront setback applied and that petitioners' proposed dwelling could not comply with it. Petitioners appealed the planning commission decision to the city council, which affirmed the planning commission denial.[7]

Petitioners appealed to LUBA, again contending that the oceanfront setback did not apply to their application. As relevant here, petitioners argued that ORS 227.175(4)(c) and (e) prohibited the city from applying the oceanfront setback because the oceanfront setback had the effect of reducing the density of petitioners' proposed residence by reducing its floor area. LUBA rejected that argument, reasoning that ORS 227.175(4)(c) and (e) did not prohibit the city from denying petitioners' application for failure to comply with the oceanfront setback because the setback is a clear and objective standard that only incidentally affected the allowed floor area, and, thus, the density, of petitioners' dwelling.

On judicial review, petitioners again contend that, in light of ORS 227.175(4)(c), the city was not permitted to apply the oceanfront setback to their application. For their part, respondents contend that those statutory provisions do not preempt cities' setback provisions or other clear and objective standards—for example, clear and objective standards requiring sidewalks or parking—that have the incidental effect of reducing the density of development below the maximum otherwise allowed by code.

The parties' arguments raise a question of statutory construction, which we resolve through the familiar method articulated by the Supreme Court in *State v. Gaines*, 346 Or. 160, 171-73, 206 P.3d 1042 (2009). With the aim of discerning the legislature's intentions, we begin by considering the text of the statute in context. To the extent that it is helpful to our analysis, we consider the legislative history of the statute. Finally, if any ambiguity remains after we consider the text, context, and legislative history, we apply maxims of statutory construction. *Id.*

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ORS 227.175 sets out procedural and substantive requirements for a city's consideration of applications for "a permit or zone change." ORS 227.175(1); *see also* ORS 227.175(2) ("The

[7] Both the planning commission and the city council noted that petitioners could apply for a setback reduction from the planning commission pursuant to CMBC 17.64, but that they had not done that.

governing body of the city shall establish a consolidated process by which an applicant may apply at one time for all permits or zone changes needed for a development project.").

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Subsection four of the statute provides standards for approval, imposition of conditions, and denial of applications. It provides as follows:

> "(a) A city may not approve an application unless the proposed development of land would be in compliance with the comprehensive plan for the city and other applicable land use regulation or ordinance provisions. The approval may include such conditions as are authorized by ORS 227.215 or any city legislation.
>
> "(b)(A) A city may not deny an application for a housing development located within the urban growth boundary if the development complies with clear and objective standards, including clear and objective design standards contained in the city comprehensive plan or land use regulations.
>
> "(B) This paragraph does not apply to [two situations that are not at issue here, namely, city or regional centers and optional alternative approval processes.]
>
> "(c) A city may not condition an application for a housing development on a reduction in density if:
>
> "(A) The density applied for is at or below the authorized density level under the local land use regulations; and
>
> "(B) At least 75 percent of the floor area applied for is reserved for housing.
>
> "(d) A city may not condition an application for a housing development on a reduction in height if:
>
> "(A) The height applied for is at or below the authorized height level under the local land use regulations;
>
> "(B) At least 75 percent of the floor area applied for is reserved for housing; and

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> "(C) Reducing the height has the effect of reducing the authorized density level under local land use regulations.
>
> "(e) Notwithstanding paragraphs (c) and (d) of this subsection, a city may condition an application for a housing development on a reduction in density or height only if the reduction is necessary to resolve a health, safety or habitability issue or to comply with a protective measure adopted pursuant to a statewide land use planning goal. Notwithstanding ORS 197.350, the city must adopt findings supported by substantial evidence demonstrating the necessity of the reduction.
>
> "(f) As used in this subsection:
>
> "(A) 'Authorized density level' means the maximum number of lots or dwelling units or the maximum floor area ratio that is permitted under local land use regulations.
>
> "(B) 'Authorized height level' means the maximum height of a structure that is permitted under local land use regulations.
>
> "(C) 'Habitability' means being in compliance with the applicable provisions of the state building code under ORS chapter 455 and the rules adopted thereunder."

Before LUBA, the parties disagreed about the meaning of paragraphs (4)(c) and (e) in several ways. They disputed whether those paragraphs apply to applications for permits that the city approves as a matter of right, or only to applications for permits that the city approves as a matter of discretion, and, if the latter, whether this application qualifies. They disputed whether those paragraphs have any effect when a city denies an application, rather than approving the application subject to conditions. They disputed whether the paragraphs prohibit a city from applying clear and objective standards that do not expressly, but rather only incidentally, require a reduction in density. And they disputed whether, in this case, application of the oceanfront setback was "necessary to resolve a health, safety or habitability issue or to comply with a protective measure adopted pursuant to a statewide land use planning goal." ORS 227.175(4)(e). The parties renew many of those arguments on appeal.

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We resolve only one of those questions.[8] As explained below, we conclude that ORS 227.175(4)(c) and (e) do not prohibit a city from applying clear and objective standards that incidentally require a reduction in density. In other words, we agree with respondents that, in enacting ORS 227.175(4)(c) and (e), the legislature did not intend to preempt the ability of local governments to apply clear and objective standards, like setbacks, that have a purpose other than reducing

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density but nevertheless have the effect of reducing the floor area or number of lots or dwelling units below the maximum otherwise allowed for the zone. Accordingly, we need not, and do not, consider any of the other issues raised by the parties. We affirm LUBA's decision.

The two paragraphs of the statute that are at issue— ORS 227.175(4)(c) and (e) —phrase the prohibited action in essentially the same way: "A city may not condition an application for a housing development on a reduction in density * * *." ORS 227.175(4)(c); *see also* ORS 227.175(4)(e) ("[*A*] *city may condition an application for a housing development on a reduction in density or height* only if the reduction is necessary to resolve a health, safety or habitability issue or to comply with a protective measure adopted pursuant to a statewide land use planning goal." (Emphasis added.)). Petitioners contend that that text forbids application of any standard (other than one that "is necessary to resolve a health, safety or habitability issue or to comply with a protective measure adopted pursuant to a statewide land use planning goal," ORS 227.175(4)(e)) that has the effect of reducing the allowed density of the development, whether it does so directly or only incidentally. To illustrate, in petitioners' view, ORS 227.175(4)(c) prohibits a city from approving an application subject to a condition stating, "the floor area will be reduced to half of the floor area allowed under the maximum floor area ratio for the zone," and equally prohibits a city from approving an application subject to a condition stating that a building must comply with a clear and objective side setback requirement, if the result of applying the setback requirement to the lot at issue is that the building

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cannot achieve the maximum floor area ratio allowed for the zone.[9]

[8] Moreover, we express no opinion on whether petitioners' proposed dwelling is a "housing development" within the meaning of ORS 227.175(4)(c).

[9] As noted above, we need not, and do not, consider whether the text of ORS 227.175(4)(c) applies only when a city approves an application but imposes conditions, or whether it also applies when a city denies an application. For simplicity, we use approval with conditions in our examples.

For their part, respondents posit that the legislature did not intend to prohibit application of clear and objective standards that, though they are aimed at achieving other goals, have the incidental effect of reducing density below the maximum allowed. Respondents contend that that understanding of the statute is supported by its text, context, and legislative history, as well as the principle that a legislative intention to preempt local law—in this case, a purported legislative intention to preempt a variety of clear and objective local standards, including setbacks—must be stated unambiguously.

Given the plain meaning of the text—in particular, the lack of specificity of the text, "condition an application * * * on a reduction in density"—either construction of the statute is plausible. An application could be "condition[ed] on * * * a reduction in density" whenever the effect of the city's application of any standard is to reduce density—as petitioners contend—or only when the decision expressly requires a reduction in density, as respondents contend. *See Webster's Third New Int'l Dictionary* 473 (2002 ed unabridged) ("condition," as a transitive verb, means "to invest with, limit by, or subject to conditions **:** burden with a condition **:** make conditional * * * **:** restrict or determine as a condition"). The text provides no clues as to the legislature's intention on that issue.

With that in mind, we turn to context. ORS 227.175(4)(d), which immediately follows ORS 227.175(4)(c), was enacted as part of the same bill as ORS 227.175(4)(c). *See* Or Laws 2017, ch 745, § 3. It provides as follows:

> "A city may not condition an application for a housing development on a reduction in height if:
>
> "(A) The height applied for is at or below the authorized height level under the local land use regulations;

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> "(B) At least 75 percent of the floor area applied for is reserved for housing; and
>
> "(C) Reducing the height has the effect of reducing the authorized density level under local land use regulations."

For purposes of both ORS 227.175(4)(c) and (d), "authorized density level" means "the maximum number of lots or dwelling units or the maximum floor area ratio that is permitted under local land use regulations."

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ORS 227.175(4)(f)(A).

We agree with respondents that paragraph (4)(d) strongly suggests that the legislature did not intend paragraph (4)(c) to prohibit application of clear and objective standards that incidentally, rather than expressly, reduce density below the maximum allowed for the zone. If petitioners' understanding of paragraph (4)(c) were correct—if that paragraph prohibited application of any standard that even incidentally reduces density below the maximum allowed—there would be no need for the legislature to prohibit cities from conditioning applications on reductions in height that have "the effect of reducing the authorized density level under local land use regulations." All height restrictions that have the effect of reducing the authorized density level below the maximum density allowed under local land use regulations would already be prohibited by paragraph (4)(c). Petitioners' understanding of paragraph (4)(c) renders paragraph (4)(d) surplusage. Accordingly, in our view, the paragraph's context strongly suggests that respondents' proffered construction is correct.

We do not find the legislative history of ORS 227.175(4) to be particularly helpful on this question. On one hand, one of the purposes of the bill in which ORS 227.175(4)(c) and (e) were enacted was, as petitioners summarize it, to "remove local governments' opportunity to reduce density at the maximum floor area ratio that the zone allowed." On the other hand, the legislative history makes clear that the legislature did not intend to strip local governments of their authority to regulate housing through application of clear and objective standards like setbacks, which is the situation that would exist if petitioners' understanding of ORS 227.175(4)(c) were correct. *See, e.g.*, Staff Measure Summary, House Committee on Rules, SB 1051 A, July 3,

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2017 (explaining that the bill would require local jurisdictions to allow "at least one accessory dwelling unit (ADU) for each single-family home in areas zoned for single-family dwellings" and noting that "[l]ocal jurisdictions may impose reasonable regulations related to approval of ADUs including, but not limited to, design and site-specific consideration like infrastructure"); Testimony, House Committee on Human Services and Housing, HB 2007, Apr 13, 2017, Ex A (Testimony of Rep. Tina Kotek) ("It is possible to have a permitting process that allows for local control regarding design and clear and objective standards related to those design preferences." (Underscoring in original.)).[10]

Finally, we agree with respondents and *amicus curiae* League of Oregon Cities that, under the circumstances presented here—where the legislature has enacted an ambiguous provision that, under one construction, would have the effect of divesting local governments of their ability to regulate in an area that has long been within local control—home-rule principles undercut the argument that the legislature intended the statutory text to have broad meaning. *See Owen v. City of Portland*, 368 Or. 661, 674, 497 P.3d 1216 (2021) (plaintiffs' argument that a statute prohibiting "enact[ment of] any ordinance or resolution which controls the rent that may be charged for the rental of any dwelling unit" should be construed to prohibit an ordinance that influenced, but did not expressly restrain or direct, the amount of rents was "unavailing," "[p]articularly when considered in light of our cases holding that state law can preempt home-rule authority only when, and to the extent that, the party urging preemption can demonstrate that the legislature unambiguously expressed its intent—a high bar to overcome" (internal quotation marks omitted)); *LaGrande/Astoria v. PERB*, 281 Or. 137, 148-49, 576 P.2d 1204, *adh'd to on reh'g*, 284 Or. 173, 586 P.2d 765 (1978) ("It is *** reasonable to assume that the legislature does not mean to displace local civil or administrative regulation of local conditions by a statewide law unless that intention is apparent." (Internal footnote omitted.)).

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Accordingly, we reject petitioners' argument that ORS 227.175(4)(c) and (e) prohibit application of all standards that have the effect of reducing density below the maximum density allowed for the zone. Here, the city denied petitioners' application on the ground that the proposed dwelling failed to

[504 P.3d 1262]

comply with the oceanfront setback, a clear and objective standard that only incidentally affected the allowed density of petitioners' proposed dwelling. That denial did not violate ORS 227.175(4)(c) or (e).

Affirmed.

[10] The relevant bill was introduced as HB 2007 (2017), but it was enacted as SB 1051 (2017). *Compare* HB 2007 (2017), *with* SB 1051 A (2017).

296 Or.App. 595
439 P.3d 581

Jill WARREN, Petitioner,
v.
WASHINGTON COUNTY and Venture Properties, Inc., Respondents.

A169547
Court of Appeals of Oregon.

Argued and submitted January 29, 2019.
March 20, 2019

Kenneth P. Dobson argued the cause and filed the brief for petitioner.

No appearance for respondent Washington County.

No appearance for respondent Venture Properties, Inc.

Before Hadlock, Presiding Judge, and DeHoog, Judge, and Aoyagi, Judge.

HADLOCK, P. J.

[296 Or.App. 596]

Respondent Venture Properties applied for approval of a six-lot subdivision on land located in Washington County. A county hearings officer approved the application and petitioner Warren appealed that opinion to the Land Use Board of Appeals (LUBA). LUBA rejected each of petitioner's challenges to the order and petitioner now seeks judicial review. Neither Venture Properties nor respondent Washington County has filed a brief in this court. For the reasons set out below, we affirm.

The pertinent facts are set out in LUBA's order. Venture Properties applied for approval of a six-lot subdivision on a 2.8-acre parcel of land. A stream called Ash Creek runs through the parcel and approximately half of the parcel is included on a map of Significant Natural Resources (SNR) that is part of the county's program for meeting Statewide Planning Goal 5.[1] The subdivision

[439 P.3d 582]

application proposed setting aside 58 percent of the property from development, including "the Ash Creek floodplain and associated wetlands and vegetated corridors." The application proposed "enhancement plantings" in a corridor adjacent to Ash Creek as required by regulations of Clean Water Services (CWS), the regional sewerage agency in that area. A county hearings officer approved the application with conditions, and LUBA affirmed the county's decision.

Petitioner's challenges to the LUBA order all relate to whether Washington County could apply certain provisions of its community development code (CDC) to prevent or restrict the proposed subdivision. To provide context for petitioner's arguments and LUBA's rationale for rejecting them, we set out the pertinent statutory provisions—in particular, ORS 197.307(4)—before discussing petitioner's arguments in detail. However, we note at the outset that at least some of

[1] As noted in OAR 660-015-0000(5), Statewide Planning Goal 5 relates to "Natural Resources, Scenic and Historic Areas, and Open Spaces." The administrative rules in OAR chapter 660, division 23, "establish[ ] procedures and criteria for inventorying and evaluating Goal 5 resources and for developing land use programs to conserve and protect significant Goal 5 resources." OAR 660-023-0000.

petitioner's arguments are premised on an assumption that part of the 2.8-acre property at issue may not qualify as

[296 Or.App. 597]

"buildable land" as that term is defined in ORS 197.295(1). That is a fact that LUBA also appears to have assumed for purposes of resolving petitioner's challenges to the subdivision approval and, accordingly, we do so, too.[2]

The extent to which the county's CDC provisions could apply to the subdivision application is controlled in part by ORS 197.307, which is sometimes referred to as one of Oregon's "needed housing statutes." *See, e.g.*, *Warren v. Washington County*, — Or. LUBA —, — (LUBA No. 2018-089, Nov. 14, 2018) (slip op. at 6) ("The statutes that are set out at ORS 197.295 to 197.314 are commonly referred to as the Needed Housing Statutes."). The statute addresses, as "a matter of statewide concern," the "availability of affordable, decent, safe and sanitary housing opportunities for persons of lower, middle and fixed income, including housing for farmworkers." In various ways, the provisions of ORS 197.307 govern the circumstances under which local governments may apply standards, conditions, and procedures that have the effect of regulating or restricting the development of housing. The legislature amended several of the needed housing statutes in 2017. *See* Or. Laws 2017, ch. 745.

Petitioner's arguments focus on the requirements of ORS 197.307(4). Before it was amended in 2017, ORS 197.307(4) provided that local governments generally could restrict development of "needed housing" on "buildable land" only through application of regulations and procedures that were "clear and objective":

> "Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the

[296 Or.App. 598]

> development of needed housing on buildable land described in subsection (3) of this section. The standards, conditions and procedures may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

ORS 197.307(4) (2015). By its terms, the "clear and objective" standard imposed by ORS 197.307(4) then applied only to development of needed housing on buildable land. The statute did not prevent local governments from applying standards, conditions, and procedures that were *not* clear and objective

[439 P.3d 583]

to regulate housing development on other types of land.[3]

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[2] ORS 197.295(1) defines "buildable lands" as "lands in urban and urbanizable areas that are suitable, available and necessary for residential uses." The term includes "both vacant land and developed land likely to be redeveloped." *Id.*

LUBA found that the property at issue in this case is included in Metro's Buildable Lands Inventory (BLI). Petitioner does not contest that finding. LUBA also ruled that inclusion of the property in the BLI means that Metro has determined that at least some portion of the property is "buildable land" as defined in ORS 197.295(1). Petitioner does not contest that ruling. However, LUBA has *not* determined that the entire property is "buildable land." Rather, it held that petitioner's arguments lacked merit "without regard to whether [the] property is 'buildable land.'"

[3] Laws other than ORS 197.307(4) may or may not have then restricted local governments' ability to apply standards or regulations that were not "clear and objective" to lands other than buildable lands. This opinion concerns only the "clear and objective" requirement imposed by ORS 197.307(4), before and after the 2017 legislation at issue, and this

As amended in 2017, ORS 197.307(4) now provides:

> "Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing. The standards, conditions and procedures:
>
> "(a) May include, but are not limited to, one or more provisions regulating the density or height of a development.
>
> "(b) May not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

Thus, ORS 197.307(4) no longer refers to "buildable land," and, by its terms, provides that local government can regulate the development of housing only through clear and objective standards, conditions, and procedures.

That 2017 version of ORS 197.307(4) applies to Venture Properties' subdivision application. In rejecting petitioner's arguments that certain CDC provisions should prevent the subdivision from going forward, LUBA ruled, as pertinent here: (1) ORS 197.307(4) prohibits Washington County "from applying any standards, conditions and procedures that are not clear and objective to [Venture Properties'] application to develop a six-lot residential subdivision,

[296 Or.App. 599]

without regard to whether [Venture Properties'] property is 'buildable land'"; (2) aspects of CDC 422-3.3, which generally prohibits new or expanded alteration of vegetation in a riparian corridor, except in specified circumstances, and CDC 422-3.4, which relates to enhancements of degraded riparian corridors, are not "clear and objective"; and (3) substantial evidence supports the county hearing officer's determination that a part of the property near Ash Creek is "degraded" for purposes of those CDC provisions. On judicial review, petitioner challenges each of those aspects of LUBA's decision.

We begin our analysis by addressing petitioner's overarching challenge to the LUBA decision, which is premised on petitioner's contention that the 2017 amendments to ORS 197.307(4) did not have the effect of extending the "clear and objective" requirement to housing development on land that is not buildable land. Rather, according to petitioner, the "clear and objective" requirement in ORS 197.307(4)"still only appl[ies] to 'buildable land.'"

To assess petitioner's statutory construction argument, we examine the text and context of ORS 197.307(4) as amended in 2017 and, to the extent it appears useful, the legislative history. *TriMet v. Amalgamated Transit Union Local 757*, 362 Or. 484, 493, 412 P.3d 162 (2018). We begin with the statute's text, which "is the most persuasive evidence of the legislature's intent." *Id.* Again, the pertinent part of the amended statute provides:

> "Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing. * * *"

ORS 197.307(4).

Nothing in the wording of that provision suggests that the requirement that local governments regulate housing development only through "clear and objective" standards applies only to housing development on "buildable land." To the contrary, ORS 197.307(4) plainly states that

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opinion should not be read to express any view on the effect of other statutes on the development of housing in this state.

the "clear and objective" requirement applies broadly to local governments' application of standards, conditions, and procedures "regulating the development of housing" generally,

[296 Or.App. 600]

including "needed housing." Reading that provision to apply only to housing that is developed on buildable land would impermissibly insert a limitation on the provision's scope, in violation of ORS 174.010 (in construing a statute, a court

[439 P.3d 584]

should "ascertain and declare what is * * * contained therein" and should not "insert what has been omitted").

Consideration of context, including the previous version of ORS 197.307(4), does not change our view of the provision's meaning. *See State v. Spainhower*, 251 Or. App. 25, 28, 283 P.3d 361 (2012) (context "includes prior versions of the statute"). The 2017 legislature expressly deleted the reference to "buildable land" from ORS 197.307(4), supporting our view that subsection (4) no longer relates only to development that occurs on that category of land. Or. Laws 2017, ch. 745, § 5. Moreover, other aspects of the 2017 legislation also reflect an intention to promote certain housing development. For example, the legislation includes provisions that, under specified circumstances, impose relatively short timelines for processing applications for development of affordable multifamily housing, prohibit counties from reducing the density associated with certain proposed housing developments, redefine "needed housing" to expressly address "affordab[ility] to households within the county with a variety of incomes," require certain municipalities to allow accessory dwelling units, and permit places of worship to use their real property to provide affordable housing. Or. Laws 2017, ch. 745, §§ 1, 2, 3, 4, 6, 7, 8. Each of those provisions may be viewed as promoting housing development—a goal that is consistent with making the "clear and objective" standard in ORS 197.307(4) applicable to housing development generally, not only to development of housing on "buildable land."

Nonetheless, in arguing that context supports her interpretation of ORS 197.307(4), petitioner points to other statutory provisions that retain references to "buildable land," particularly ORS 197.307(3), which states (as it did before the 2017 legislation):

> "When a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, needed housing shall be permitted in one or more zoning districts or in zones described by some

[296 Or.App. 601]

> comprehensive plans as overlay zones with sufficient buildable land to satisfy that need."

Petitioner posits that, because subsection (3) of ORS 197.307 already references "buildable land," the legislature likely deleted that reference from subsection (4) simply "to avoid repetitious language." We disagree. As LUBA explained, ORS 197.307(3) relates to "estimating housing demand and land supply" and it "imposes a planning mandate on local governments" requiring them to allow needed housing in the particular areas identified in that subsection of the statute. ORS 197.307(4) addresses a different concern, limiting the standards that local governments may apply when considering an application to develop housing. For at least that reason, the reference to "buildable land" in subsection (3) does not suggest that the legislature silently intended subsection (4) to apply only to applications for housing on buildable land.

Petitioner's additional statutory construction arguments rely on the wording of an administrative rule that apparently has not yet been updated to reflect the 2017 amendment to ORS 197.307(4), the absence of a discussion of the previous "buildable land" limitation in the

legislative history of that amendment, and petitioner's view that interpreting the provision according to its plain terms would lead to an absurd result. We have considered each of those arguments and conclude that they lack merit. We conclude, as did LUBA, that the "clear and objective" requirement in ORS 197.307(4) applies, as it states, to "standards, conditions and procedures regulating the development of housing, including needed housing," without regard to whether the development will occur on "buildable land."

We turn to petitioner's other challenges to the LUBA order, which focus on LUBA's determination that pertinent aspects of CDC 422-3.3 and CDC 422-3.4 are not "clear and objective" and that, consequently, the county could not apply those code provisions to the proposed development. CDC 422 includes the county standards that are designed "to permit limited and safe development in areas with significant natural resources, while providing for the identification, protection, enhancement and perpetuation" of those resources. CDC 422-1. CDC 422-3.3 sets out the standards

[296 Or.App. 602]

for development in a riparian

[439 P.3d 585]

corridor. As pertinent here, that CDC provision states:

> "A. No new or expanded alteration of the vegetation or terrain of the Riparian Corridor * * * shall be allowed except for the following:
>
> "* * * * *
>
> "(7) Where it can be demonstrated, with concurrence of the Clackamas County biologist or other applicable district biologist of the Oregon Department of Fish and Wildlife, that a riparian corridor * * * has been degraded, an enhancement of [that] area which conforms to the definition and criteria listed in Section 422-3.4 may be permitted * * *. Enhancement or alteration of a non-degraded portion of these areas is permitted when it is in conjunction with and it is needed to support the enhancement of the degraded area. * * *"

CDC 422-3.3. In turn, CDC 422-3.4 provides that "[e]nhancement of a degraded riparian corridor" that is permitted under CDC 422-3.3 A. (7) "shall meet the following" requirements, including:

> "A. For the purposes of Section 422-3.3 A. (7) an enhancement is a modification, as a result of which no later than five (5) years after completion of the project, the quality and/or quantity of the natural habitats is *measurably improved* in terms of animal and plant species numbers, number of habitat types, and/or amount of area devoted to natural habitat."

CDC 422-3.4 (emphasis added).

As noted, LUBA determined that CDC 422-3.3 and CDC 422-3.4 could not be applied to prevent the enhancement plantings along Ash Creek because the term "measurably improved" is not "clear and objective," as ORS 197.307(4) requires. On judicial review, petitioner does not challenge that determination directly; that is, petitioner does not assert that the term "measurably improved" is clear and objective.[4] Rather, petitioner argues that LUBA should not

[4] Accordingly, we express no view on whether the term "measurably improved" meets the "clear and objective" standard.

have applied the "clear and objective" test at all, because the term "enhancement" is merely a definition, and not a "standard[ ],

[296 Or.App. 603]

condition[ ] [or] procedure[ ]" for purposes of ORS 197.307(4). We disagree. Application of CDC 422-3.3 and CDC 422-3.4 to either allow or disallow alteration of a riparian corridor through enhancement plantings in conjunction with a proposed subdivision amounts to "regulat[ion of] the development of housing, including needed housing." Further, whether such enhancement is permissible under those CDC provisions depends in part on whether the natural habitat will be "measurably improved" as a result. CDC 422-3.4. Thus, measurable improvement of natural habitat is a "condition" to allowing enhancement of a degraded riparian corridor.

Petitioner also argues on judicial review that LUBA should not have reached the question whether the term "measurably improved" is clear and objective because the general prohibition against "new or expanded alteration of the vegetation or terrain of the Riparian Corridor" in CDC 422-3.4 itself is clear and objective. Because that general prohibition is clear and objective, petitioner argues, it does not matter whether any of the exceptions to the prohibition—including the enhancement exception—also meets that requirement. Petitioner relies on the presence of a severability clause in the CDC and contends that application of that clause means that, "even if the definition of 'enhancement' in the list of exceptions is found to be unenforceable, then the otherwise clear and objective general prohibition against 'new or expanded alteration of vegetation' in the riparian SNR would still be enforceable."[5] That is not an argument that petitioner meaningfully developed before LUBA and it is, therefore, not properly preserved for our review. *See Willamette Oaks, LLC v. City of Eugene*, 295 Or. App. 757, 765-66, 437 P.3d 314 (2019) (discussing preservation

[439 P.3d 586]

principles as they apply in judicial review of LUBA proceedings).

We reject petitioner's remaining arguments on judicial review without discussion.

Affirmed.

[5] The clause on which petitioner relies is CDC 105-1, which states:

"If any portion of this Code is for any reason held invalid or unconstitutional by a court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions of this Code."

GROUP B, LLC, Petitioner,
v.
CITY OF CORVALLIS, Respondent.

LUBA No. 2015-019

LAND USE BOARD OF APPEALS OF THE STATE OF OREGON

August 25, 2015

FINAL OPINION AND ORDER

Appeal from City of Corvallis.

Bill Kloos, Eugene, filed a petition for review and argued on behalf of petitioner.

David E. Coulombe, City Attorney, Corvallis, filed the response brief and argued on behalf of respondent. With him on the brief was Fewel, Brewer & Coulombe.

BASSHAM, Board Chair; HOLSTUN, Board Member; RYAN Board Member, participated in the decision.

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

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Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a city council decision that denies its application for planned development approval for a 10-unit apartment building.

REPLY BRIEF

Petitioner moves to file a reply brief to two alleged new matters raised in the response brief: (1) waiver of an issue, and (2) the city's argument for why the city is not required to adopt findings addressing a code provision petitioner argued is dispositive and in need of findings. The city objects to the reply brief, arguing that it is not limited to new matters within the meaning of OAR 661-010-0039. The objection is not well-founded, and the reply brief is allowed.

FACTS

A key issue in this appeal is whether the needed housing statute at ORS 197.307 applies to the proposed multi-family development.

The subject property is a vacant 0.81-acre lot created in 2006 as part of the Coronado residential subdivision, known as "Tract B." At all relevant times since 1981, the majority of the area that consists of Tract B has been and remains zoned Planned Development (PD) RS-12 (Medium High-Density with a Planned Development Overlay). A multi-family dwelling is a primary permitted use in the (PD) RS-12 zone. Under the comprehensive plan designation that applies to Tract B, the minimum density is five dwelling units and the maximum density is ten units.

The planning and development history of the subject property and the surrounding properties is complex. In the beginning was a 17-acre parcel (the parent parcel) owned by the Elks Lodge. The area of Tract B is located in the southeast corner of that parent parcel. In 1981, the Elks obtained a zone

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change from a low-density residential zone to PD (RS-12), and also obtained Detailed Development Plan (DDP) approval to construct a congregate care facility (a type of assisted living facility), known as The Regent Retirement Residence (The Regent), on the eastern third of the parent parcel. The area of the parent parcel subject to the 1981 DDP included what would later become Tract B. In part to address concerns regarding conflicts between The Regent facility and nearby residential development, the 1981 DDP included Condition 12, which limits the location of the congregate facility:

> "The building shall be set back from Elks Drive no less than 30 feet, no less than 135 feet from the south property line, and no less than 55 feet from the east property line. Other applicable setbacks are included on the site plan."

The requirement that The Regent building be set back "no less than 135 feet from the south property line" effectively prohibited The Regent building from being constructed within the area that now consists of Tract B.

In 1992, the parent parcel was partitioned into three parcels: Parcel 1 (7.76 acres) included the existing Elks Lodge, Parcel 3 (3.12 acres) included The Regent facility, and Parcel 2 (5.69 acres) included the vacant remainder of the parent parcel, including what later became Tract B. The 1992 partition effectively severed The Regent facility from the area that became Tract B. However, the majority of the Tract B area remained subject to the 1981 DDP, including Condition 12.

In 1998, as part of periodic review, Parcel 2 including the Tract B area was included in the city's inventory of buildable lands, pursuant to Statewide Planning Goal 10 (Housing).

In 2006, Parcel 2 of the 1992 partition was subdivided into the Coronado subdivision, which created 57 lots and Tract B. The 2006 subdivision created

Page 4

NW Mirador Place, a cul-de-sac that ends adjacent to Tract B and provides access to Tract B, via a short flagpole. The decision also approved sanitary and water connections to serve Tract B. The 2006 decision removed the PD overlay from the 57 residential lots, but did not remove the PD overlay from Tract B. No development was proposed for Tract B. The staff report for the 2006 subdivision explains:

> "It is important to note that Tract 'B' contains the entire area of Tax Lot 200 [Parcel 2] that is zoned PD (RS-12). The applicant has chosen not to subdivide this portion of the parcel in order to avoid having to apply for a Major Modification to a Detailed Development Plan. The Detailed Development Plan that was approved for The Regent Congregate Care Facility (DC-81-2, PD-81-1), which was constructed on the parcel immediately north of the PD (RS-12) portion of Tax Lot 200, also applied to that portion of Tax Lot 200. Therefore, any development on this portion of Tax Lot 200 would require a land use approval through the Planned Development process." Record 2200.

The Coronado subdivision became final, and NW Mirador Place was constructed as approved.

At some point thereafter, petitioner acquired Tract B. In 2012, petitioner applied to the city for planned development approval for a two-story, 10-unit apartment building, similar to the building currently proposed. The planning commission denied that application.

In 2014, petitioner submitted the present application, with revisions to address the bases for the denial of the 2012 application. Petitioner argued in its application that, pursuant to ORS 197.307(4), the city cannot apply any standards or conditions that are not clear and objective.

See n 1. The planning commission conducted a hearing and, on February 4, 2015, denied the present application on three grounds: (1) inconsistency with Condition 12 of the 1981

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DDP, which the planning commission apparently understood to prohibit any building in the 135-foot area between The Regent building and Tract B's southern property line, (2) inconsistency with planned development standards at Corvallis Land Development Code (LDC) 2.5.40.04 that require that proposed development be compatible with surrounding development, under a number of different factors, and (3) inconsistency with cul-de-sac standards adopted after 2006 that the planning commission understood to prohibit NW Mirador Place from providing access to more than 18 dwelling units.

Petitioner appealed the planning commission decision to the city council, which conducted a *de novo* hearing. On April 6, 2015, the city council issued its decision denying the application. This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Under these assignments of error, petitioner argues that the city erred in denying the proposed multi-family development based on standards and conditions that are not clear and objective, contrary to ORS 197.307(4). For the following reasons, we generally agree with petitioner.

ORS 197.307(4) provides that, with one exception, "a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of needed housing on buildable land[.]"[1] The sole exception is where a local government adopts an alternative

[1] ORS 197.307 provides, in relevant part:

> "(3) When a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, needed housing shall be permitted in one or more zoning districts or in zones described by some comprehensive plans as overlay zones with sufficient buildable land to satisfy that need.
>
> "(4) Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of needed housing on buildable land described in subsection (3) of this section. The standards, conditions and procedures may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.
>
> "* * * * *
>
> "(6) In addition to an approval process for needed housing based on clear and objective standards, conditions and procedures as provided in subsection (4) of this section, a local government may adopt and apply an alternative approval process for applications and permits for residential development based on approval criteria regulating, in whole or in part, appearance or aesthetics that are not clear and objective if:
>
> > "(a) The applicant retains the option of proceeding under the approval process that meets the requirements of subsection (4) of this section;
> >
> > "(b) The approval criteria for the alternative approval process comply with applicable statewide land use planning goals and rules; and
> >
> > "(c) The approval criteria for the alternative approval process authorize a density at or above the density level authorized in the zone under the approval process provided in subsection (4) of this section.
>
> "(7) Subject to subsection (4) of this section, this section does not infringe on a local government's prerogative to:

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approval process regulating, in whole or in part, appearance or aesthetics that are not clear and objective, if the applicant retains the option of proceeding under clear and objective standards.

Generally, approval standards are clear and objective if they do not impose "subjective, value-laden analyses that are designed to balance or mitigate impacts[.]" *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158 (1998), *aff'd* 158 Or App 1, 970 P2d 685 (1999). Relatedly, ORS 227.173(2) provides that:

> "When an ordinance establishing approval standards is required under ORS 197.307 to provide only clear and objective standards, the standards must be clear and objective on the face of the ordinance."

Further, ORS 197.831 places the burden on the local government to demonstrate, before LUBA, that standards and conditions imposed on needed housing that are required to be clear and objective "are capable of being imposed only in a clear and objective manner."[2]

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A. The Proposed Multi-Family Development is Needed Housing

The city's decision does not take a clear position on whether the proposed development constitutes "needed housing" for purposes of ORS 197.307, but on appeal the city does not contend otherwise. Petitioner argues, and we agree, that the proposed multi-family development constitutes "needed housing" as that term is defined at ORS 197.303(1)(a),[3] and Tract B constitutes "buildable land" as that term is used in ORS 197.307.

Nonetheless, the city's decision articulates several reasons, amplified in the response brief, why the city believes that ORS 197.307(4) does not preclude the city from applying Condition 12 of the 1981 DDP and the planned development standards at LDC 2.5.40.04 requiring "compatibility."

We note, initially, that there is no possible dispute that the planned development standards at LDC 2.5.40.04 requiring "compatibility" with surrounding development, based on 14 factors, are not "clear and objective" approval standards. The LDC 2.5.40.04 compatibility standard requires "subjective, value-laden analyses that are designed to balance or mitigate impacts." *Rogue Valley Assoc. of Realtors*, 35 Or LUBA at 158. Under ORS 197.307(4), such standards generally cannot be applied to needed housing. As we understand the city's decision, the city believes that LDC 2.5.40.04 compatibility standard can be applied to proposed development of needed

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> "(a) Set approval standards under which a particular housing type is permitted outright;
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> "(b) Impose special conditions upon approval of a specific development proposal; or
>
> "(c) Establish approval procedures."

[2] ORS 197.831 provides:

> "In a proceeding before [LUBA] or an appellate court that involves an ordinance required to contain clear and objective approval standards, conditions and procedures for needed housing, the local government imposing the provisions of the ordinance shall demonstrate that the approval standards, conditions and procedures are capable of being imposed only in a clear and objective manner."

[3] ORS 197.303(1) defines "needed housing" in relevant part as "housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels, including at least * * * [a]ttached and detached single-family housing and multiple family housing for both owner and renter occupancy[.]"

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housing on Tract B, notwithstanding ORS 197.307(4), because Tract B is subject to the 1981 DDP and Condition 12.

B. Condition 12

As noted, Condition 12 of the 1981 DDP provides:

> "The [Regent] building shall be set back from Elks Drive no less than 30 feet, no less than 135 feet from the south property line, and no less than 55 feet from the east property line. Other applicable setbacks are included on the site plan."

The city council found that Condition 12 is an approval standard for the proposed development, and that the applicant must either satisfy Condition 12 or demonstrate that a modification of Condition 12 is warranted under the compatibility standards at LDC 2.5.40.04. Record 21. The city council further interpreted Condition 12, implicitly, to effectively preclude construction of the proposed apartment building within the 135-foot "setback" described in Condition 12. The city council ultimately denied the application because petitioner could not satisfy Condition 12, and had not demonstrated that a modification to Condition 12 would satisfy the compatibility standards at LDC 2.5.40.04.

Petitioner argues that Condition 12 is not a "clear and objective" standard or condition within the meaning of ORS 197.307(4). Petitioner contends that, while it is clear that Condition 12 prohibits the location of The Regent building within 135 feet of the south property line, petitioner argues that it is far less clear that Condition 12 has the effect of prohibiting other development between The Regent building and the south property line of what is now Tract B, or that Condition 12 effectively converts the area between The Regent building and the south property line into an open space or buffer area in which no buildings may be constructed, as the city apparently interpreted

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Condition 12. Petitioner argues that because Condition 12 is ambiguous on that point, and requires interpretation to apply it as the city has in the present case, the condition is not "clear and objective" and therefore cannot be applied as a basis to deny the proposed needed housing.

The city responds that the city council correctly interpreted Condition 12 to impose a setback area between The Regent building and the south property line of what is now Tract B, which effectively limits future use of Tract B to a buffer area, and therefore precludes construction of the proposed apartment building. The city argues that, under the city council's interpretation of Condition 12, approval and construction of the proposed apartment building would necessarily require a modification of Condition 12 and the 1981 DDP, or a nullification of the 1981 DDP as it applies to Tract B.

ORS 197.307(4) mandates that local governments apply only clear and objective "conditions" to needed housing on buildable land. The statute does not limit the scope of "conditions" to conditions that are imposed in the decision that approves needed housing. Neither does the statute exempt conditions that are imposed by earlier land use approvals that do not approve needed housing, such as the 1981 DDP. In addition, the city council interpreted the city development code to the effect that Condition 12 constitutes not only a condition, but an approval "standard." ORS 197.307(4) therefore governs the city's application of Condition 12, either as a condition or as an approval standard. Consequently, the city may apply Condition 12 to approve or deny the proposed needed housing only if and to the extent that Condition 12 is "clear and objective."

We agree with petitioner that Condition 12 is ambiguous and requires interpretation as applied to the proposed development. Condition 12

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unambiguously prohibits the location of The Regent building within 135 feet of the south property line of what is now Tract B. However, Condition 12 is ambiguous regarding whether other development is similarly precluded within the area that is now Tract B. Condition 12 mentions no other development or buildings, and does not state, or necessarily imply, that no other building is allowed within 135 feet of the south property line. On the other hand, Condition 12 also does not state, or suggest, that other buildings can be constructed within that 135-foot wide area consistent with the apparent purpose of the condition, to buffer nearby single-family residences from The Regent building. Condition 12 is sufficiently ambiguous on these points that it can be interpreted to support either of two diametrically opposed conclusions, one where needed housing is allowed and one where it is prohibited. A condition that requires such interpretation, to determine whether proposed needed housing is allowed at all, is not a "clear and objective" standard or condition within the meaning of ORS 197.307(4). *See Tirumali v*. *City of Portland*, 169 Or App 241, 246, 7 P3d 761 (2000) (a standard that is ambiguous, *i.e*., capable of more than one plausible interpretation, is "unclear" and hence not a "clear and objective land use standard" for purposes of the exclusion to LUBA's jurisdiction at ORS 197.015(10)(b)(B)).

The city argues, nonetheless, that ORS 197.307(4) does not preclude the city from applying Condition 12, as interpreted, as a basis to require petitioner to obtain a modification or nullification of the 1981 DDP, pursuant to the discretionary standards at LDC 2.5.40.04. We understand the city to argue that because petitioner proposes a new building in an area where the 1981 DDP approves no building, petitioner is necessarily seeking to redesign or modify the 1981 DDP. As noted, a request to modify the 1981 DDP is governed by the

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discretionary planned development standards, at LDC 2.5.40.04, which require a determination that the modification is "compatible" with surrounding development with respect to 14 factors. Application of those discretionary standards is consistent with ORS 197.307(4), we understand the city to argue, because petitioner has essentially "opted" to pursue an alternative development process subject to discretionary standards, as authorized by ORS 197.307(6). *See* n 1. According to the city, petitioner has the option of either proceeding under the "clear and objective" 1981 DDP "standards," including Condition 12 as interpreted by the city council, or proceeding under the discretionary standards to modify the 1981 DDP, which are not clear and objective. Because petitioner has elected to proceed under the discretionary standards to modify the 1981 DDP, the city argues that application of those discretionary standards to approve or deny the proposed needed housing is authorized by ORS 197.307(6) and does not offend ORS 197.307(4).

Petitioner argues, and we agree, that at no relevant time since 1981, when Condition 12 and the PD overlay were first applied, has the city's land use legislation offered a "clear and objective" path for approval of needed housing on the area that is now Tract B. Petitioner's filing of an application for a Planned Development Major Modification was required by the city code to develop Tract B with the proposed needed housing, which is a permitted use in the PD (RS-12) zone, not an "option" that petitioner voluntarily exercised for purposes of ORS 197.307(6). Under ORS 197.307(6), a local government may impose unclear, subjective or discretionary standards and conditions on needed housing only if it offers a path that allows needed housing subject only to clear and objective standards and conditions. We understand the city to argue that the 1981 DDP (as interpreted) is itself clear and objective and that development

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under the clear and objective 1981 DDP was thus an available option for purposes of ORS 197.307(6). We reject the argument. As discussed, Condition 12, the most salient aspect of the 1981 DDP, is ambiguous regarding whether the area of Tract B is developable at all, and is thus not a clear and objective standard or condition. Moreover, even if Condition 12 or the 1981 DDP explicitly and unambiguously prohibited any building in the area now comprising Tract B, we do not see that the 1981 DDP would constitute a "clear and objective" alternative "approval process" for needed housing within the meaning of ORS 197.307(6). Because the city has identified no clear and objective approval process for needed housing on Tract B that an applicant could choose, the city cannot rely on ORS 197.307(6) to authorize imposition of the subjective standards for modifying the DDP at LDC 2.5.40.04.

The city also suggests that petitioner is bound by the choices of its predecessor-in-interest in 1981, who chose to seek rezoning to PD (RS-12) and development of the eastern third of the parent parcel under the planned development process, in order to develop The Regent facility. Because the predecessor-in-interest chose to take advantage of the flexibility offered by the planned development process rather than pursue other options to develop The Regent facility, the city argues that it is consistent with ORS 197.307(4) and (6) to require petitioner to modify the 1981 DDP pursuant to the subjective criteria at LDC 2.5.40.04.

We disagree with the city. We might agree with the city if the 1981 DDP proposal had involved *needed housing*, and the applicant chose the Planned Development process to gain approval of that needed housing, in lieu of a clear and objective path to develop needed housing. Even though ORS 197.307(6) had not yet been adopted in 1981, we see no reason why the two-track

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framework it embodies could not govern, and bind, current proposals for needed housing that seek to modify a prior approval for needed housing under a discretionary approval track that is otherwise consistent with ORS 197.307(6). However, the 1981 DDP did not propose or approve needed housing, and the choices the 1981 applicant made in gaining approval for The Regent do not force petitioner to accept a subjective approval track for needed housing, or otherwise provide a basis for the city to avoid its obligation under ORS 197.307(4) to apply only clear and objective standards and conditions to proposed needed housing on buildable land.

Finally, the city notes that ORS 197.307(7) authorizes the city to "[i]mpose special conditions upon approval of a specific development proposal" and "[e]stablish approval procedures." *See* n 1. We understand the city to argue that Condition 12 represents a "special condition" that was imposed on the 1981 DDP approval, and the city can thus apply Condition 12 as a means to effectively force petitioner to seek approval under the discretionary standards at LDC 2.5.40.04. However, as noted the 1981 DDP was not a "specific development proposal" for needed housing, so ORS 197.307(7) has no applicability in the present case. Further, ORS 197.307(7) does not purport to modify the terms of ORS 197.307(4), or authorize the city to impose unclear or subjective standards, conditions or procedures. Read in context, ORS 197.307(7) simply clarifies that local governments retain the authority to craft individualized conditions for specific needed housing proposals. However, such special conditions are still subject to overarching requirement at ORS 197.307(4) that conditions imposed must be "clear and objective." As discussed above, Condition 12 is not clear and objective.

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In sum, Tract B is zoned PD (RS-12) and subject to the 1981 DDP, the city may apply any clear and objective planned development standards or conditions to the proposed needed

housing. However, because the proposal is needed housing located on inventoried buildable lands, ORS 197.307(4) prohibits the city from applying any unclear or subjective standards or conditions to approve or deny the proposed needed housing. Because Condition 12 is ambiguous regarding whether any development (including needed housing) of Tract B is allowed at all, and is not clear and objective, the city cannot apply Condition 12 to prohibit the proposed needed housing, or as a vehicle to subject the proposal to subjective approval standards at LDC 2.5.40.04.

The first and second assignments of error are sustained.

THIRD ASSIGNMENT OF ERROR

As noted, NW Mirador Place was approved as part of the 2006 subdivision. As approved and constructed, NW Mirador Place is a cul-de-sac that terminates adjacent to Tract B, provides access to Tract B and to approximately 17 other lots in the Coronado subdivision, and also includes utilities stubbed to Tract B. One basis for denial in the city council's decision is noncompliance with LDC 4.0.60.c, which provides in relevant part:

> "Street network plans must provide for connectivity within the transportation system to the extent that, generally, both Local Connector and Local Streets will be created within a development. Identified traffic calming techniques, such as bulbed intersections, etc., can reduce traffic speeds and, where included, are to be constructed at the time of development. To further address traffic speeds and volumes on Local Connector and Local Streets, the *following street designs*, along with other designs intended to reduce traffic speeds and volumes, *shall be considered*:

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> "1. Straight segments of Local Connector and Local Streets should be less than .25 mile in length, and include design features such as curves and T intersections.
>
> "2. *Cul-de-sacs should not exceed 600 ft*. *nor serve more than 18 dwelling units*.
>
> "3. Street designs that include traffic calming, where appropriate, are encouraged." (Emphasis added.)

The city council interpreted LDC 4.0.60.c.2 as a mandatory applicable approval criterion for the proposed housing, and concluded:

> "[T]he Council finds that the proposal does not comply with LDC Section 4.0.60.c as it would result in as many as 27 dwellings taking access from the NW Mirador Place cul-de-sac. Therefore, the Council concludes that the proposal is inconsistent with and fails to satisfy the criteria relating to traffic and off-site facilities." Record 17.

Petitioner argues under the third assignment of error that the city erred in applying LDC 4.0.60.c.2 to deny the proposed needed housing, because LDC 4.0.60.c.2 is not clear and objective. According to petitioner, LDC 4.0.60.c.2 is a highly discretionary standard that by its terms applies to the *design* of local streets, not to approval of development that is served by already designed, approved and constructed streets. Further, petitioner argues that LDC 4.0.60.c.2 is framed in inherently discretionary terms: it requires that the city "consider[]" street designs in at least three particulars. Street designs that include traffic calming are "encouraged." Straight streets "should" be no more than .25 mile in length, and "should" include curves and T intersections. Cul-de-sacs "should" not exceed 600 feet nor serve more than 18 dwelling units. Petitioner notes that LDC 1.6.30 defines the term "should" to mean "[e]xpressing what is desired, but not mandatory." When the code intends to express a mandatory

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obligation, petitioner argues, it uses the word "shall," which LDC 1.6.30 defines as "[e]xpressing what is mandatory."

We agree with petitioner that LDC 4.0.60.c.2 is not a "clear and objective" standard, and therefore cannot be applied to deny needed housing, consistent with ORS 197.307(4). In order to apply LDC 4.0.60.c.2 to the proposal, the city council had to interpret that code provision in at least two ways. First, the city (implicitly) determined that LDC 4.0.60.c.2 applies not just to the design of proposed streets, but also to proposed development served by already designed, approved and constructed streets. Second, the city concluded that the terms of LDC 4.0.60.c.2 are *mandatory* approval standards that must be satisfied to approve development, not merely design features that "should" be considered (but need not be imposed). Record 22. The merits of the latter interpretation are somewhat dubious. Even with full deference accorded a governing body's interpretation of code provisions pursuant to ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010), it is a tall order to interpret "should" as that term is defined at LDC 1.6.30 to mean a *mandatory* obligation, because LDC 1.6.30 expressly defines it as non-mandatory. In its response brief, the city argues that the modal auxiliary verb "should" modifies only the first clause of LDC 4.0.60.c.2 ("should not exceed 600 ft") and does not modify the second clause ("nor serve more than 18 dwelling units"). However, that reading does violence to the grammatical and semantic structure of LDC 4.0.60.c.2. "Should," as a modal auxiliary, clearly modifies the main verbs in both clauses ("exceed" and "serve"). As defined by LDC 1.6.30, "should" means "expressing what is desired." Read in light of that definition, LDC 4.0.60.c.2 expresses the desire that a cul-de-sac serve no

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more than 18 dwelling units. As petitioner argues, such code language grants the city a considerable degree of discretion.

However, regardless of how LDC 4.0.60.c.2 is correctly interpreted, or what interpretations might survive review under ORS 197.829(1), the fact that the city had to interpret LDC 4.0.60.c.2 in order to determine (1) whether it applies at all to the proposed needed housing, and (2) whether it imposes mandatory approval standards, means that LDC 4.0.60.c.2 is not a clear standard for purposes of ORS 197.307(4). It is the city's burden to demonstrate that LDC 4.0.60.c.2 is a clear and objective approval standard. ORS 197.831. The city has not met that burden.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

As noted, Tract B was created in 2006 with a 27-foot wide, 40-foot long flagpole connecting the interior of Tract B to NW Mirador Place. After the 2006 subdivision was approved, the city adopted LDC 3.6.30, which requires a maximum 25-foot front yard setback. As applied to Tract B, LDC 3.6.30 would require that any proposed building be located in the 27-foot wide flagpole. Further, after 2006 the city also adopted LDC 4.10.60.01.b, which requires 40 percent of the street frontage to be occupied by a building. Again, as applied to Tract B, this would require that any proposed building be constructed in the flagpole. A staff report incorporated as findings concluded that residential development of any density on the site would be "nearly impossible" under LDC 3.6.30 and LDC 4.10.60.01.b, and recommended that a variance to those standards be allowed. Record 1552. Although it is not clear, the planning commission apparently did not approve a variance to LDC 3.6.30 and LDC 4.10.60.01.b.

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Petitioner argued to the city council that because LDC 3.6.30 and 4.10.60.01.b. were adopted after the 2006 Coronado subdivision that created Tract B and NW Mirador Place, those standards do not apply to development of Tract B, pursuant to ORS 92.040(2), which provides that only laws in effect at the time an application is made for a subdivision inside an urban growth boundary "shall govern subsequent construction on the property" unless the applicant elects otherwise.[4]

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The city council rejected that argument, concluding that ORS 92.040(2) did not preclude the city from applying post-2006 approval standards to the proposed construction on Tract B.[5]

On appeal, petitioner argues, and we agree, that the city erred in applying LDC 3.6.30 and 4.10.60.01.b to deny the proposed development of Tract B. As the Court of Appeals has explained, ORS 92.040(2) is intended "to ensure that the local government laws on which subdivision applications were predicated would be applied to subsequent development on subdivision lots unless developers elected otherwise." *Athletic Club of Bend*, *Inc*. *v*. *City of Bend*, 239

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Or App 89, 97, 243 P3d 824 (2010). In the present case, the 2006 subdivision created Tract B in its current configuration, with a short, narrow flagpole accessing NW Mirador Place. That configuration presumably complied with whatever maximum building setback and frontage requirements, if any, which were in effect in 2006. Under that configuration, it is clear that future development of Tract B, if any, would occur in the flag portion of Tract B. Although the 2006

[4] ORS 92.040 provides, in relevant part:

> "(1) Before a plat of any subdivision or partition subject to review under ORS 92.044 may be made and recorded, the person proposing the subdivision or partition or authorized agent or representative of the person shall make an application in writing to the county or city having jurisdiction under ORS 92.042 for approval of the proposed subdivision or partition in accordance with procedures established by the applicable ordinance or regulation adopted under ORS 92.044. Each such application shall be accompanied by a tentative plan showing the general design of the proposed subdivision or partition. * * * [A]pproval by a city or county of [a tentative subdivision plan] shall be binding upon the city or county for the purposes of the preparation of the subdivision or partition plat, and the city or county may require only such changes in the subdivision or partition plat as are necessary for compliance with the terms of its approval of the tentative plan for the proposed subdivision or partition.
>
> "(2) After September 9, 1995, when a local government makes a decision on a land use application for a subdivision inside an urban growth boundary, only those local government laws implemented under an acknowledged comprehensive plan that are in effect at the time of application shall govern subsequent construction on the property unless the applicant elects otherwise.
>
> "(3) A local government may establish a time period during which decisions on land use applications under subsection (2) of this section apply. However, in no event shall the time period exceed 10 years, whether or not a time period is established by the local government."

[5] The city council findings state, in relevant part:

> "* * * [T]he City Council finds that ORS 92.040 does not apply in this case because the applicant in [the 2006 subdivision] did not propose development on the subject site within the general design of the proposed development, the tentative plat decision did not create a 'lot' on the subject site and the approval of the subdivision did not therefore include consideration of development-related criteria on the site, traffic impacts associated with development, or any other applicable criteria. The Council finds the labeling of the subject site as a 'tract' to be consistent with the owner's express intent not to develop the site as part of the subdivision, but at a later time, as may be approved consistent with the standards and conditions of the Planned Development overlay or as a modification to the Planned Development * * *." Record 12.

subdivision applicant did not propose specific development of Tract B, Tract B was provided access, utilities and a configuration predicated on locating future development, if any, in the flag portion of the property.

Application of the post-2006 maximum building setback and frontage requirements at LDC 3.6.30 and 4.10.60.01.b would radically change the ballgame. As we understand it, application of LDC 3.6.30 and 4.10.60.01.b would compel any proposed building to be located in the narrow pole portion of the property (where a driveway and utilities must also be located), which the city's own findings state would make residential development of any density on the site "nearly impossible." Record 1552. A site that was configured and provided access and utilities in a manner that would allow the site to be developed in the future, presumably with the medium-density residential use for which it is planned and zoned, would become unbuildable for any residential use. In our view, the present case is one of the circumstances in which the legislature intended ORS 92.040(2) to operate, at least to the extent necessary to preserve the potential for future development of Tract B embodied in the configuration approved in the 2006 subdivision.

The city's arguments to the contrary are not persuasive. The city contends that petitioner fails to establish the conditions precedent for

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application of ORS 92.040(2). According to the city, a developer can invoke ORS 92.040(2) only if (1) at the time of subdivision approval it complied with the ORS 92.040(1) requirement to provide a "tentative plan showing the general design of the proposed subdivision or partition[,]" (2) the tentative plan provides information on proposed development of the lots created, and (3) the subdivision approval evaluates proposed development of lots against the applicable criteria, in this case the planned development and other standards that applied to the 2006 subdivision application. However, the city argues, the 2006 subdivision applicant submitted a tentative plan that proposed no development of Tract B, and no development of Tract B was evaluated against the applicable criteria or approved in the 2006 decision.[6] Therefore, the city argues, ORS 92.040(2) does not apply to preclude application of post-2006 standards such as LDC 3.6.30 and 4.10.60.01.b.

We partially agree with the city. Because the 2006 subdivision applicant did not propose development of Tract B, and the city did not evaluate any development of Tract B against whatever criteria would be applied to proposed development of lots at the tentative plat stage, ORS 92.040(2) would not generally operate to shield future development of Tract B from application of new development standards adopted after 2006 that regulate development of Tract B. However, as explained above, the 2006 subdivision decision did make a significant decision regarding the general *location* of future development on

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Tract B, namely, that any future development would occur in the *flag* portion of the site, consistent with whatever maximum building setbacks and frontage standards, if any, which were in effect in 2006. Tract B was clearly not configured with the expectation that future development would occur in the *pole* portion of the site. On the contrary, the pole portion of the site was presumably sized and configured to allow a driveway and utilities to access the interior of the site, where future development would occur. Because the 2006 decision accomplished

[6] The city also emphasizes that the 2006 plat did not label Tract B as a "lot," and argues that Tract B is not a "lot." We do not see that labels matter in the present case. As a matter of law, a unit of land created by a subdivision is a "lot," no matter what the unit of land is labeled on the plat. *See* ORS 92.010(4) and (16) (definitions of "lot" and "subdivide land"). For what it is worth, Tract B is technically a "lot."

that much, ORS 92.040(2) operates to preclude application of different or conflicting post-2006 development standards, specifically the new maximum building setback and frontage standards at LDC 3.6.30 and 4.10.60.01.b, because those standards would effectively compel development to be located in the pole portion of the site. Accordingly, we agree with petitioner that the city erred to the extent it denied petitioner's application for noncompliance with LDC 3.6.30 and 4.10.60.01.b.

The fourth assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

The fifth assignment of error is framed as an alternative challenge, if LUBA concludes that the city is not limited by ORS 197.307(4) or that LUBA agrees with the city that petitioner "opted" for application of discretionary standards for purposes of ORS 197.307(6). Because we did not reach the predicate conclusions, there is no need to address the alternative fifth assignment of error.

DISPOSITION

We have sustained petitioner's challenges to the city's bases for denial. Petitioner seeks reversal of the decision. The city does not argue that remand is the appropriate disposition if petitioner's assignments of error are sustained.

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OAR 661-010-0071(1)(c) provides that LUBA shall reverse a land use decision if the decision violates a provision of applicable law and is prohibited as a matter of law. OAR 661-010-0071(2)(d) provides that LUBA shall remand a land use decision for further proceedings when the decision misconstrues the applicable law, but is not prohibited as a matter of law. As we understand the current posture of this case, the city has identified no valid basis to deny petitioner's application for needed housing. Accordingly, we believe that the city's decision to deny the application is "prohibited as a matter of law," and that reversal rather than remand is the appropriate disposition.

The city's decision is reversed.

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HOME BUILDERS ASSOCIATION OF LANE COUNTY and EUGENE CHAMBER OF COMMERCE, Petitioners, and

REST-HAVEN MEMORIAL PARK and CHARLES WIPER III, Intervenors-Petitioner,

v.

CITY OF EUGENE, Respondent, and

KEVIN MATTHEWS, ROBERT ZAKO, JOHN KLINE and DAVID G. HINKLEY, Intervenors-Respondent.

LUBA No. 2001-059.

LUBA No. 001-063.

Oregon Land Use Board of Appeals.

February 28, 2002.

Appeal from City of Eugene.

Bill Kloos, Eugene, filed a petition for review and argued on behalf of petitioner Home Builders Association of Lane County and intervenors-petitioner.

Allen L. Johnson, Portland, filed a petition for review and argued on behalf of petitioner Eugene Chamber of Commerce. With him on the brief was Johnson and Sherton, PC.

Emily N. Jerome, Eugene, filed the response brief and argued on behalf of respondent. With her on the brief was Harrang, Long, Gary, Rudnick, PC.

Donna M. Matthews, Eugene, represented intervenor-respondent Kevin Matthews.

David Hinkley, John Kline, and Robert Zako, Eugene, represented themselves.

BASSHAM, Board Member; HOLSTUN, Board Chair; BRIGGS, Board Member, participated in the decision.

REMANDED.

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

FINAL OPINION AND ORDER

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Opinion by Bassham.

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NATURE OF THE DECISION

Petitioners appeal the city's adoption of a comprehensive update to Eugene Code (EC) chapter 9, the city's zoning and land division ordinance.

FACTS

In 1982, the Land Conservation and Development Commission (LCDC) acknowledged EC chapter 9 and the Eugene-Springfield Metro Area Comprehensive Plan (Metro Plan). Although it has been amended a number of times since 1982, EC chapter 9 has never had a comprehensive review and update. In 1994, the city initiated such a comprehensive review. The

city conducted its review for over seven years, by means of a number of different proceedings, generating a 17,180-page record. The city's review, and the revised 428-page EC chapter 9, are both known as the Land Use Code Update (LUCU).[1]

The LUCU recodifies, with minor or no editorial changes, some preexisting provisions of EC chapter 9. It also extensively reorganizes the existing code, deletes a number of existing provisions, and adopts a number of new or amended provisions. As codified, the LUCU contains 10 large sections. LUCU 9.0000 contains general provisions, code enforcement provisions, and definitions. LUCU 9.1000 contains general provisions regarding zoning and nonconforming uses. LUCU 9.2000, 9.3000 and 9.4000 contain regulations for the city's base zones, special area zones, and overlay zones, respectively. The

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9.2000s contain a new base zone, the Park, Recreation and Open Space zone. The 9.4000s contain new overlay zones. In the 9.5000s, the LUCU sets out standards for specific types of development, such as bed-and-breakfast facilities and multi-family housing. In the 9.6000s, the LUCU sets out nondiscretionary general development standards, intended for applications for building permits for developments that do not require land use approval. LUCU 9.7000 describes the different procedures applicable to different types of applications and proceedings. LUCU 9.8000 sets out application requirements and development criteria for discretionary land use applications. Some of the criteria in LUCU 9.8000 require compliance with the criteria in LUCU 9.6000. Finally, LUCU 9.9000 contains selected policies from the city's adopted refinement plans, incorporated into the city's code to comply with ORS 197.195, which requires such incorporation if those policies are to be applied to limited land use decisions.

The city initially adopted the LUCU on February 26, 2001. Petitioners separately appealed that decision to LUBA. LUBA consolidated the appeals on March 27, 2001. The city then withdrew its decision for reconsideration pursuant to ORS 197.830(13). On May 29, 2001, the city readopted the decision, unchanged except for the effective date. Petitioners refiled their notices of intent to appeal, and LUBA resumed its proceedings on these consolidated appeals.

OFFICIAL NOTICE

Petitioner Home Builders Association of Lane County (Home Builders) requests that the Board take official notice of several documents related to LCDC`s acknowledgment of the Metro Plan in 1982. The documents are provided in an appendix (Volume III) to Home Builders' petition for review. No party objects to this request, and it is allowed. Petitioner Eugene Chamber of Commerce (Chamber) requests that the Board take official notice of the entire Metro Plan, including the refinement plans and other documents and maps that have been added to or made a part of the Metro Plan since 1982. However,

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[1] By agreement of the parties, petitioner Home Builders Association of Lane County included the codified version of the LUCU as an appendix (Volume II) to its petition for review. Petitioner represents that Volume II is identical to Record pages 3 to 428, containing the uncodified version of the LUCU, with the exception that certain scriveners' errors have been corrected, and a table of contents added. We follow the parties in citing to code provisions according to the codified version in Volume II, rather than to the uncodified version in the record.

Further, we follow the city in referring to the updated version of EC chapter 9 adopted in this decision as "LUCU," while referring to the unamended version of EC chapter 9 as "EC," in order to more easily distinguish the two versions. The city also points out that the current codification scheme contains five digits ("9.####") while the unamended version contained four digits ("9.###"). Thus, we will refer to the current and former code, respectively, in the following format: "LUCU 9.####" and "EC 9.###."

Chamber states that it has been unable to secure from the city an authoritative and complete list of all the documents that comprise the Metro Plan. Therefore, Chamber requests that LUBA decline to take notice of any part of the Metro Plan cited by the city unless it determines that "a complete set of such documents" is "made available for review by Petitioners at least three weeks prior to oral argument." Chamber Petition for Review 12.

The city objects to Chamber's qualifications to its request for official notice. We agree that Chamber has not identified any legal basis for such a qualified request. Accordingly, we will take official notice of any part of the Metro Plan that the parties bring to our attention.

STANDING

The city disputes the standing of intervenors-petitioner, apparently on the grounds that intervenors-petitioner have not demonstrated that they "appeared" before the city, as required by ORS 197.830(2). Intervenors-petitioner join in the petition filed by Home Builders. Footnote 1 of Home Builders' petition states that intervenors-petitioner appeared during the proceedings below and cites to the record to support that statement. Absent some challenge from the city to that demonstration of standing, we conclude it is sufficient to satisfy ORS 197.830(2), and therefore intervenors-petitioner have standing in these appeals.

FIRST AND THIRD ASSIGNMENTS OF ERROR (HOME BUILDERS)

Home Builders' first and third assignments of error allege that the LUCU violates the needed housing statutes at ORS 197.307.[2] We address these assignments together.[3]

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I. Introduction

ORS 197.303(1) defines "needed housing" for purposes of ORS 197.307 as "housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels," and includes a broad nonexclusive list of housing types.[4] In turn, ORS 197.307(3)(a) requires that "needed housing" shall be permitted in one or more zoning districts or overlay zones "with sufficient buildable land to satisfy that need."[5] ORS 197.307(4) allows local governments to set approval standards and procedures

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[2] Chamber's petition for review presents four assignments of error, and adopts by reference the three assignments of error in Home Builders' petition for review. Accordingly, unless more specific reference is necessary, we use "petitioners" to refer to both petitioners.

[3] Some of petitioners' arguments under these assignments of error relate to Goal 10 (Housing) and the adequacy of the city's buildable lands inventory. We address those arguments below.

[4] ORS 197.303(1) provides:

> "As used in ORS 197.307, until the beginning of the first periodic review of a local government's acknowledged comprehensive plan, `needed housing' means housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels. On and after the beginning of the first periodic review of a local government's acknowledged comprehensive plan, `needed housing' also means:
>
> "(a) Housing that includes, but is not limited to, attached and detached single-family housing and multiple family housing for both owner and renter occupancy;
>
> "(b) Government assisted housing;
>
> "(c) Mobile home or manufactured dwelling parks as provided in ORS 197.475 to 197.490; and
>
> "(d) Manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions."

[5] ORS 197.307(3) provides, in relevant part:

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governing, and impose special conditions on, needed housing.[6] However, ORS 197.307(6) specifies that any such approval standards, special conditions or procedures shall be "clear and objective."[7]

In *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998), *aff'd* 158 Or App 1, 970 P2d 685, *rev den* 328 Or 594 (1999), we discussed at length the history and meaning of ORS 197.303 and 197.307, specifically the requirement in ORS 197.307(6) that approval standards, special conditions or procedures applied to needed housing be "clear and objective." We concluded that, under these statutes, needed housing

"is not to be subjected to standards, conditions or procedures that involve subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community." 35 Or LUBA at 158.

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We then examined a number of code provisions adopted by the city's legislative decision, and determined that many of them did not qualify as "clear and objective" under our understanding of that statutory term. In doing so, we held that code provisions that simply impose informational requirements—for example, requirements that the applicant submit information regarding the natural features of the site, or a geologic study in certain hazard zones—are not "approval standards" within the meaning of ORS 197.307(6). 35 Or LUBA at

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> "(a) When a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, needed housing, including housing for seasonal and year-round farmworkers, shall be permitted in one or more zoning districts or in zones described by some comprehensive plans as overlay zones with sufficient buildable land to satisfy that need.
>
> "(b) A local government shall attach only clear and objective approval standards or special conditions regulating, in whole or in part, appearance or aesthetics to an application for development of needed housing or to a permit, as defined in ORS 215.402 or 227.160, for residential development. The standards or conditions shall not be attached in a manner that will deny the application or reduce the proposed housing density provided the proposed density is otherwise allowed in the zone.
>
> "* * * * *
>
> "(d) In addition to an approval process based on clear and objective standards as provided in paragraph (b) of this subsection, a local government may adopt an alternative approval process for residential applications and permits based on approval criteria that are not clear and objective provided the applicant retains the option of proceeding under the clear and objective standards or the alternative process and the approval criteria for the alternative process comply with all applicable land use planning goals and rules."

[6] ORS 197.307(4) provides:

> "Subsection (3) of this section shall not be construed as an infringement on a local government's prerogative to:
>
> "(a) Set approval standards under which a particular housing type is permitted outright;
>
> "(b) Impose special conditions upon approval of a specific development proposal; or
>
> "(c) Establish approval procedures."

[7] ORS 197.307(6) provides:

> "Any approval standards, special conditions and the procedures for approval adopted by a local government shall be clear and objective and shall not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

158-59. We assumed, for purposes of that opinion, that such informational requirements could constitute "procedures for approval" under ORS 197.307(6). However, we held that, to the extent such informational requirements are not "clear and objective," that failure is not fatal, given that ORS 227.178(2) requires that the city "notify the applicant of exactly what information is missing within 30 days of receipt of the application." Viewed in context with ORS 227.178(2), we held, the city's provisions for informational requirements were sufficiently clear and objective. 35 Or LUBA at 159.

We further addressed an argument that several code provisions we found in violation of ORS 197.307(6) also violated ORS 197.307(3)(b), a provision that was added to the statute in 1997. *See* n 5. We remanded the decision to allow the city to explain whether any code provisions found not to be clear and objective under ORS 197.307(6) also violate ORS 197.307(3)(b). In so doing, we interpreted ORS 197.307(3)(b) as applying to standards or conditions only if "the standards or special conditions regulate *only* for appearance or aesthetic purposes." 35 Or LUBA at 166 (emphasis in original). The petitioner in *Rogue Valley* appealed our decision to the Court of Appeals, challenging our conclusions that (1) insofar as informational requirements are subject to and fall short of the requirement to be "clear and objective," the city may supply clarity through the notices that ORS 227.178(2) requires the city to provide to applicants; and (2) ORS 197.307(3)(b) applies only to standards or conditions that regulate exclusively for appearance or aesthetics. The court affirmed both those conclusions. In resolving the first

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contention, the court noted that the petitioner's challenge was a facial one to a legislative enactment. To succeed in such a facial challenge, the court stated, the petitioner "must demonstrate that the provisions are *categorically incapable* of being clearly and objectively applied under any circumstances where they may be applicable." 158 Or App at 4 (emphasis original; citing *Benson v. City of Portland*, 119 Or App 406, 850 P2d 416, *rev den* 318 Or 24 (1993)).

In response to LUBA`s and the court's *Rogue Valley* decisions, the 1999 legislature passed HB 3410, which amended ORS 197.307(3)(b) and added new provisions, codified at ORS 197.831, 215.416(8) and 227.173(2). Regarding ORS 197.307(3)(b), section 1 of HB 3410 added the terms "in whole or part" to the current version of the statute. That change is apparently directed at LUBA`s and the court's holding that ORS 197.307(3)(b) is applicable only to standards or conditions that are *exclusively* concerned with appearance or aesthetics. Sections 2 and 3 of HB 3410 amended ORS 215.416 and 227.173, which govern approval or denial of a "permit," to state that:

"When an ordinance establishing approval standards is required under ORS 197.307 to provide only clear and objective standards, the standards must be clear and objective on the face of the ordinance."

That change is apparently directed at LUBA`s and the court's holding that notice required by ORS 227.178(2) can remedy a lack of clarity in an informational requirement, to the extent required by ORS 197.307(6).

Finally, section 5 of HB 3410, codified at ORS 197.831, added the following provision to the statutes governing LUBA`s review:

"In a proceeding before [LUBA] or on judicial review from an order of the board that involves an ordinance required to contain clear and objective approval standards for a permit under ORS 197.307 and 227.175, the local government imposing the provisions of the

ordinance shall demonstrate that the approval standards are capable of being imposed only in a clear and objective manner."

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ORS 197.831 is apparently directed at the court's statement that, under a facial challenge to a legislative land use decision, the petitioner's burden is to demonstrate that the challenged provisions are categorically incapable of being applied clearly and objectively under any circumstances where they may be applicable.

A threshold issue in the present case is the effect of the 1999 amendments on LUBA`s review of petitioners' arguments, that certain LUCU provisions violate the ORS 197.307(6) requirement that standards, conditions and procedures for approval be "clear and objective."[8] We understand petitioners to contend that the intent and effect of ORS 197.831 is to restore the burden and standard of review that existed prior to the court's *dictum* in *Rogue Valley*.[9] That standard, according to petitioners, has always placed on the *local government* the *ultimate* burden of demonstrating in a challenge to legislative adoption of land use regulations that its "legislative planning and zoning ordinances comply with state land use goals, rules and statutes." Chamber's Petition for Review 10. Further, petitioners argue, that standard has never placed on the petitioner the burden of demonstrating that the challenged regulations are "categorically incapable" of being applied clearly and objectively "under any circumstances where they may be applicable." 158 Or App at 4. According to petitioners, that very different and difficult burden belongs and is properly confined to review of regulatory takings challenges to a legislative enactment, such as that in *Benson v. City of Portland*, the case cited in the court's *Rogue Valley* decision.

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The city's response brief agrees with petitioners that ORS 197.831 is directed at the court's statement of the petitioner's burden in its *Rogue Valley* decision. Further, the city argues that ORS 197.831 essentially restores the burden and standard under ORS 197.307(6) that LUBA applied in its *Rogue Valley* decision. We do not understand petitioners to disagree on the latter point. Petitioners quote extensively and with apparent approval from our discussion of what "clear and objective" means under ORS 197.307(6), and cite our *Rogue Valley* decision frequently in arguing that specific LUCU provisions are not "clear and objective." Neither petition for review argues that the burden and standard under ORS 197.831 is different than the burden and standard that LUBA applied in *Rogue Valley*, or attempts to articulate what the difference might be. Accordingly, our analysis will assume that ORS 197.831 does not alter the burden and standard that we applied in our *Rogue Valley* decision. Under that decision, the city has the ultimate burden of demonstrating that the LUCU provisions challenged in the petitions for review are "clear and objective" within the meaning of ORS 197.307(6). Such standards are "clear and objective" if the local government demonstrates that the terms of the standards do not subject needed housing to "subjective, value-laden analyses that are designed to balance or mitigate impacts" on the subject property, other property or the community. 35 Or LUBA at 158.[10]

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[8] As far as we can tell, petitioners do not argue that any LUCU provision violates ORS 197.307(3)(b).

[9] Chamber argues that the court's statement of the burden and its standard of review was *dictum*, because the ordinance provisions challenged in *Rogue Valley* prescribed local requirements for the content of applications, and were thus not "standards or procedures required to be clear and objective under ORS 197.307." Chamber's Petition for Review 9 n 2. As noted above, both LUBA and the court assumed, without deciding, that such informational requirements could constitute "procedures for approval" for purposes of ORS 197.307(6).

[10] However, as we cautioned in *Rogue Valley*, few tasks are *less* clear or *more* subjective than attempting to determine whether a particular land use approval criterion is clear and objective. 35 Or LUBA at 155.

With that understanding of the applicable law, we turn to petitioners' challenges.

II. Petitioners' Challenges

ORS 197.307(3)(d) allows a local government to adopt an alternative approval process for residential applications and permits based on criteria that are not clear and objective, as long as the applicant has the option of proceeding instead under clear and objective criteria. *See* n 5; *see also Callison v. LCDC*, 145 Or App 277, 284 n 8, 929 P2d

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1061 (1996) (clear and objective criteria are not rendered otherwise simply because local governments provide an optional, alternative set of approval standards that are not clear and objective). As the city explains, the city designed the LUCU to offer two separate sets of approval criteria applicable to land use applications involving needed housing. The first track (needed housing track) is intended to contain only clear and objective criteria. The second is an optional, alternative track (alternative track) that includes criteria that are not intended to be clear and objective.

Petitioners advance three general types of challenges. First, petitioners contend that some of the criteria under the needed housing track contain terms or standards that are not in fact clear and objective. These criteria are identified in Table 1.1 of Home Builders' petition for review, which challenges over 100 LUCU provisions, organized in 31 categories.

Second, petitioners argue that some of the city's needed housing standards, even assuming they are clear and objective, are written in a manner that effectively prohibits and renders impossible the development of needed housing under clear and objective standards. Petitioners offer three examples or types of such standards, and argue that these types of standards violate the needed housing statutes because they essentially force the needed housing developer into seeking approval under the alternative track. Petitioners submit that forcing a needed housing applicant to pursue approval under the alternative track is inconsistent with the intent of the needed housing statutes.

Third, petitioners argue that a number of LUCU provisions, even if clear and objective, nonetheless violate ORS 197.307(6) because they "discourage needed housing through unreasonable cost or delay." These LUCU provisions do so by either (1) reducing the area of development sites that can be developed; (2) requiring additional amenities in connection with development; or (3) adding additional requirements for filing complete applications for development.

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A. Clear and Objective

As noted, Table 1.1 in Home Builders' petition for review identifies 31 categories of standards that apply under one or more of six types of criteria for land use approvals under the needed housing track. Petitioners contend, in 31 footnotes attached to the table, that these standards are either not clear and objective, or require compliance with standards that are not clear and objective.[11]

[11] Correlating Table 1.1, its footnotes, and the parties' arguments about specific LUCU provisions is a frustrating exercise. In hindsight, we should not have accepted Home Builders' petition for review, because the bulk of its needed housing arguments are contained in a three-page table and accompanying pages of footnotes. Further, as discussed below, the bulk of its Goal 5 arguments are contained in a table accompanied by thirteen pages of footnotes. Aside from the difficulty that format presents in understanding Home Builders' arguments, the resulting compression allowed Home Builders to effectively circumvent the 50-page limit at OAR 661-010-0030(2)(b), without seeking the Board's permission.

The city offers a number of general and specific responses. The city's general defenses include several theories for why a number of the challenged provisions are not, in fact, subject to the ORS 197.307(6) requirement that they be "clear and objective." Finally, the city addresses each of the provisions identified in Table 1.1 and argues that, to the extent such provisions are required to be clear and objective, they satisfy that requirement. We first address the city's general defenses.

1. General Defenses

a. Purpose and Applicability Provisions

The city responds to certain challenges by arguing that the disputed code provisions merely state the purpose or define the applicability of other code provisions, and that such purpose or applicability provisions are not "standards" within the meaning of ORS 197.307(6).[12]

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We agree with the city that purpose or applicability provisions that by their terms *or the terms of other related code provisions* do not apply as approval criteria for needed housing are not "standards" within the meaning of ORS 197.307(6). ORS 197.307(6) does not require that such purpose or applicability provisions must be clear and objective. We agree with the city that the purpose and applicability provisions that it cites are not, by their erms or the terms of other related provisions, approval standards.[13]

b. Existing Code Provisions

The city contends that a number of petitioners' challenges to specific code language are challenges to existing code provisions that were carried forward from the EC with little or no substantive change.[13] The city concedes that the *application* of any such existing code

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[12] For example, petitioners argue that the purpose and applicability provisions of LUCU 9.5500(1) and (2) are not clear and objective. We quote representative portions of LUCU 9.5500(1) and (2):

> "**(1) Purpose of Multiple-Family Standards**. The purpose of these development standards is to:
>
> "(a) Ensure that new multiple-family development enhances the character and livability of Eugene's neighborhoods[.]
>
> "**(2) Applicability of Multiple-Family Standards**
>
> "(a) Except for building alterations and building additions that increase the square footage of livable floor area by less than 50%, multiple-family standards shall apply to all multiple family developments in all zones except commercial. In cases where the standards apply, they shall be considered applicable for the portion of the development site impacted by the proposed development.
>
> "(b) Multiple family standards shall also apply to multiple family developments in commercial zones unless the entire ground floor, with the exception of areas for lobbies, stairs, elevators and bicycle storage for residents, is in non-residential use. * * * "

[13] For example, petitioners argue that LUCU 9.6820(5) is not clear and objective. LUCU 9.6820(5) provides:

> "Where needed, the planning director shall require public accessways from a cul-de-sac longer than 150 [feet], measured from the centerline of the intersecting street to the radius point of the cul-de-sac[,] to provide safe, convenient, and direct circulation for pedestrians, bicyclists, and emergency vehicles."
>
> The city argues that LUCU 9.6820(5) was carried forward from EC 9.045(7), which provided:
>
> "There shall be no cul-de-sac more than 400 feet long from the centerline of the intersecting street to the radius point of the cul-de-sac bulb. The planning director shall require public accessways from cul-de-sacs where necessary to provide safe, convenient, and direct circulation for pedestrians and bicyclists."

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provisions might be challenged in the context of a quasi-judicial decision on a specific needed housing application under ORS 197.307(6), but the city argues that whether such existing provisions are clear and objective cannot be challenged in the present appeal of the city's legislative decision.

Presumably, the city believes that our review of carried-forward standards in the present appeal would constitute an impermissible collateral attack on those standards. Although the city does not cite it, the most apt authority we find for that proposition is *Urquhart v. Lane Council of Governments*, 80 Or App 176, 721 P2d 870 (1986). In *Urquhart*, LUBA remanded a plan amendment that applied a new land use designation to certain undeveloped lands that were not included in the plan's acknowledged Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources) inventory, without first considering whether to add the lands to the plan's Goal 5 inventory. The Court of Appeals held that, if there was a defect in the regional plan, it was in the acknowledged Goal 5 inventory, and LUBA lacked authority to remand on the basis of a defect in the inventory that was not directly or indirectly attributable to the challenged plan amendment. However, we believe the present case is closer to *Dept. of Transportation v. Douglas County*, 157 Or App 18, 967 P2d 901 (1998). In that case, the county adopted a decision that was intended to comply with all requirements of the transportation planning rule. The petitioner argued that the rule required the county to amend certain plan and code provisions, and requested remand on the grounds that the county had failed to amend those provisions. LUBA concluded, based on the reasoning in *Urquhart*, that it had no authority to review the unamended

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provisions for compliance with the rule. The court reversed, distinguishing *Urquhart* on several grounds, and holding that LUBA had authority to review the unamended provisions for compliance with the rule. Central to the court's analysis was its conclusion that, unlike *Urquhart*, the rule applied directly to the challenged decision, the county intended its decision to comply comprehensively with the rule, and the rule itself required compliance prior to the county's periodic review.

Here, the city concedes that ORS 197.307(6) applies directly to its decision, and that the LUCU represents a comprehensive effort to conform its land use regulations with the needed housing statutes.[14] What is particularly determinative in the present case is that the city intended its legislative enactment to implement and comply with the needed housing statutes. *Compare Volny v. City of Bend*, 37 Or LUBA 493, 502, *aff'd* 168 Or App 516, 4 P3d 768 (2000) (legislative amendment to city's transportation element of its comprehensive plan was not deficient for failure to adopt a transportation system plan required by administrative rule, where the challenged amendment was not intended to and did not have the effect of implementing the rule). The city does not dispute that its decision significantly amends its land use regulations governing housing in an effort to bring those regulations into compliance with the needed housing statutes, and that such amendments are subject to scrutiny under ORS 197.307(6). In such circumstances, the city cannot carry forward unamended or slightly amended portions of those regulations and expect they will be immune from challenge under ORS 197.307(6). In addition, the city does not dispute that application of any such carried-forward provisions in a

[14] While ORS 197.307 does not itself require compliance at any particular time, ORS 197.646 requires that local governments amend their plan and land use regulations to implement new or amended statutes when those new or amended statutes become applicable to the local government.

future quasi-judicial decision may be subject to challenge under ORS 197.307(6). Given that concession, we see no reason to

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defer the question of whether those unamended provisions are consistent with ORS 197.307(6).

c. Authority to Impose Conditions

The city responds to a number of petitioners' challenges by arguing that the disputed provision merely authorizes the city to impose certain conditions, and does not itself constitute either a "standard" or "condition" that can be challenged in the present legislative proceeding.[15] The city submits that if the city in fact imposes conditions that are not clear and objective, such conditions may be challenged in an appeal of the quasi-judicial decision imposing those conditions. However, the city argues, code provisions that merely authorize the imposition of conditions are not subject to scrutiny under ORS 197.307(6) in the present appeal of the city's legislative enactment.

We addressed a similar issue in our *Rogue Valley* decision, concluding that a provision allowing the city to impose certain conditions "if it is deemed necessary to mitigate any potential negative impact caused by the development," violated ORS 197.307(6). 35 Or LUBA at 159. We recognized that the conditions that might actually be imposed under that provision might be clear and objective. Nonetheless, we concluded that the city's authority to impose conditions under that provision was "highly discretionary and subjective," and therefore was not a clear and objective procedure. *Id.* at 160. In the present case, we similarly reject the city's categorical argument that a provision authorizing the city to impose conditions is immune from scrutiny under ORS 197.307(6). Depending on their terms, such

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provisions may constitute or contain "standards" or "procedures for approval." If so, such provisions must be clear and objective.

We now turn to the parties' arguments that specific LUCU provisions are not "clear and objective."

2. Specific Challenges

a. LUCU 9.5500

LUCU 9.8100 and 9.8445 require that, if applicable, the proposal comply with the multiple-family standards at LUCU 9.5500. Petitioners argue in Table 1.1, footnote 1 that LUCU 9.6420(3), cross-referenced in LUCU 9.5500(12)(b)(3), is not clear and objective. LUCU 9.6420(3) pertains to interior parking area landscaping, and requires that parking lots with more than a specified number of spaces include a specified square footage of landscaping per space.[16] In our *Rogue Valley* decision, we commented that "numerical or absolute" standards

[15] For example, petitioners challenge LUCU 9.6845, as not constituting a clear and objective standard, special condition or procedure for approval:

> "Where necessary to insure safety, reduce traffic hazards and promote the welfare of the general public, pedestrians, bicyclists and residents of the subject area, the planning director or public works director may require that local streets and alleys be designed to discourage their use by non-local motor vehicle traffic and encourage their use by local motor vehicle traffic, pedestrians, bicyclists, and residents of the area."

[16] LUCU 9.6420(3)(e)(1) provides:

> "In addition to the landscaping standards required in subsections (c) and (d), landscaping shall be provided within the interior of surface parking areas for 50 or more motor vehicles so as to:

are almost paradigmatically "clear and objective." 35 Or LUBA at 154 n 20. We cited an example from the legislative history of ORS 197.307 referencing a similar

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numerical landscaping standard. 35 Or LUBA at 157 n 25. The city argues, and we agree, that the landscaping standards in LUCU 9.6420(3)(e)(1) are clear and objective. Although petitioners do not assist us on this point, the target of their criticism may be language in LUCU 9.6420(3)(e)(1) that, the city contends, merely describes the purpose of the landscaping standards in LUCU 9.6420(3)(e)(1), (2) and (3), *e.g.*, to improve the visual qualities of the area, delineate circulation, improve air quality, and moderate parking lot microclimates. The city's position on this point would be stronger if it had separated this language from the undisputed standards in LUCU 9.6420(3)(e)(1), (2) and (3) and denominated the language as a purpose statement, as the city did with at least some other LUCU provisions. *See, e.g.*, LUCU 9.5500(1) at n 12. Notwithstanding that omission, we agree with the city that, read in context, the disputed language describes the goals furthered by complying with the clear and objective standards at LUCU 9.6420(3)(e)(1), (2) and (3), and does not itself function as an approval standard. This subassignment is denied.

b. Metro Plan Diagram

LUCU 9.8325(2) and 9.8520(2) both require that proposed land uses and densities within proposed development be "consistent with the land use designation(s) shown on the Metro Plan Land Use Diagram, as refined in any applicable refinement plan." The Metro Plan diagram is a large color-coded map that depicts plan designations in the Eugene-Springfield Metropolitan Area. *See* Response Brief App 5. The Metro Plan diagram does not depict individual lot or parcel lines, and it contains text noting that "[o]ne cannot determine the exact designation of a particular parcel of land without consulting the appropriate local jurisdiction." The text goes on to state that the "home jurisdiction will use the diagram to determine a site's plan designation" by relying on refinement plans, identifiable features on the diagram, the plan text, or other information that can support such a determination. *Id.*

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We understand petitioners to argue, in Table 1.1, footnote 2, that the LUCU 9.8325(2) and 9.8520(2) requirements of consistency with the Metro Plan diagram designations are not clear and objective, because one cannot determine from the diagram itself the designation of any particular site and thus whether proposed uses and densities are consistent with that designation. Further, petitioners note that while some refinement plans contain plan designations for specific parcels, some do not.

The LUCU 9.8325(2) and 9.8520(2) consistency requirements are themselves clear and objective. The city argues, and we agree, that the absence of lot or parcel depictions from the Metro Plan diagram and from some refinement plans does not render LUCU 9.8325(2) and

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"a. Improve the visual qualities of these areas.

"b. Delineate and define circulation movements of motorists and pedestrians.

"c. Improve air quality.

"d. Encourage energy conservation by moderating parking area microclimates.

"Parking area landscaping shall be provided according to Table 9.6420(3)(e)(3). Interior

Parking Area Landscaping." Table 9.6420(3)(e)(3) follows, prescribing 15 square feet of landscaping per parking space for lots with 50 to 99 spaces, and 22 square feet of landscaping per parking space for lots with 100 or more spaces.

9.8520(2) unclear or subjective. The diagram text requires the "home jurisdiction" to identify a site's designation, using the diagram, any applicable refinement plan, or other pertinent information. The needed housing applicant's obligation under LUCU 9.8325(2) and 9.8520(2) is to demonstrate that the proposed development is consistent with that designation. That the home jurisdiction may have to consult documents other than the diagram and applicable refinement plans in particular cases, in order to determine a site's designation, does not mean that the LUCU 9.8325(2) and 9.8520(2) consistency requirements are not clear and objective.[17] This subassignment is denied.

c. Preservation of Existing Natural Resources

LUCU 9.8100(3), 9.8325(4), 9.8445(3) and 9.8520(8) require preservation of existing natural resources, demonstrated by compliance with five criteria (a) through (e).[18] Petitioners argue in Table 1.1, footnote 3 that these five criteria are not clear and objective.

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(i) Criteria (a)-(c)

Petitioners first argue that the requirements in criteria (a)-(c) for a 100-foot "perimeter" around the "area occupied" by rare plant populations and rare animal populations, and a 50-foot buffer protecting "waterways" measured from the "top of the bank," are not clear and objective, because the quoted terms are imprecise and not defined.

The city responds that the terms "perimeter," "area occupied," and "top of the bank" have plain and commonly understood meanings, and the lack of a precisely defined starting point for the required buffer zones does not mean that the disputed standards are not clear and objective. The city also argues that the term "waterways" has a plain and commonly understood meaning.[19]

---

[17] Petitioners advance an identical argument respecting LUCU 9.8220(5)(a) in Table 1.1, footnote 21. For the same reasons as expressed in the text, we conclude that LUCU 9.8220(5)(a) is clear and objective.

[18] LUCU 9.8100(3) is representative, and provides as follows:

> "The proposal will preserve existing natural resources by compliance with all of the following:
>
> "a. All rare plant populations (those that are proposed for listing or are listed under State or Federal law) are preserved. The protected area shall include the area occupied by the plant population(s), plus a minimum 100 foot buffer around the perimeter of the plant population(s).
>
> "b. All documented habitat for all rare animal species (those that are proposed for listing or are listed under State or Federal law) is preserved. The protected area shall include the area occupied by the animal population(s), plus a minimum 100 foot buffer around the perimeter of the animal population(s).
>
> "c. All waterways are protected. Protected areas shall include the area between the banks and a minimum 50 foot buffer on each side of the top of the bank.
>
> "d. The proposal complies with EC 9.6880 to EC 9.6885 Tree Preservation and Removal Standards.
>
> "e. Natural resource areas designated on the Metro Plan diagram as `Natural Resource' and areas identified in any city-adopted natural resource inventory are protected. Protection shall include the area of the resource and a minimum 50 foot buffer around the perimeter of the natural resource area."

[19] As framed, the parties' arguments tend to focus on whether particular *terms* in the challenged standards are clear and objective. We caution that the ultimate question under ORS 197.307(6) is whether the *standard* is clear and objective, viewed in context. That the standard may contain imprecise or ambiguous terms is a relevant and, depending on the terms and their function in the standard, perhaps sufficient, consideration in answering that ultimate

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We noted in our *Rogue Valley* decision that even numerical standards such as setbacks and height limitations may "not always be entirely clear," because one must determine where the measurement begins. 35 Or LUBA at 154 n 20. We also noted that with respect to height limitations, many zoning ordinances include complicated formulas for determining the reference point from which height is measured. *Id.* The present issue is similar: whether a numerical standard is not "clear and objective" because the critical reference point from which the required measurement must begin is stated in undefined descriptive terms. We generally agree with the city that use of such terms does not necessarily offend ORS 197.307(6), at least where the terms have plain and commonly understood meanings, and the described referents can be located by a reasonable person with reasonable effort. However, we cannot say that the standards containing the disputed terms are clear and objective. It may be possible in many cases to determine the "area occupied" and hence the perimeter of a rare plant population, but the city does not explain how one can reasonably determine the "area occupied" by a rare animal population, which presumably is mobile to some degree. Absent delineation of habitat in an inventory or map, or some similar reasonable means of locating the described referents, we do not believe criteria (a) and (b) are clear and objective.

Similarly, determining whether a feature is a "waterway," and what is the "bank" or "top of the bank," requires considerably more assistance than the city's ordinance provides. The LUCU does not define "waterway," "bank" or "top of the bank," or provide any means of identifying and locating those referents, which have a multiplicity of meanings, with different geographic consequences. *See Willhoft v. City of Gold Beach*, ___ Or LUBA ___ (LUBA Nos. 2001-088/89, December 3, 2001) (describing the multiple meanings of "bank" and "top of bank" and the difficulty locating them). For that reason, criterion (c) is not clear and objective.

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(ii) Criterion (d)

With respect to criterion (d), petitioners argue that the LUCU 9.6880-9.6883 standards referenced in criterion (d) contain unspecified procedures that are not clear and objective. Further, petitioners argue, LUCU 9.6885(2)(b) is ambiguous, because it does not clearly or objectively state what constitutes acceptable "consideration" of specified preservation priorities.[20]

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question. However, the existence of imprecise or ambiguous terms in a standard does not *necessarily* resolve whether that standard violates ORS 197.307(6).

[20] LUCU 9.6885(2) sets forth standards for tree preservation and removal, and provides in relevant part:

> "No permit for a development activity subject to this section shall be approved until the applicant submits plans or information, including a written report by a certified arborist, that demonstrates compliance with the following standards:
>
> "(a) The following minimum percentages of the existing number of significant trees on the development site whose condition rating is 60 or higher (on a scale of 0 to 100) will be preserved:
>
> "1. 60% for projects on property zoned R-1.
>
> "2. 40% for projects on property zoned R-1.5 and R-2.
>
> "3. 40% for projects on property zoned R-3 and R-4. This percentage may be reduced to 20% providing the proposed project achieves at least 50% of the maximum density required for that zone.
>
> "4. 20% for projects on property zoned commercial, industrial, and public land.
>
> "5. 40% for projects on property in all other zones. * * *

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Petitioners do not identify what procedures in LUCU 9.6880-9.6883 they believe offend ORS 197.307(6), and we do not see that any procedure does so.

With respect to LUCU 9.6885(2)(b), the city responds that it simply requires that the application show "consideration" of certain priorities, and that such an informational requirement, to the extent it is subject to ORS 197.307(6), is clear and objective. We agree that LUCU 9.6885(2)(b) merely requires that the application reflect "consideration" of specified priorities and does not require that that consideration be adequate or acceptable. Petitioners' argument essentially reads a discretionary requirement into the code, that the consideration be "acceptable" in some manner. That requirement is not stated in LUCU 9.6885(2)(b) or necessarily implied. This subassignment of error is denied.

(iii) Criterion (e)

With respect to criterion (e), petitioners contend that references to the Metro Plan diagram's natural resource designations and any "city-adopted natural resource inventory" are unclear. Petitioners repeat their argument, discussed above, that the diagram does not depict property boundaries and thus cannot delineate the boundaries of natural resource areas. Finally, petitioners question whether the reference to "city-adopted natural resource inventory" includes only acknowledged Goal 5 inventories, or whether it includes other inventories, such as a 1991 Metro Natural Resources Study that the city apparently adopted but did not incorporate into its acknowledged Goal 5 inventory.

The city responds first that natural resource areas cannot be developed with housing and therefore criterion (e) simply does not implicate ORS 197.307(6). However, criterion (e) requires a buffer zone between development and a natural resource area, and presumably

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applies in circumstances where development, including needed housing, is proposed adjacent to a natural resource area. Therefore, criterion (e) implicates ORS 197.307(6).

The city next argues that natural resource areas are clearly delineated on the Metro Plan diagram, for the reasons described above. We agree that there seems no reason that the boundaries of designated natural resource areas cannot be located with precision using the diagram, refinement plans and other documents referenced by the diagram, for purposes of the 50-foot buffer required by criterion (e).

The city does not respond to petitioners' argument that the reference to "areas identified in any city-adopted natural resource inventory" is unclear, because it may include adopted inventories other than the city's acknowledged Goal 5 inventory. Petitioners identify one such

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"(b) *The materials submitted shall reflect that consideration has been given to preservation in accordance with the following priority*:

"1. Significant trees located adjacent to or within waterways or wetlands designated by the city for protection, and areas having slopes greater than 25%;

"2. Significant trees within a stand of trees; and

"3. Individual significant trees.

"(c) That development will occur in a manner that protects at least 70% of the critical root zone of each tree retained under subsection (2)(a) above.

"(d) If the proposal includes removal of any street tree(s), removal of those street trees has been approved, or approved with conditions according to the process at EC 6.320 Tree Removal and Replacement — Permit Decision." (Emphasis added.)

adopted inventory, a 1991 natural resources study. We agree with petitioners that criterion (e) is ambiguous in that respect. The ambiguity may be significant, because if criterion (e) references inventories that do not follow the Metro Plan diagram's delineations, or do not provide their own delineations, then there may be no objective way to determine their boundaries and thus the reference point for the required 50-foot buffer. This subassignment of error is sustained, in part.

d. Complies with All Applicable Standards

LUCU 9.8100(4) requires that a conditional use proposal comply "with all applicable standards," and then sets forth a nonexclusive list of standards that might apply.[21] Petitioners

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argue in Table 1.1, footnote 4 that the phrase "all applicable standards" invites argument over what standards are applicable, and thus is not clear and objective.

The city responds that the phrase "all applicable standards" does not render LUCU 9.8100(4) unclear or subjective, because it is the nature of the development proposal, rather than LUCU 9.8100(4), that dictates whether a standard applies. For example, the city argues, a needed housing proposal for multi-family housing must provide bicycle parking, while a proposal for a single-family-dwelling need not. We agree that, viewed in context, the phrase "all applicable standards" does not render LUCU 9.8100(4) unclear or subjective. Depending on the nature of the proposal, certain standards, for example floodplain or geological hazard standards, might or might not apply. The phrase "all applicable standards" simply recognizes that the nature or location of certain proposals may trigger different sets of standards. LUCU 9.8100(4) supplies a nonexhaustive list of possible standards. That it does not list every possible standard that might apply to every possible type of proposed development does not mean LUCU 9.8100(4) violates ORS 197.307(6). This subassignment of error is denied.

e. Compliance with LUCU 9.6705

LUCU 9.8100(4)(a), 9.8220(2)(d), 9.8325(7)(c), 9.8445(4)(c) and 9.8520(3)(d) each require compliance with LUCU 9.6705, which sets out the purpose of the city's floodplain development provisions. In footnote 5 to Table 1.1, petitioners argue that LUCU 9.6705 is

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not clear and objective. The city attaches to its brief Ordinance 20235, adopted October 10, 2001, which amends the predicate code provisions to remove the requirement that development comply with the purpose statement at LUCU 9.6705. Response Brief Appendix 27-29, 31-32.

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[21] As amended by Ordinance 20235, LUCU 9.8100(4) provides:

> "The proposal complies with all applicable standards, including, but not limited to:
>
> "(a) [LUCU] 9.6706 Development in Flood Plains through [LUCU] 9.6709 Special Flood Hazard Areas — Standards.
>
> "(b) [LUCU] 9.6710 Geological and Geotechnical Analysis.
>
> "(c) [LUCU] 9.6730 Pedestrian Circulation On-Site.
>
> "(d) [LUCU] 9.6735 Public Access Required.
>
> "(e) [LUCU] 9.6750 Special Setback Standards.
>
> "(f) [LUCU] 9.6775 Underground Utilities.
>
> "(g) [LUCU] 9.6780 Vision Clearance Area.
>
> "(h) An approved adjustment to a standard pursuant to the provisions beginning at [LUCU] 9.8015 of this land use code constitutes compliance with the standard."

For the reasons expressed above, a purpose provision that is not an approval criterion is not a "standard" that must comply with ORS 197.307(6). In addition, the city argues, and petitioners do not dispute, that Ordinance 20235 amended the LUCU to remove any requirement that needed housing comply with the purpose statement at LUCU 9.6705. Accordingly, we agree with the city that petitioners' challenge to LUCU 9.6705 is without merit.

f. Compliance with LUCU 9.6730

LUCU 9.8100(4)(c), 9.8325(7)(e), 9.8445(4)(e) and 9.8520(3)(f) each require that certain needed housing must comply with standards in LUCU 9.6730, which governs pedestrian circulation. *See* n 22 (*quoting* LUCU 9.8100(4)). In Table 1.1, footnotes 7 and 31, petitioners argue that LUCU 9.6730(3)(d) and (e) contain terms that are not clear and objective.[22]

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Petitioners argue that use of the terms "where necessary" and "minimize" in LUCU 9.6730(3)(d) and (e) render those provisions unclear and subjective. The city responds that Ordinance 20235 deletes the term "minimize" from LUCU 9.6730(3)(e) and thus moots petitioners' challenge to that provision. However, the city does not direct us to the pertinent section of Ordinance 20235. The only section of the ordinance we find affecting LUCU 9.6730 is section 27, at Response Brief App 21, but that section amends LUCU 9.6730(3)(*b*), not (*e*), and the amendment has nothing to do with the term "minimize." Accordingly, the city has not demonstrated that petitioners' challenge to LUCU 9.6730(3)(e) is moot.

With respect to subsection (d), the city argues that the terms "where necessary for traffic circulation" merely recognize that some applications will not propose development in which driving aisles intersect pedestrian paths, and thus subsection (d) will not apply. Read in isolation, the terms "where necessary for traffic circulation" might be understood as surplusage, as the city asserts. However, read together, LUCU 9.6730(3)(d) and (e) require that the proposed parking lots and driveways present the fewest possible conflicts between pedestrians and vehicles, and that any proposed intersections between driving aisles and pedestrian paths be "necessary for traffic circulation." These are substantive, vague requirements that grant the city considerable discretion in approving or denying needed housing. Consequently, LUCU 9.6730(3)(d) and (e) are not clear and objective.

g. Adjustments under LUCU 9.8015

LUCU 9.8100(4)(h), 9.8220(2), 9.8325(7), 9.8445(4) and 9.8520(3) each provide that "[a]n approved adjustment to a standard pursuant to the provisions beginning at [LUCU] 9.8015 of this land use code constitutes compliance with the standard." The adjustment process at LUCU 9.8015 to 9.8030 is similar to the variance process that allows deviation from certain standards contained elsewhere in the code. For example, LUCU 9.5500(6)(a) prescribes

[22] LUCU 9.6730(3) provides in relevant part:

> "All on-site pedestrian paths provided for the purposes of complying with this land use code shall conform with the following standards:
>
> "* * * * *
>
> "(d) *Where necessary for traffic circulation*, on-site pedestrian paths may be intersected by driving aisles as long as the crossing is marked with striping or constructed with a contrasting paving material to indicate a pedestrian crossing area.
>
> "(e) On-site vehicular and pedestrian circulation shall be designed to *minimize* vehicular/pedestrian conflicts at driveway crossings within parking lots and at vehicle ingress/egress points." (Emphasis added.)

numerical maximum building massing standards for multi-family housing. LUCU 9.8030(8)(a) allows relief from the limits at LUCU 9.5500(6)(a) if the applicant

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demonstrates, among other things, that the adjustment "[c]reate[s] a vibrant street façade with visual detail."

Petitioners argue that the adjustment process at LUCU 9.8015 contains standards that are not clear and objective, and therefore LUCU 9.8100(4)(h), 9.8220(2), 9.8325(7), 9.8445(4) and 9.8520(3) are not clear and objective. The city responds, and we agree, that LUCU 9.8100(4)(h), 9.8220(2), 9.8325(7), 9.8445(4) and 9.8520(3) merely state that an adjustment to a standard constitutes compliance with that standard. The city may provide a needed housing applicant with a choice between meeting a clear and objective standard by complying with its terms *or* by obtaining a discretionary variance or adjustment to that standard without offending ORS 197.307(6). *See* ORS 197.307(3)(d) and *Callison*, 145 Or App at 284 n 8. This subassignment of error is denied.

h. Features Included in the Application

LUCU 9.8220(2)(k), 9.8325(12), 9.8445(4)(j) and 9.8520(10) each require that the applicant show compliance with "applicable development standards explicitly addressed in the application," or words of similar effect. Petitioners argue, in Table 1.1, footnote 10, that this language invites argument over what standards are "explicitly addressed" in the application and what the applicable standards might be.

The city explains that, under the old code, certain standards such as landscaping standards would be addressed only at the building permit stage. According to the city, the intent of the disputed language is to allow an applicant to choose to address such standards at the initial development permit stage. If an applicant chooses to explicitly address such standards in their initial development application, the city argues, the city will review and approve those standards along with the initial development permit. The city argues, and we agree, that the disputed standards are clear and objective. This subassignment of error is denied.

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i. Lot Dimension and Density Requirements

LUCU 9.8220(2)(a), 9.8325(7)(a), 9.8445(4)(a) and 9.8520(3)(a) each require that the applicant show compliance with standards at LUCU 9.2000 through 9.3915 regarding lot or parcel dimensions and density requirements. Petitioners argue that "[t]he majority of the provisions contained in [LUCU] 9.2000-9.3915 do not constitute clear and objective standards and, furthermore, are not relevant to needed housing." Table 1.1, footnote 11.[23]

LUCU 9.2000 through 9.3915 occupy more than 100 pages of the city's code, and set forth a large number of requirements, including lot or parcel dimensions and density requirements applicable in each of the city's many zones and subzones. The city argues that it cannot respond, because petitioners have made no effort to identify which of these many requirements petitioners believe are not clear and objective, much less why. We agree that, absent some assistance from petitioners, we cannot perform our review function. We therefore do not consider petitioners' arguments concerning these provisions. This subassignment of error is denied.

[23] Home Builders does not identify, and we are not aware of, any requirement that standards applied to needed housing be "relevant to needed housing." Any standards applied to needed housing must, of course, be clear and objective.

j. Emergency Response Time

LUCU 9.8325(7)(j) and 9.8520(7) require for approval of a planned unit development or subdivision that "[n]ew dwellings shall be within a 4-minute response time for emergency medical services." LUCU 9.8220(6) imposes a similar five-minute requirement for approval of a partition. Petitioners argue in Table 1.1, footnotes 12 and 13, that these response time requirements are not clear and objective, because it is not clear how the response time is measured, and what assumptions are made about the time of day, traffic, etc. Petitioners note that during the proceedings below city staff produced maps showing the current four-minute and five-minute response times in the city, and concede that such maps, if adopted into the

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LUCU, would be clear and objective. Record 1878-80. However, petitioners argue, the city did not adopt such maps, and without them it is uncertain how a needed housing applicant can determine whether or not proposed development is permitted under LUCU 9.8325(7)(j) and 9.8520(7).[24]

The city responds that the response time requirements are numeric and quantifiable, as evidenced by the maps city staff produced during the proceedings below. If the standard is written so clearly that a map can be produced showing the permitted and prescribed areas, the city argues, it is clear and objective.

The city's response does not explain how response time is calculated or how, absent adoption of maps or a clear method of delineation, a needed housing applicant can reasonably determine whether proposed development is permitted under LUCU 9.8325(7)(j) and 9.8520(7). Presumably a number of variables could have been applied in producing the maps, including the current location or service area of emergency response providers and assumptions about speed, traffic, etc. Those variables, particularly the current location or service area of providers, will likely change over time. It is not clear whether the city envisions that city staff will calculate whether an applicant's proposal falls within the current response time area, or that the applicant must perform the calculations. Under either scenario, it is unclear how that calculation is made. ORS 227.173 requires that ordinance provisions that apply to needed housing "must be clear and objective on the face of the ordinance." The response time requirement does not meet that standard. This subassignment of error is sustained.

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k. Street Standards

LUCU 9.8220(2)(b), 9.8325(6)(a) and 9.8520(3)(b) require that partitions, PUDs and subdivisions comply with the street, alley and public ways standards at LUCU 9.6800 through 9.6870. Petitioners argue in Table 1.1, footnote 14 that a number of provisions at LUCU 9.6800 through 9.6870 are not clear and objective.

(i) Dedication of Public Ways

LUCU 9.6805 allows the city to require dedication of public ways as a condition of approval, subject to constitutional limitations, and to require that the applicant design and locate any such public ways according to the LUCU 9.0020 purpose statement.[25] The city argues that

[24] As discussed below, the LUCU provides that if property lies outside the response time limits, it may still be developed, but only under discretionary standards. We address, below, petitioners' challenges to those LUCU provisions.

[25] LUCU 9.6805 provides:

LUCU 9.6805 is not a standard, but simply authority to impose conditions, and thus need not be clear and objective. We rejected that general defense, above. We agree with petitioners that the second sentence of LUCU 9.6805, requiring that the applicant design and locate dedicated public ways to facilitate community needs according to the LUCU 9.0020 purpose statement, is not clear and objective. This subassignment of error is sustained.

(ii) Options to Dedication

LUCU 9.6815(2)(a) requires that all streets and alleys shall be public unless the developer demonstrates that dedication "is not necessary" to comply with the code or the

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street connectivity requirements at LUCU 9.6815(2)(b) to (f).[26] The city argues, and we agree, that the dedication requirement is clear and objective. That the city provides an

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> "As a condition of any development, the city may require dedication of public ways for bicycle and/or pedestrian use as well as for streets and alleys, provided the city makes findings to demonstrate consistency with constitutional requirements. The public ways to be dedicated to the public by the applicant shall be of such design and location as necessary to facilitate provision for the transportation and access needs of the community and subject property according to [LUCU] 9.0020 Purpose."

LUCU 9.0020 describes the purpose of the zoning ordinance, including "to protect and promote the health, safety, and general welfare of the public and to preserve and enhance the economic, social, and environmental qualities of the community."

[26] LUCU 9.6815(2) provides in relevant part:

> "(a) All streets and alleys shall be public unless the developer demonstrates that a public street or alley is not necessary for compliance with this land use code or the street connectivity standards of subparagraphs (b) to (f) of this subsection.
>
> "(b) The proposed development shall include street connections in the direction of all existing or planned streets within 1/4 mile of the development site. The proposed development shall also include street connections to any streets that abut, are adjacent to, or terminate at the development site. * * *
>
> "(c) The proposed development shall include streets that extend to undeveloped or partially developed land that is adjacent to the development site or that is separated from the development site by a drainage channel, transmission easement, survey gap, or similar property condition. The streets shall be in locations that will not prevent the adjoining property from developing consistent with applicable standards.
>
> "(d) The proposed street alignment shall minimize excavation and embankment and avoid impacts to natural resources, including water-related features.
>
> "(e) The requirements of subparagraphs (b) and (c) of this subsection do not apply if it is demonstrated that a connection cannot be made because of the existence of one or more of the following conditions:
>
> "1. Physical conditions preclude development of the connecting street. Such conditions may include, but are not limited to, topography or likely impact to natural resource areas such as wetlands, ponds, streams, channels, rivers, lakes or upland wildlife habitat area, or a resource on the National Wetland Inventory or under protection by state or federal law.
>
> "2. Buildings or other existing development on adjacent lands, including previously subdivided but vacant lots or parcels, physically preclude a connection now or in the future, considering the potential for redevelopment.
>
> "(f) In cases where a required street connection would result in the extension of an existing street that is not improved to city standards and the street has an inadequate driving surface, the developer shall construct a temporary barrier at the entrance to the unimproved street section with provision for bicycle, pedestrian, and emergency vehicle access. The barrier shall be removed by the city at the time the existing street is improved to city standards or to an acceptable standard

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alternative to dedication that is not clear and objective does not offend the statute. This subassignment of error is denied.

(iii) Street Connectivity Standards

Petitioners argue that certain terms in LUCU 9.6815(2)(b) to (f) are not clear and objective. *See* n 27.

LUCU 9.6815(2)(c) requires street extension to adjacent undeveloped land, even if that land is separated by listed property conditions, including any property condition "similar" to those listed. Because the listed property conditions are specifically described, it is sufficiently clear what property conditions may be "similar."

LUCU 9.6815(2)(f) requires that the developer take certain actions when an existing street to which a connection is required has "an inadequate driving surface." While that phrase, considered in isolation, may be unclear or allow the city impermissible discretion, LUCU 9.6815(2)(f) goes on to specify that the city's determination of "inadequate driving surface" shall be based on the street rating in the city's rating system and the anticipated traffic volume. Considered as a whole, LUCU 9.6815(2)(f) is clear and objective.

However, we agree with petitioners that, without further specification, the following provisions are impermissibly vague and discretionary: the LUCU 9.6815(2)(c) requirements that proposed street alignment "will not prevent the adjoining property from developing consistent with applicable standards," the LUCU 9.6815(2)(d) requirement that the proposed street alignment "shall minimize excavation and embankment" and shall "avoid impacts to natural resources," and the LUCU 9.6815(2)(e) provisions that exempt development from the street extension requirement where physical conditions "preclude" the connection. This subassignment of error is sustained, in part.

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(iv) Cul-de-Sac Standards

Petitioners challenge several provisions in LUCU 9.6820, governing cul-de-sacs.[27] LUCU 9.6820(1)(b) specifies that an exception to the cul-de-sac requirement is warranted when

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adopted by the public works director. In making a determination of an inadequate driving surface, the public works director shall consider the street rating according to Eugene's Paving Management System and the anticipated traffic volume."

[27] LUCU 9.6820 provides in relevant part:

"(1) All streets that terminate shall be designed as a cul-de-sac bulb, except when any of the following conditions exist:

"(a) The street will be extended in the future.

"(b) Topographic constraints, existing development, or natural features prevent the construction of a bulb.

"(c) The street is less than 150 feet long.

"(2) If a street qualifies for exception under subsection (1)(a), a temporary easement shall be provided and a turnaround of suitable strength constructed in an alternative location approved by the planning director. Conditions such as signage, restrictive covenants, or maintenance agreements may be required by the planning director to ensure that the turnaround area remains in good repair and available for use as intended.

"* * * * *

"topographic constraints, existing development, or natural features prevent" construction of a cul-de-sac. Petitioners argue that it is not clear when, or in whose judgment, circumstances will "prevent" construction of a required cul-de-sac. We agree

Petitioners also argue that LUCU 9.6820(2) and (5) grant the city impermissible discretion in approving temporary turnarounds and requiring public accessways off a cul-de-sac. The city responds that LUCU 9.6820(2) simply provides authority to impose conditions but is not itself a standard, and that LUCU 9.6820(5) was carried over from a preexisting code provision and is thus not subject to ORS 197.307(6). However, LUCU 9.6820(2) does more than provide authority to impose conditions; the first sentence imposes an approval

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standard. For reasons explained above, that LUCU 9.6820(5) is carried forward from a preexisting provision does not obviate compliance with ORS 197.307(6). We agree with petitioners that LUCU 9.6820(2) and (5) are not clear and objective standards. This subassignment of error is sustained.

(v) Street Intersections

LUCU 9.6830(1)(a) requires that "[s]treets and alleys shall intersect one another at an angle as near to a right angle as is *practicable* considering [the] topography of the area and previous adjacent layout." (Emphasis added.) Petitioners argue that the term "practicable" renders the provision unclear and subjective.

The city responds that LUCU 9.6830(1)(a) imposes an absolute, clear and objective requirement: streets must intersect at right angles. According to the city, that LUCU 9.6830(1)(a) also provides, under specified circumstances, for an alternative that achieves the maximum possible adherence to that absolute does not render it unclear or subjective. We agree. This subassignment of error is denied.

(vi) Public Accessways

Petitioners argue that portions of LUCU 9.6835 are vague and discretionary.[28] The city makes no attempt to demonstrate that LUCU 9.6835 is clear and objective, and we conclude that it is neither clear nor objective. This subassignment of error is sustained.

> "(5) Where needed, the planning director shall require public accessways from a cul-de-sac longer than 150', measured from the centerline of the intersecting street to the radius point of the cul-de-sac[,] to provide safe, convenient, and direct circulation for pedestrians, bicyclists, and emergency vehicles."

[28] LUCU 9.6835 provides in relevant part:

> "(1) When necessary to provide safe, convenient and direct access for pedestrians and bicyclists to and from nearby residential areas, transit stops, neighborhood activity centers, and other commercial and industrial areas, or where required by adopted plans, the city shall require within the development the dedication to the public and improvement of accessways to connect to cul-de-sacs, or to pass through blocks, provided the city makes findings to demonstrate consistency with constitutional requirements. `Nearby' means uses within 1/4 mile that can reasonably be expected to be used by pedestrians, and uses within 2 miles that can reasonably be expected to be used by bicyclists. * * *
>
> "(2) When necessary to provide connectivity, the city shall require improvements to existing unimproved public accessways on properties adjacent to the development, provided the city makes findings to demonstrate consistency with constitutional requirements. Said improvements to unimproved public accessways shall connect to the closest public street or developed accessway. Where possible, accessways may also be employed to accommodate the uses included in [LUCU] 9.6500 Easements."

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(vii) Special Safety Requirements

LUCU 9.6845 states that the city may require that local streets be designed to discourage their use by non-local traffic.[29] Petitioners contend that the city's discretion in imposing such requirements, *i.e.*, "where necessary to insure safety" etc., renders LUCU 9.6845 unclear and subjective.

The city responds that LUCU 9.6845 is not a standard or procedure subject to ORS 197.307(6), but simply a potential basis for attachment of a condition of approval. We disagree. LUCU 9.6845 is a "standard" subject to ORS 197.307(6) because, as applied in multi-stage partitions, PUDs and subdivisions, it functions as an approval criterion. If the city approves a tentative subdivision plat with a condition that the final plat must show changes to conform to LUCU 9.6845, and the city denies the final plat if those changes are not made, then LUCU 9.6845 is an approval criterion. Therefore, it must be clear and objective. The city makes no effort to demonstrate that it is so. This subassignment of error is sustained.

(viii) Transit Facilities

LUCU 9.6865(1) and (2) allow the city to require additional right-of-way or other improvements to develop transit facilities "where a need" for such facilities "has been identified." Petitioners argue that these provisions are not clear and objective. The city

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makes no attempt to demonstrate that they are clear and objective and we conclude that they are neither clear nor objective.

I. Public Improvement Standards

LUCU 9.8220(2)(c), 9.8325(7)(b), 9.8445(4)(b) and 9.8520(3)(c) respectively require that applications for partitions, PUDs, site design and subdivision involving needed housing comply with standards for public improvements at LUCU 9.6500 through 9.6510. In Table 1.1, footnote 15, petitioners contend that several provisions in LUCU 9.6500 through 9.6510 are not clear and objective.

LUCU 9.6500(2) provides that "[e]asements may be required along lot or parcel rear lines or side lines, or elsewhere as necessary to provide needed facilities for present or future development of the area." Petitioners argue that LUCU 9.6500 fails to define what "needed facilities" are. However, LUCU 9.6500(1) discusses easements for "wastewater sewers and other public utilities." Viewed in context, it is clear that the "needed facilities" referenced in LUCU 9.6500(2) are the facilities discussed in other provisions of LUCU 9.6500.

LUCU 9.6505(3) states that a developer shall pave all streets and alleys on the development site and that "the city manager may require the developer to pave streets and alleys that are impacted by the development." Petitioners contend that the quoted language is not clear and objective, because it is unclear which streets and alleys are "impacted" by development. The city does not attempt to demonstrate otherwise. We agree that the quoted language is neither clear nor objective.

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[29] LUCU 9.6845 provides:

> "Where necessary to insure safety, reduce traffic hazards and promote the welfare of the general public, pedestrians, bicyclists and residents of the subject area, the planning director or public works director may require that local streets and alleys be designed to discourage their use by non-local motor vehicle traffic and encourage their use by local motor vehicle traffic, pedestrians, bicyclists, and residents of the area."

LUCU 9.6505(4) states that sidewalks shall be located, designed and constructed "according to the provisions of this land use code * * * and other adopted plans and policies." LUCU 9.6505(5) includes identical language regarding bicycle paths. Petitioners contend that the quoted language invites argument in identifying what are the applicable standards, and thus is not clear and objective. We disagree. The quoted language simply

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refers to other standards, and is sufficiently clear and objective to comply with ORS 197.307(6).

Finally, LUCU 9.6510 states that the city may require the applicant to provide "adequate" drainage by constructing facilities "adequate for the drainage needs of the area." Petitioners argue that LUCU 9.6510 is vague and discretionary. The city does not attempt to demonstrate otherwise. We agree with petitioners that LUCU 9.6510 is neither clear nor objective. This subassignment of error is sustained, in part.

m. Grading on Steep Sites

LUCU 9.8325(5) and 9.8520(5) provide that for PUD or subdivision applications involving needed housing, "[t]here shall be no proposed grading on portions of the development site that meet or exceed 20% slope." Petitioners contend that this requirement is not clear and objective, because the code does not explain what method should be used to determine slope. The city responds, and we agree, that the slope of a property is an objectively determinable fact, and the absence of instructions on how to determine slope does not offend ORS 197.307(6).[30] This subassignment of error is denied.

n. Pedestrian, Bicycle and Transit Circulation

LUCU 9.8220(5)(b), 9.8325(6)(b) and 9.8520(6)(a) provide that partitions, PUDs and subdivisions shall provide for pedestrian, bicycle and transit circulation.[31] In Table 1.1,

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footnote 17, petitioners contend that these provisions are not clear and objective, because they do not specify when pedestrian, bicycle and transit circulation is "needed," and because they require discretionary determinations such as whether uses exist within two miles that can "reasonably be expected to be used" by bicyclists.

The city responds that pedestrian, bicycle and transit circulation are "needed" depending on whether such circulation is required in the code for the type of development proposed. However, LUCU 9.8220(5)(b), 9.8325(6)(b) and 9.8520(6)(a) do not say that, and the city identifies no other provisions that specify when pedestrian, bicycle and transit circulation are "needed" for partition, PUD and subdivision approval. We agree with petitioners that these provisions are not clear and objective. This subassignment of error is sustained.

[30] For the same reason, we reject petitioners' challenge in Table 1.1, footnote 27, to LUCU 9.8520(11), which regulates development within the South Hills Study Area on slopes that exceed 20 percent.

[31] LUCU 9.8220(5)(b), 9.8325(6)(b) and 9.8520(6)(a) provide:

> "[The applicant shall provide] pedestrian, bicycle and transit circulation, including related facilities, as needed among buildings and related uses on the development site, as well as to adjacent and nearby residential areas, transit stops, neighborhood activity centers, office parks, and industrial parks, provided the city makes findings to demonstrate consistency with constitutional requirements. `Nearby' means uses within 1/4 mile that can reasonably be expected to be used by pedestrians, and uses within 2 miles that can reasonably be expected to be used by bicyclists."

o. Required Public Improvements

LUCU 9.8100(5) and 9.8445(5) require for conditional use or site review approval that the applicant show that required public improvements are in place. If such improvements are not in place, the applicant must either (1) post a performance bond, or (2) file a petition for public improvements, and the petition must be accepted by the city engineer.[32] Petitioners argue in Table 1.1, footnote 18, that the requirement to show that public improvements are in place is not clear and objective. Further, petitioners argue that

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the second option is not clear and objective, because it fails to state standards under which the city engineer is required to accept a petition for public improvements, and standards for the assessment of the real property for the improvements.

Petitioners do not explain why the public improvement requirement is unclear or subjective, and we do not see that it is. It simply refers to public improvements required by other LUCU provisions or in a tentative plan approval. Although no party points them out to us, the second option presumably is governed by standards governing city approval of petitions for local improvement districts, in EC chapter 7. Petitioners do not explain why such standards violate ORS 197.307(6), or argue that the first option is not clear and objective. This subassignment of error is denied.

p. Existing Improvements

LUCU 9.8220(3) and 9.8520(4) require that applications for partitions and subdivisions show that the proposal will not cause "existing improvements on proposed lots" to be inconsistent with applicable LUCU standards. Petitioners contend, in Table 1.1, footnote 19, that these standards invite argument over what standards are "applicable" and when the proposal would cause existing improvements to be "inconsistent" with such standards.

The evident intent of LUCU 9.8220(3) and 9.8520(4) is to prevent development from rendering existing improvements nonconforming with respect to other LUCU standards. As explained above, that code provisions refer generally to other applicable standards, without listing those standards, does not in and of itself offend ORS 197.307(6). Whether existing improvements are rendered nonconforming with other applicable standards depends on the terms of those other standards, not on LUCU 9.8220(3) and 9.8520(4), which are themselves clear and objective. We reject petitioners' challenge to LUCU 9.8220(3) and 9.8520(4).

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q. Access Management Guidelines

LUCU 9.8220(4) requires that partitions abutting collector and arterial streets comply with "access management guidelines of the agency having jurisdiction over the street." Petitioners argue, in Table 1.1, footnote 20, that ORS 197.307(6) requires s*tandards*, not

[32] LUCU 9.8100(5) and 9.8445(5) require for conditional use permit or site review approval that:

> "Public improvements as required by this land use code or as a condition of tentative plan approval have been completed, or:
>
> "(a) A performance bond or suitable substitute as agreed upon by the city has been filed with the city finance officer in an amount sufficient to assure the completion of all required public improvements; or
>
> "(b) A petition for public improvements and for the assessment of the real property for the improvements has been signed by the property owner seeking the [approval], and the petition has been accepted by the city engineer."

guidelines. However, LUCU 9.8220(4) is itself a standard, one that requires compliance with certain guidelines, which thereby function as mandatory approval standards, despite their label. Petitioners make no argument that LUCU 9.8220(4) or the applicable guidelines are not clear and objective. For that reason we reject petitioners' challenges to LUCU 9.8220(4).

r. Availability of Public Facilities and Services

LUCU 9.8325(8) requires for PUD approval a showing that "[p]ublic facilities and services are available to the site[.]" Petitioners argue, in Table 1.1, footnote 22, that this standard is unclear because it does not define "public facilities and services," or specify the level of facilities and services sufficient to constitute being "available." Nothing in the text or context of LUCU 9.8325(8) indicates the scope of "public facilities and services," nor clarifies whether inadequate facilities and services are nonetheless "available." We agree that LUCU 9.8325(8) is not clear and objective.

s. Future Land Division

LUCU 9.8220(7) and 9.8520(9) require that partition and subdivision applications proposing parcels or lots in excess of 13,500 square feet shall indicate that such parcels or lots can be further divided without violating the code or "interfering with the orderly extension of adjacent streets, bicycle paths and accessways." LUCU 9.8220(7) and 9.8520(9) also provide that "[i]f the planning director deems it necessary" for future land division, "any restriction of buildings" within future streets, paths or accessways "shall be made a matter of record" in the plat approval. Petitioners argue, in Table 1.1, footnote 23, that the above-quoted language is unclear and grants the city impermissible discretion.

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The city responds that it will be sufficiently obvious in any given case whether or not future division of an oversize lot or parcel will interfere with future streets, paths or accessways. We agree. LUCU 9.8220(7) and 9.8520(9) require the application to show, by the location of property lines and other details, whether an oversize lot or parcel can be divided under the code. The application must also show that such future division will not interfere with extension of adjacent streets and paths. Whether such interference exists or not should be evident on the face of the partition or subdivision plat.

However, the second sentence of LUCU 9.8220(7) and 9.8520(9) grants the city discretion to restrict the location of buildings on the plat and make any such restrictions a "matter of record" in the plat approval. The city does not attempt to demonstrate that such grant of discretion is consistent with ORS 197.307(6). That aspect of LUCU 9.8220(7) and 9.8520(9) is not clear and objective. This subassignment of error is sustained, in part.

t. Dwellings within One-Quarter Mile of Park

LUCU 9.8325(9) requires that all proposed dwellings within a PUD be within one-quarter mile of a recreation area or open space. Petitioners argue, in Table 1.1, footnote 24, that the "method for measuring distance" in LUCU 9.8325(9) is not clear and objective. We understand petitioners to argue that it is fundamentally unclear whether the one-quarter mile distance is measured by how the crow flies, or by surface streets. The potential difference, we agree, is considerable. LUCU 9.8325(9) is not clear and objective.

u. Stormwater Runoff

LUCU 9.8325(10) requires that a PUD application demonstrate that:

"Stormwater runoff from the PUD will not create negative impacts on natural drainage courses either on-site or downstream, including, but not limited to, erosion, scouring, turbidity, or transport of sediment due to increased peak flows or velocity."

Petitioners argue, in Table 1.1, footnote 25, that discretionary terms such as "negative impacts" in LUCU 9.8325(10) are unclear and subjective. The city responds that LUCU

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9.8325(10) does not require discretion or the exercise of judgment; it simply requires *no* negative impacts from increased peak flows or velocity. While that standard may be difficult to meet, the city argues, it is clear and objective. We agree. *See 1000 Friends of Oregon v. LCDC (Hood River Co.)*, 91 Or App 138, 143, 754 P2d 22 (1988) (prohibition on any adverse impact on identified resources is clear and objective). LUCU 9.8325(10) is a prohibition on negative impacts of the type listed, caused by increased peak flows or velocity. Either the proposed PUD will meet that standard or it will not.[33] This subassignment of error is denied.

v. Solar Lot Standards

LUCU 9.8325(11) requires that lots proposed in a PUD for single-family detached dwellings shall comply with solar lot standards at LUCU 9.2790. Petitioners argue, in Table 1.1, footnote 26, that "whether the solar lot standards apply to the project as a whole or to a particular lot depends on a range of standards that are ambiguous or allow discretionary review."

The city responds, and we agree, that without more assistance from petitioners we cannot perform our review function. Petitioners do not identify the "range of standards" in LUCU 9.2790 they believe are ambiguous and discretionary, and none are apparent to us. Without some explanation, we do not see that there is any ambiguity or discretion involved in applying the solar lot standards pursuant to LUCU 9.8325(11). This subassignment of error is denied.

w. South Hills Development

LUCU 9.8325(13) prohibits development above an elevation of 900 feet within the boundaries of the South Hills Study, and further requires a 300-foot setback from the

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"ridgeline" unless the city manager determines that "the area is not needed as a connection to the city's ridgeline trail system." Petitioners argue, in Table 1.1, footnote 27, that LUCU 9.8325(13) is not clear and objective, because it is not clear how elevation is calculated, and the city manager's determination is discretionary. We disagree that either offends ORS 197.307(6). The elevation of land, like its slope, is an objectively determinable fact. As for "ridgeline," the city points out that LUCU 9.8325(13) itself describes the pertinent reference point as the "line indicated as being the urban growth boundary within the South Hills Study plan area." We agree with the city that because the 300-foot setback is clear and objective, offering a discretionary alternative to that requirement does not violate the statute. This subassignment of error is denied.

x. Blair Boulevard Special Area Zone

LUCU 9.3515 sets out a number of design standards for development within the Blair Boulevard Historic Commercial Special Area Zone. Petitioners argue, in Table 1.1, footnote 28, that some of the standards within one of the LUCU`s special zones, at LUCU 9.3515, are not

[33] We address, below, petitioners' argument that LUCU 9.8325(10) is so difficult to meet that it impermissibly forces needed housing applicants to opt for the alternative discretionary track.

clear and objective. Petitioners do not identify which of the numerous standards at LUCU 9.3515 they believe violate ORS 197.307(6). In any case, as far as we can tell the special zone is a Goal 5-designated historic area, and residential development within Goal 5-designated historic areas is not subject to statutory restrictions on needed housing. ORS 197.307(3)(e). We reject petitioners' arguments under LUCU 9.3515.

y. Multi-Family Housing

LUCU 9.5500 sets out standards for multi-family housing. LUCU 9.5500(4)(b) requires that on development sites with less than 100 feet of street frontage, at least 40 percent of the "site width" shall be occupied by a building placed within 10 feet of the minimum front yard setback line. LUCU 9.5500(5)(a) requires that multi-family buildings located within 40 feet of the front lot line shall have their "primary orientation" toward the street. Petitioners argue, in Table 1.1, footnote 29, that the above-quoted terms render these

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standards not clear and objective. However, both terms have plain, commonly understood meanings that are sufficiently clear and objective when read in context. This subassignment of error is denied.

z. Landscape Standards

LUCU 9.6220 requires that installed plant materials shall "meet current nursery industry standards," and shall be maintained "in a healthy and attractive manner." We agree with petitioners that these standards are not clear and objective. This subassignment of error is sustained.

B. Alternative Track

Petitioners' second general type of challenge is that certain standards, even if they are clear and objective, are so difficult or impossible to comply with that at least some needed housing applicants will be forced to apply for needed housing under the alternative, discretionary track. According to petitioners, the city has essentially legislated that some areas of the city or types of needed housing can be developed only under discretionary criteria. Petitioners contend that the city must ensure that the entirety of its inventory of buildable residential lands can be developed under clear and objective standards.

1. Emergency Response Times

In section II.A.2.j, above, we sustained petitioners' arguments that LUCU 9.8325(7)(j), 9.8520(7), and 9.8220(6) are not clear and objective. These provisions, part of the needed housing track, require for approval of a subdivision, planned unit development or partition in the South Hills area of the city that new dwellings shall be within a four or five-minute response time for emergency medical services. No similar requirement applies under the alternative, discretionary track. Petitioners argue that, even if these standards are made clear and objective, they suffer from the additional and unfixable flaw that they effectively rule out the possibility of developing needed housing in this area of town under nondiscretionary criteria.

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The city responds that nothing in the needed housing statutes requires that all areas of the city must be immediately available for development of needed housing under clear and objective standards, or that clear and objective standards be immediately applicable to every development proposing needed housing. According to the city, it is consistent with ORS 197.307 to prohibit development in certain areas of the city that are not yet fully served by urban services, such as emergency services, as long as such prohibitions are clear and objective.

Once emergency services are extended, the city argues, the developer may choose to use the needed housing track instead of the alternative track. The city contends that developers who do not choose to wait and who choose to develop notwithstanding arguably inadequate emergency services must comply with discretionary criteria requiring, among other things, minimization of fire risk. Providing developers that option, the city argues, does not offend ORS 197.307.

We generally agree with the city that nothing in the needed housing statutes requires that all of the city's buildable lands inventory must be developable at a given time. There may be other reasons why the city cannot impose temporary restrictions that affect the timing of development, to avoid overburdening public facilities and services.[34] However, ORS 197.307 is not concerned with the timing of development, and simply does not address that issue. If ORS 197.307 is not concerned with a temporary *total* prohibition on new housing, then we fail to see how the statute is offended by a temporary *partial* prohibition that allows development of needed housing under discretionary criteria that are designed to address the public safety concern that prompts the temporary restrictions. This subassignment of error is denied.

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2. Stormwater Runoff

In section II.A.2.u, we held that LUCU 9.8325(10) imposes a clear and objective requirement that stormwater runoff from a PUD will not "create negative impacts on natural drainage courses" such as erosion, turbidity or sediment transport, "due to increased peak flows or velocity." We agreed with the city that, while LUCU 9.8325(10) may be difficult to meet, its prohibition on negative impacts of the specified type is clear and objective. Petitioners argue that, even if LUCU 9.8325(10) is clear and objective, it nonetheless offends the needed housing statute, because it is so difficult to meet that it effectively forces needed housing applicants to opt for the alternative, discretionary track.[35] Petitioners submit that rain falls on all development, and all water moving across ground carries some sediment, creates some turbidity, and has some erosional component, no matter how minute, and therefore no PUD could possibly comply with LUCU 9.8325(10).

We agree with petitioners, at least in the abstract, that imposing a clear and objective standard that is impossible or virtually impossible to meet is a prohibition in the guise of a standard. ORS 197.307(3)(d) allows the city to offer a discretionary approval track, "provided the applicant retains the option of proceeding under the clear and objective standards[.]" That option is illusory if the clear and objective standards are impossible to satisfy. It may not be the case that LUCU 9.8325(10) is impossible to satisfy. However, the city provides no assistance on this point, or indeed respond to this subassignment of error at all. Accordingly, we sustain this subassignment of error.

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3. Conflicting Standards

Finally, petitioners argue that the LUCU violates ORS 197.307(6) because it lacks a clear and objective mechanism for resolving conflicts among clear and objective standards. Petitioners contend that certain clear and objective standards potentially conflict with each other

[34] Petitioners do not argue that the city's emergency response restrictions constitute a *de facto* moratorium, or that they endanger the city's ability to meet its Goal 10 (Housing) obligations within the relevant planning period.

[35] The corresponding alternative track standard is LUCU 9.8325(9), which provides:

> "Stormwater runoff from the PUD will not create *significant* negative impacts on natural drainage courses either on-site or downstream, including, but not limited to, erosion, scouring, turbidity, or transport of sediment due to increased peak flows or velocity." (Emphasis added.)

to the extent that, in approving or denying an individual application, the city might exercise some discretion in resolving that conflict. For example, petitioners note that PUD standards in the South Hills area of the city require that 40 percent of the development site be preserved in contiguous open space, which excludes improvements such as streets. However, petitioners argue, this potentially conflicts with other PUD standards that require streets to connect in the direction of all existing or planned streets within one-quarter mile of the site.

Petitioners concede that the city's code includes adjustment procedures that allow an applicant to seek relief from particular standards, and that an applicant might invoke such procedures if the application presented a conflict in the manner hypothesized above. However, petitioners contend that the adjustment procedures are not themselves clear and objective, and therefore cannot satisfy ORS 197.307(6). According to petitioners, only a clear and objective conflict mechanism can satisfy the statute. Petitioners offer no suggestion as to what a "clear and objective" conflict procedure might look like.

The city responds that, if any conflict between clear and objective standards such as that hypothesized ever arises, then one of two things will happen. To avoid denial for failure to meet all clear and objective standards, the applicant will either (1) modify the application so that it meets all clear and objective standards; or (2) invoke the city's discretionary adjustment procedure, to adjust one or more standards. If the applicant fails to do either, the city argues, it will deny the application for failure to meet all standards.

ORS 197.307 does not require a conflict mechanism for resolving potential conflicts between clear and objective criteria. If any two clear and objective standards conflicted on

their face, such that it was impossible to satisfy both, then we might well agree with petitioners that such standards offend the statute. However, petitioners have not identified any clear and objective standards that conflict on their face. At most, petitioners speculate that an application for development of a particular site might not be able to show compliance with two clear and objective standards, either because of a particular aspect of the proposal or because of some feature of the site or its surroundings that makes it difficult or impossible to satisfy both standards. In the former circumstance, the applicant can modify the proposal so that it complies with all standards. In the latter, the problem is not conflicting standards, but rather that some feature of the site makes it difficult or impossible to comply with all applicable standards. The city's adjustment processes are apparently designed for just such circumstances. In neither circumstance is it accurate to say that the *standards* conflict. In sum, we do not see that the absence of some mechanism for resolving potential conflicts between standards violates ORS 197.307. This subassignment of error is denied.

III. Discourage Needed Housing Through Unreasonable Cost or Delay

Finally, petitioners argue in Home Builders' third assignment of error that a number of LUCU provisions, even if clear and objective, nonetheless violate ORS 197.307(6) because they "discourage needed housing through unreasonable cost or delay." These LUCU provisions do so by either (1) reducing the area of development sites that can be developed; (2) requiring additional amenities in connection with development; or (3) imposing burdensome requirements for filing complete applications for development.

For example, petitioners argue that, as discussed below in regard to Goals 5, 9 and 10, the LUCU requires protection of "critical root zones" for trees. Petitioners argue that such regulations effectively reduce the supply of buildable land, and thus increase demand and price. Similarly, petitioners argue that certain LUCU provisions require new amenities, such as

landscaping, and a new requirement that all on-site utilities be placed underground, that will increase the cost of needed housing. Petitioners also argue that new informational

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requirements for geotechnical reports, new requirements for pre-application conferences, and requirements that tentative PUD approvals undergo public hearings will increase costs and cause delay in the development of needed housing.

ORS 197.307(6) prohibits standards, conditions or procedures for approval that, either in themselves or cumulatively, discourage needed housing "through unreasonable cost or delay." The statute does not prohibit *reasonable* cost or delay. In our view, the question of whether approval standards or procedures discourage needed housing through *unreasonable* cost or delay cannot, in most cases, be resolved in the abstract, in a challenge to a legislative decision that adopts such standards or procedures. In the absence of actual application of standards or procedures in a particular case, it is difficult to see how any party could demonstrate what the delay or additional cost might be, whether that delay or cost is reasonable or unreasonable, and whether that delay or cost discourages needed housing, either alone or in combination with other standards or procedures. Because different sets of standards and procedures will apply to different applications in different areas of the city, demonstrating in the abstract that standards or procedures *cumulatively* discourage needed housing is rendered even more difficult. These difficulties are apparent in the present case, because the petitions for review make no attempt to demonstrate why any standards or procedures, alone or cumulatively, result in *unreasonable* cost or delay, much less what those costs or delay might be. While petitioners argue that certain standards or procedures are likely to increase cost or delay, they make no effort to demonstrate that such increased cost or delay is unreasonable, alone or cumulatively. With the possible exception discussed below, we believe it is highly unlikely that such a demonstration can be made or, if made, reviewed in a meaningful manner, except in the context of an "as-applied" challenge.

One exception to the foregoing is a challenge against a standard or procedure on the grounds that the standard or procedure is unreasonable as a matter of law; in other words, the standard or procedure lacks a rational basis. Any cost or delay attributable to a standard or

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procedure that lacks a rational basis is perforce "unreasonable," whatever the actual cost or delay that might be incurred in a particular case. Such a facial challenge can be meaningfully addressed and resolved in an appeal of a legislative decision.

In the present case, the only challenges we perceive that argue, in essence, that a standard or procedure lacks a rational basis are petitioners' challenges to two procedural requirements.

Petitioners first contend that LUCU 9.6710 requires a "geotechnical" analysis for any proposed PUD, site review, or subdivision application on land with slopes equal to or greater than five percent, and for any proposed development that includes construction of a public street, alley, drainage system or sewer. One of three levels of analysis is required, depending on the slope. The purpose of this informational requirement, according to LUCU 9.6710(1), is to ensure that facilities in "areas of known or potential unstable soil conditions are located, designed and constructed in a manner that provides for public health, safety, and welfare." However, petitioners argue that the results of the required geotechnical analysis are not tied to any approval standard. Because the required information is not related to any approval standard, we understand petitioners to argue, it is a purposeless requirement that functions only to increase costs and cause delay.

The city's statewide Goal 7 (Areas Subject to Natural Disasters and Hazards) findings discuss the geotechnical analysis requirement at LUCU 9.6710, and suggest that "development must occur in accordance with the analysis' recommendations." Record 496. However, the city does not identify any standard that imposes that requirement, or that relies on the required geotechnical analysis in any way. As far as we can tell, the geotechnical analysis requirement functions only to supply the city with potentially expensive information that has no bearing on any approval standard. Consequently, we agree with petitioners that the requirement violates ORS 197.307(6).

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The second procedure is at LUCU 9.7055, which makes tentative PUD approvals subject to the city's "Type III" procedures, which require a public hearing. Petitioners argue that approval under clear and objective standards should not require a hearing at all, and at most should be subject to administrative approval under a "Type I" procedure, which does not provide for notice, opportunity for comment, hearing or local appeal. We understand petitioners to contend that the only apparent purpose for requiring a hearing for tentative PUD approval is to impose additional costs and delay on needed housing. The city responds that subdivisions and site review approvals are "limited land use decisions" as defined at ORS 197.015(12), which by statute must provide notice and opportunity for comment and thus must be processed under at least "Type II" procedures, which provide for notice, opportunity for comment and local appeal. Similarly, the city argues, tentative PUD approval is a "permit" decision as defined at ORS 227.160(2), which must be processed under procedures that provide the opportunity for a public hearing. We agree that petitioners have not demonstrated that the hearing requirement for tentative PUD approval lacks a rational basis.

The first and third assignments of error (Home Builders) are sustained, in part.

SECOND ASSIGNMENT OF ERROR (HOME BUILDERS)

FOURTH ASSIGNMENT OF ERROR (CHAMBER)

Petitioners contend that the city erred in adopting a number of LUCU provisions regulating natural resources, including inventoried Goal 5 resources, without complying with the requirements of Goal 5 and the Goal 5 administrative rule at OAR chapter 660, division 23.

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The city's adoption of the LUCU is a "post-acknowledgment plan amendment," or PAPA.[36] In adopting a PAPA, local governments are required to apply Goal 5 only if the PAPA "affects a Goal 5 resource." OAR 660-023-0250(3).[37] As defined in that rule, and as relevant

[36] OAR 660-023-0010(5) defines a PAPA to include "amendments to an acknowledged comprehensive plan or land use regulation and the adoption of any new plan or land use regulation."

[37] OAR 660-023-0250(3) and (4) provide, in relevant part:

> "(3) Local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if:
>
> "(a) The PAPA creates or amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5;
>
> "(b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list[.]
>
> "* * * * *

here, the LUCU "affects a Goal 5 resource" only if it (1) "creates or amends a resource list"; (2) amends a "land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5"; or (3) "allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list."

Petitioners argue that the LUCU "creates or amends a resource list" within the meaning of OAR 660-023-0250(3)(a), because the city essentially adopted a program of protecting *unacknowledged* and *uninventoried* Goal 5 resources, without completing the Goal 5 process. Further, petitioners contend that the LUCU amends regulations protecting

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inventoried Goal 5 resources, without addressing the requirements of Goal 5 and the Goal 5 rule.

The challenged decision takes the position that the LUCU does not "affect" any Goal 5 resource, and therefore the LUCU is consistent with Goal 5.[38] The city's response brief argues that, to the extent any LUCU amendment "affects a Goal 5 resource," the amendment is consistent with the Goal 5 inventory and the original program to protect the resource, and therefore the amendment is consistent with Goal 5. The city also argues that the city can regulate or protect environmental resources that are not inventoried Goal 5 resources, without doing so under Goal 5, and that such regulations do not constitute creation or amendment of a "resource list," or otherwise trigger application of the Goal 5 rule.

I. Creates or Amends a Resource List

To address the last argument first, we agree with the city that no authority brought to our attention requires that the city in all cases apply Goal 5 and the Goal 5 rule before it amends its acknowledged land use regulations to protect resources that are indisputably *not* part of the city's acknowledged inventory of Goal 5 resources. *See Ramsey v. City of Portland*, 30 Or LUBA 212, 217 (1995) (adoption of an ordinance regulating the cutting of individual trees does not affect any Goal 5 site nor implicate Goal 5, even though it arguably furthers the objectives of Goal 5). The city explains that it is currently in periodic review

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and, as part of periodic review, it is updating its Goal 5 inventory.[39] The city argues that adoption of the LUCU is not part of that periodic review task and is not intended to create or add to the city's list or inventory of Goal 5 resources. We agree that the city is required to comply with and complete the Goal 5 process only if and to the extent its decision "affects a Goal 5 resource" or otherwise triggers application of the Goal 5 rule. *See Rest-Haven Memorial Park v. City of*

> "(4) Consideration of a PAPA regarding a specific resource site, or regarding a specific provision of a Goal 5 implementing measure, does not require a local government to revise acknowledged inventories or other implementing measures, for the resource site or for other Goal 5 sites, that are not affected by the PAPA, regardless of whether such inventories or provisions were acknowledged under this rule or under OAR 660, Division 16."

[38] The decision's Goal 5 findings state, in relevant part:

> "The Metro Plan has an acknowledged Goal 5 inventory. The changes to the [LUCU] do not [a]ffect the existing measures that ensure that Goal 5 resources are maintained. * * *" Record 495.
>
> "* * * None of the changes to the [LUCU] are intended specifically to protect a Goal 5 resource and none of the changes would allow a use inconsistent with a Goal 5 resource identified for protection. Therefore, the changes to the [LUCU] are consistent with Goal 5." Record 496.

[39] We understand the "resource list" referenced in OAR 660-023-0250(3) to be the same thing as the city's Goal 5 inventory.

Eugene, 39 Or LUBA 282, 299, *aff'd* 175 Or App 419, 28 P3d 1229 (2001) (ordinance adopting new protections for both inventoried Goal 5 drainageways and noninventoried waterways, as an "interim protection" pending completion of the city's Goal 5 process, must be consistent with the Goal 5 rule). Petitioners have not established that the LUCU was intended to create a Goal 5 resource list or has the effect of amending the city's acknowledged Goal 5 resource list. Accordingly, we focus our analysis on petitioners' arguments under OAR 660-023-0250(3) that the LUCU amends the city's acknowledged programs for protecting inventoried Goal 5 resources, without complying with the rule.

II. Amendment of Regulations Protecting Goal 5 Resources

The parties agree that the starting point for analysis under OAR 660-023-0250(3) is to identify the city's acknowledged Goal 5 inventory and the program that was adopted to protect significant Goal 5 resources. The next step is to determine whether any LUCU provision amends a "land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5" or "allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list."[41] If so, then the city must address and comply with the Goal 5 rule, in adopting such provisions.

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A. Goal 5 Inventory

Identifying the city's Goal 5 inventory is not an easy task, in part because it was adopted as part of a regional planning process, and in part because the inventory consists, as far as we can tell, of a large collection of various "working papers" and maps. In Table 2.1, accompanied by 60 footnotes, Home Builders attempts to correlate acknowledged, inventoried Goal 5 resources with LUCU provisions that allegedly affect those resources. Column A of Table 2.1 organizes the inventoried resources in six pertinent categories: areas of significant vegetation, wildlife and wildlife habitat (VWWH); scenic areas; water areas; Willamette River Greenway; sand and gravel areas, and energy sources.

The city argues, and petitioners do not dispute, that most of the 35 identified VWWH and all of the sand and gravel sites are not within the City of Eugene or were excluded from the city's inventory of significant Goal 5 sites during the acknowledgment process. The city states that only eight of the listed VWWH areas and none of the sand/gravel areas are included on the city's acknowledged Goal 5 inventory. The eight VWWH sites are Bertlesen Slough, Willow Creek Wetlands, Willamette Wetlands, Delta Ponds, Skinner's Butte Park, Alton Baker Park, Hendricks Park and Amazon Park.

Significant scenic areas are not listed in any resource list, but instead are mapped at Figure H-2, which appears in the Home Builders Appendix III, 117. Buttes, ridgelines, viewpoints with public access, parklands, golf courses and cemeteries are identified as scenic areas on Figure H-2. Apparently some of the VWWH sites are also scenic areas. Significant water areas are mapped on a different map, found in the city's Appendix, at 125.[40] Water areas include bodies of water, wetlands, stream corridors, floodways and aquifer recharge areas. Some VWWH sites are also water sites. The Willamette River Greenway is identified by maps J-1, J-2 and J-3, found in the Home Builders Appendix III, 133, 137, 139.

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With respect to energy sources, petitioners claim that although the city addressed energy sources such as solar energy under different goals than Goal 5, such resources are in

[40] The significant water areas map is also labeled Figure H-2.

fact Goal 5 resources, and therefore part of the city's Goal 5 inventory. Accordingly, petitioners argue, several LUCU amendments affecting the city's solar standards must comply with the Goal 5 rule. The city does not respond specifically to this claim, although as discussed below it argues generally that petitioners have in many cases failed to demonstrate that challenged LUCU provisions are part of the city's Goal 5 program. We agree that petitioners have not demonstrated that "energy sources" are an inventoried Goal 5 resource, and that the city's solar standards are part of the city's Goal 5 program.

B. Program to Achieve the Goal

For each of the above-described categories of inventoried sites, Column C of Table 2.1 lists categories of LUCU provisions that allegedly apply to those inventoried resources. Petitioners contend that these provisions either increase or decrease the level of protection provided by the city's acknowledged Goal 5 program. For example, petitioners argue that for many kinds of development approvals, including site review, subdivisions, PUDs and conditional use permits, the LUCU requires the "preservation of significant natural features," and provides a list of such features.[41] According to petitioners, these increased protections

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apply to lands that include inventoried Goal 5 resources such as wildlife habitat, wetlands, riparian corridors and natural areas. Therefore, petitioners argue, the city cannot adopt such amendments unless it first addresses and complies with Goal 5 and the Goal 5 rule.

Identifying the city's program to achieve Goal 5 is even more problematic than identifying its Goal 5 inventory. The city takes the position, and we do not understand petitioners to

[41] For example, LUCU 9.8090(5) requires for conditional use permit approval that:

> "The proposal is designed and sited to minimize impacts to the natural environment by addressing the following:
>
> "(a) Protection of Natural Features. The preservation of significant natural features to the greatest degree attainable or feasible, including:
>
> "1. Significant on-site vegetation, including rare plants (those that are proposed for listing or are listed under state or federal law), and native plant communities.
>
> "2. All documented habitat for all rare animal species (those that are proposed for listing or are listed under state or federal law).
>
> "3. Prominent topographic features, such as ridgelines and rock outcrops.
>
> "4. Wetlands, intermittent and perennial stream corridors, and riparian areas.
>
> "5. Natural resource areas designated in the Metro Plan diagram as `Natural Resource' and areas identified in any city-adopted natural resource inventory.
>
> "(b) Tree Preservation. The proposed project shall be designed and sited to preserve significant trees to the greatest degree attainable or feasible * * *:
>
> "* * * * *
>
> "(c) Restoration or Replacement. The proposal mitigates, to the greatest degree attainable or feasible, the loss of significant natural features described in criteria (a) and (b) above, through the restoration or replacement of natural features such as:
>
> "1. Planting of replacement trees within common areas; or
>
> "2. Re-vegetation of slopes, ridgelines, and stream corridors; or
>
> "3. Restoration of fish and wildlife habitat, native plant habitat, wetland areas, and riparian vegetation.
>
> "* * * * *"

dispute, that the scope of the program, *i.e.*, the portion of the comprehensive plan and land use regulations that were adopted in order to protect a significant Goal 5 resource, are those identified in various LCDC acknowledgment orders attached to the parties' briefs. These orders discuss a number of measures to protect Goal 5 resources that include, as far as we can tell, the following: certain Metro Plan policies, certain plan designations, certain zoning classifications, the South Hills Study, the land division code, and certain specific zoning ordinance provisions addressing PUDs, cluster subdivisions, site

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review, tree preservation, and building height limitations. We discuss, below, the parties' disputes over whether specific challenged LUCU provisions are part of the city's program to achieve Goal 5.

The city offers a number of general and specific defenses to petitioners' arguments. We address the city's general defenses first and then the parties' specific arguments regarding particular resources and code provisions. For the reasons explained below, we agree with petitioners that some LUCU amendments amend regulations that apply to and protect some inventoried Goal 5 resources. Petitioners are correct that the city cannot adopt such amendments unless it addresses and complies with Goal 5 and the Goal 5 rule.

C. The City's General Defenses

1. Increased Protection to Goal 5 Resources

The first general defense is the city's repeated argument that, to the extent a LUCU provision applies to an inventoried Goal 5 resource and merely *increases* the level of protection afforded that resource, such an amendment is necessarily consistent with Goal 5, without further inquiry, as long as the city's Goal 5 inventory designates that resource for "protection" against conflicting uses. In other words, the city argues, once the city chooses as part of its original Goal 5 process to fully protect a resource from conflicting uses, and adopts measures to protect that resource, the city may subsequently increase the level of protection provided, and that increased protection either does not trigger Goal 5 review or is axiomatically consistent with Goal 5.

We disagree. The city adopted its Goal 5 inventory and program to achieve the goal under OAR chapter 660, division 16, which requires that the city make a policy choice, based on its Goal 5 analysis, with respect to each resource site to (1) fully protect the site against conflicting uses, (2) limit conflicting uses, or (3) fully allow conflicting uses. OAR 660-016-0010.[42]

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The city explains that for most resource sites the identified conflicting uses were "(1) aggregate extraction versus other Goal 5 values; (2) timber harvest versus other Goal 5 values; and (3) low density residential development as it encroaches upon natural resources at the urban fringe." Response Brief 57, *quoting* Appendix 134. In choosing to protect a site, the city adopted various measures designed to protect the site from conflicting uses, and those measures were acknowledged by LCDC to comply with Goal 5. Certainly the city could not *decrease* the level of protection provided by those measures, without demonstrating that such decreased protection is consistent with Goal 5. The rationale for requiring that demonstration where the city *increases*

[42] The city's original Goal 5 analysis and inventory was developed under the old Goal 5 rule at OAR chapter 660, division 16. A similar requirement to determine whether a significant resource should be protected, partially protected, or not protected against conflicting uses, based on an economic, social, environmental and energy (ESEE) analysis, is found at OAR 660-023-0040.

the level of protection is less obvious, but we believe that OAR 660-023-0250(3) nonetheless requires such a demonstration. In relevant part, the text of the rule provides that any PAPA that amends a land use regulation adopted in order to protect a significant Goal 5 resource must comply with Goal 5. The rule is not limited to amendments that decrease levels of protection. If LCDC intended the rule to exclude amendments that increase levels of protection to protected sites, it could have easily said so.

Further, in originally choosing a level of protection consistent with Goal 5, the city necessarily made a choice under Goal 5 to balance a variety of conflicting considerations, including the relative value of the conflicting uses that the site is protected against, how stringent protections should be, and the economic and social costs and benefits of those protections. That choice was presumably based in part on the rule-required environmental, social, economic and energy (ESEE) analysis that was developed by the city to decide to protect, partially protect, or not protect the resource. OAR 660-016-0010. That choice may

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have involved balancing, for example, the city's Goal 5 obligations with its obligations under other statewide planning goals, such as Goals 9 (Economic Development) and 10. *See* ORS 197.340 (local governments must give statewide planning goals equal weight). The city must justify post-acknowledgment decisions to increase the level of protection given to inventoried Goal 5 resources, which will presumably disturb the balance of conflicting considerations arrived at 20 years earlier in its original Goal 5 analysis.

2. Nonsubstantive Changes

The second general defense is the city's frequent argument that amendments to certain challenged LUCU provisions are carried forward from the EC with only minor editorial or nonsubstantive changes. The city argues that such nonsubstantive changes do not require review under Goal 5.

We generally agree that provisions acknowledged to comply with Goal 5 that are carried forward without substantive change into newly codified regulations do not constitute an "amendment" of a Goal 5 regulation for purposes of OAR 660-023-0250(3). The difficulty, of course, is determining whether any changes are truly nonsubstantive. For example, LUCU 9.6715(3), which the city holds up as an example of nonsubstantive change, carries forward the same height limitation in EC 9.536(c), in almost identical terms.[43] We

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[43] For example, petitioners allege that height limitation provisions at LUCU 9.6715(3) affect the inventoried Skinner's Butte area, among others. The city argues that LUCU 9.6715(3) is substantively the same as EC 9.536(c). We quote the relevant LUCU and EC provisions below:

> **EC 9.536(c):**
>
> "Height limitations to be established to protect the view from and to the Skinner Butte area. This area is further described as follows: All property lying east of Washington Street and lying north of the Southern Pacific Railroad tracks, and lying west of Coburg Road, and lying south of the Willamette River.
>
> "The maximum height of any building where the existing ground elevation is below 460 feet shall be to an elevation of 500 feet. The maximum height of any building where the existing ground elevation is above 460 feet shall be 40 feet above the existing ground elevation at all points. In neither case shall the maximum height in the zoning district within which the building or structure is located be exceeded."

have little trouble agreeing with the city that any changes to the height limitation itself are nonsubstantive. However, we note that LUCU 9.6715(3) also appears to change the southern boundary of the Goal 5-protected Skinner's Butte scenic area. *See* n 45. If *that* amendment is challenged, a simple response that the change is "nonsubstantive" may not be sufficient to demonstrate that the amendment does not require review under Goal 5. A change in the area to which a regulation applies is a substantive change.

D. Specific Challenges

Column C of Table 2.1 lists more than a dozen categories of LUCU provisions that petitioners argue apply to one or more of the Goal 5 resources listed in Column A.

1. Height Limitation Areas

In Table 2.2, footnotes 6 and 20, petitioners challenge height limitations at LUCU 9.6715(3) and (4). As noted above, LUCU 9.6715(3) includes height limitations for Skinner's Butte. LUCU 9.6715(4) includes height limitations for Gillespie Butte. We agree with the city that the LUCU 9.6715(3) height limitations for Skinner's Butte are the same as in EC 9.536(c), which are acknowledged to comply with Goal 5. Petitioners offer no other challenge to LUCU 9.6715(3). With respect to LUCU 9.6715(4), the city does not dispute that the LUCU imposes new height limitations regarding Gillespie Butte, which under the previous code was not subject to any Goal 5-related height limitations. The city's only

LUCU 9.6715(3):

"Skinner Butte Height Limitation Area. The boundaries of the Skinner Butte Height Limitation Area are as follows:

"All property lying east of Washington Street, lying north of, and including, the north side of 6th Avenue, lying west of Coburg Road, and lying south of the Willamette River. (See Map 9.6715(3) Skinner Butte Height Limitation Area.) Within the Skinner Butte Height Limitation Area, the maximum height of any structure where the existing ground elevation is at, or below, 460 feet above mean sea level shall be to an elevation of 500 feet above mean sea level. The maximum height of any building where the existing ground elevation is above 460 feet mean sea level shall be 40 feet above the existing ground elevation at all points. In neither case shall the maximum height of any building or structure exceed the maximum allowed in the zone."

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response is that such new limitations are consistent with the "protected" status of Gillespie Butte, and therefore necessarily consistent with Goal 5 and the Goal 5 rule, without further inquiry. We rejected that general defense, above. OAR 660-023-0250(3) requires that the city apply the Goal 5 rule to determine whether the additional protection imposed by LUCU 9.6715(4) is consistent with the goal and rule. There is no dispute that the city did not do so. This subassignment of error is sustained.

2. Subdivision, Site Review, PUD, and Conditional Uses

Petitioners argue that a number of LUCU provisions governing subdivision, site review, PUD, and conditional use permits change the level of protection afforded the inventoried VWWH areas, the inventoried scenic areas, the inventoried water areas and portions of the Willamette River Greenway, and therefore the city must demonstrate that they comply with Goal 5 and the Goal 5 rule. The provisions applicable to conditional use permits requiring preservation of

significant natural features were set out earlier at n 43. The LUCU contains similar or identical provisions for subdivisions, site review and PUD applications.[44]

The city responds that petitioners have not related any of the identified LUCU provisions to any specific VWWH resource site, or explained why those provisions apply or potentially apply to development of those sites. The city also argues that at least the challenged subdivision provisions cannot apply to any of the eight identified significant VWWH areas, because each is subject to a combination of zoning, minimum lot size or comprehensive plan provisions that effectively prohibit any subdivision.[45]

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We agree with the city that petitioners have not demonstrated that *all* of the identified LUCU provisions apply to specific resource sites. The city may well be correct that the eight listed VWWH sites cannot be subdivided, and therefore the challenged subdivision provisions will never apply to those sites. On the other hand, it seems apparent that some challenged provisions apply to at least some Goal 5 sites. For example, Bertelsen Slough, an inventoried site, is zoned I-2, which permits a wide range of conditional uses. *See* LUCU 9.2450. The city does not argue that Bertelsen Slough cannot be developed with, for example, conditional uses, nor dispute that such uses would be subject to the requirement at LUCU 9.8090(5) that approved conditional uses preserve significant natural features to the maximum extent feasible. *See* n 43. Similarly, Delta Ponds is zoned PL, which allows a wide range of conditional uses. Further, Delta Ponds is subject to both PD and SR overlay zones, which require that any proposed development, including permitted uses, comply with the PUD and site review provisions that, again, require protection of significant natural resources. In short, it appears that in one form or another the challenged requirements to protect significant natural resources are potentially applicable to most if not all of the identified VWWH areas. The city makes no argument that the inventoried scenic and water areas and the Willamette River Greenway can never be subject to the identified criteria.

In sum, petitioners are correct that the city must apply the Goal 5 rule to these criteria, and determine whether they are consistent with the goal and rule. If the city can better explain why certain criteria, such as the challenged subdivision criteria, cannot apply to

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identified Goal 5 resource sites, then the city need not evaluate those criteria under the rule. Where challenged criteria potentially apply to development of Goal 5 resource sites, the city must explain why those criteria are consistent with the goal and rule. This subassignment of error is sustained.

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[44] The challenged LUCU provisions include subdivision criteria at LUCU 9.8515(7) and 9.8520(8), site review criteria at LUCU 9.8440(2) and 9.8445(3), PUD criteria at LUCU 9.8320(4) and 9.8325(4), and conditional use criteria at LUCU 9.8090(5) and 9.8100(3). These criteria are challenged in Table 2.1, footnotes 7, 13, 14, 15, 21, 27, 28, 29, 36, 42, 44, 45, 49, 50, 53, and 56.

[45] The city argues that the zoning, lot size and plan designation of the following sites listed as significant vegetation, wildlife and wildlife habitat areas effectively prohibit subdivision: (1) Bertlesen Slough, privately owned, designated Natural Resources (NR) and zoned Light-Medium Industrial (I-2), with Wetland Buffer (WB) and Site Review (SR) overlays; (2) Willow Creek Wetlands, privately owned, designated NR and zoned Agriculture (AG) with WB and Waterside Protection (WP) overlays; (3) Willamette Wetlands, privately owned, designated Parks and Open Space and zoned AG; (4) Delta Ponds, publicly owned, designated Parks and Open Space and zoned Public Land (PL) with Planned Unit Development (PD) and SR overlays; (5) Skinner's Butte, publicly owned, designated Parks and Open Space and zoned PL; (6) Alton Baker Park, publicly owned, designated Parks and Open Space and zoned PL; (7) Hendricks Park, publicly owned, designated Parks and Open Space and zoned PL; and (8) Amazon Park, publicly owned, designated Parks and Open Space and zoned PL. The AG zone has a 20-acre minimum lot size; the PL zone has a minimum 6,000 square foot lot size. Response Brief 56-57 n 43.

3. Public Land Zone

Petitioners argue, in Table 2.1, footnotes 8 and 22, that specified amendments to the provisions governing the Public Land (PL) zone, at LUCU 9.2680 to 9.2687, alter protections afforded to inventoried VWWH areas and, to the extent any inventoried scenic areas fall within the zone, to scenic areas.

The city disputes that the PL zone provisions constitute regulations that were adopted "in order to protect a significant Goal 5 resource." OAR 660-023-0250(3). We understand the city to argue that the PL zone plays no role in the city's program to achieve Goal 5 that was acknowledged by LCDC, and therefore any amendments to the PL zone need not be evaluated under the Goal 5 rule. As noted above, several inventoried VWWH areas are zoned PL. Petitioners argue that the purpose of the PL zone is to implement the Metro Plan by providing areas for government services including "parks and open space." LUCU 9.2680. Petitioners contend that the PL zone implements Metro Plan Goal 5 policies to protect inventoried VWWH and scenic areas.

As far as we can tell, none of the LCDC acknowledgment orders specifically discuss the PL zone as a Goal 5 implementing measure. However, one order discusses the "parks and open space" plan designation as a Goal 5 designation, and also plan policies that require protection of open space through various means, including zoning. Response Brief App 136, 138. A zoning classification that implements a Goal 5 plan designation and is applied to an inventoried Goal 5 resource would seem to be among the regulations that "protect a significant Goal 5 resource" within the meaning of OAR 660-023-0250(3). Given the purpose of the PL zone, and that each of the VWWH sites zoned PL is designated "parks and

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open space," it appears that the PL zone implements the "parks and open space" plan designation. Although there is ambiguity on this point, we agree with petitioners that the PL zoning classification implements a Goal 5 plan designation and, therefore, amendments to that zone must comply with the Goal 5 rule. There is no dispute that the city did not evaluate these amendments under the rule. This subassignment of error is sustained.

4. Park, Recreation, and Open Space Zone

The LUCU adopts a new zoning classification at LUCU 9.2600 *et seq*., the Parks, Recreation, and Open Space (PRO) zone, but that zone has not yet been applied to any properties. The purpose of the PRO zone is to implement the Metro Plan by providing areas that preserve parks, recreation areas and open spaces. LUCU 9.2600. The city explains that the PRO zone is designed to be applied to sites that, under the EC, would be zoned PL. The city's Goal 5 findings explain that the zone is intended to protect the city's Goal 5 open space resources. Petitioners argue that many PRO provisions increase the level of protection provided to parks and open spaces under the EC.

The city responds that because the PRO zone has not yet been applied to any property, the adoption of the zone cannot possibly trigger Goal 5. For the reasons expressed above in our discussion of the PL zone, we agree with petitioners that the PRO zone is among the regulations that "protect a significant Goal 5 resource." That the city has not yet applied the zone to any property does not mean that adoption of the zone escapes scrutiny under Goal 5 or the Goal 5 rule. This subassignment of error is sustained.

5. Natural Resource Zone

Petitioners contend in Table 2.1, footnotes 10 and 24, that six LUCU amendments to the NR zone provisions at LUCU 9.2500 *et seq*. increase or decrease the protection afforded Goal 5

resources. The city responds that three of the six amendments are merely nonsubstantive clarifications of EC provisions. We do not agree that the three disputed

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amendments are accurately characterized as nonsubstantive.[46] The city does not respond to petitioners' arguments regarding the other three amendments. This subassignment of error is sustained.

6. Wetland Buffer Overlay

Two of the VWWH sites are subject to the Wetland Buffer (WB) overlay zone, and the zone is intended to protect wetlands, which are inventoried significant water areas. Petitioners assert, and the city does not dispute, that the WB zone applies to portions of the Willamette River Greenway. In Table 2.1, footnotes 11 and 40, petitioners argue that five amendments to the WB zone provisions at LUCU 9.4800 *et seq*. increase or reduce protections afforded these Goal 5 resources.[47]

The city responds that each of the five amendments is merely a nonsubstantive clarification or change to previous EC provisions. The only disputed amendment that is clearly nonsubstantive is the deletion of EC 9.264(8), which is replicated in substantially

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similar terms at LUCU 9.7025(1). We cannot say that the remaining amendments are nonsubstantive. The city offers no other basis to conclude that these amendments are consistent with Goal 5 or that they comply with the Goal 5 rule. This subassignment of error is sustained, in part.

7. Waterside Protection Overlay

One of the VWWH sites is subject to the Waterside Protection (WP) overlay zone, and the zone is intended to protect designated waterways, riparian areas and adjacent wetlands. Petitioners assert, and the city does not dispute, that portions of the Willamette River Greenway are subject to the WP zone. Petitioners argue, in Table 2.1, footnotes 12 and 41, that 11 LUCU

[46] LUCU 9.2520(3)(c)(3) adds language to a section listing the uses permitted subject to site review, to state that "[s]tructures for the control of water are not considered impervious surfaces for the purpose of this section." LUCU 9.2520(4)(h) changes EC 9.306, which prohibited application of chemicals unless necessary to address an imminent threat to public health and safety, to specify that the planning director must make the determination that application of chemicals is necessary. LUCU 9.2530(2)(a) deletes language at EC 9.305(b)(1)(e) that provided that vegetation removal is limited to the removal of "[t]he minimum area of native vegetation necessary for approved uses or conditional uses or uses allowed by exception as specified in [EC] 9.262 and 9.264." That language was replaced by language at LUCU 9.2530(2)(b), which states that vegetation removal shall be "the minimum necessary for the proposed use and shall avoid removal of native vegetation to the extent practicable."

[47] EC 9.264(2) states that the Wetland Buffer overlay zone applies to land adjacent to wetlands identified in the West Eugene Wetlands Plan. LUCU 9.4815 states that the zone "may" be applied to such lands. Petitioners argue that this change renders application of the zone discretionary. LUCU 9.4820 removes "gravel parking areas" from the EC 9.264(3) definition of development exempt from the overlay zone, but adds a similar exemption for gravel areas constructed prior to May 24, 1995, as an essential component of the development. LUCU 9.4820 also specifies that "unauthorized fill" does not constitute exempt development. LUCU 9.4830(2)(a)(5) allows "[m]aintenance of existing utility *facilities* and easements" as a permitted use in the overlay zone. (Emphasis added.) EC 9.264(4)(b)(1)(e) formerly provided for "[m]aintenance of existing utility easements" as a permitted use in the zone. EC 9.264(6) specified that all development proposals shall be reviewed under the site plan review procedures. The LUCU deletes EC 9.264(6) but does not replace it with any specified procedure. EC 9.264(8) required a performance contract for any site or conditional use approval in the zone. The LUCU deletes EC 9.264(8), but imposes substantively identical requirements at LUCU 9.7025(1).

amendments to the WP zone provisions at LUCU 9.4700 *et seq.* increase or reduce protection to Goal 5 VWWH and water area resources.

The city responds that each of the 11 challenged amendments is not subject to review under the Goal 5 rule because it either increases levels of protection to already protected Goal 5 resources, or consists only of nonsubstantive changes. We rejected the first defense, above. We cannot say that the remaining amendments are nonsubstantive, with the exception of an amendment to LUCU 9.4760(2). Petitioners argue that LUCU 9.4760(2) deletes a requirement at EC 9.262(7)(c) that four factors be considered "in the order listed." We agree with the city that, notwithstanding the deletion of the above-quoted language, the requirement continues to exist in LUCU 9.4760(2) that the four factors be considered in the order listed.[48] The city offers no other basis to avoid addressing the other amendments under the Goal 5 rule. This subassignment of error is sustained, in part.

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8. Landscaping

LUCU 9.6240(2) provides that developers "who choose to preserve significant vegetation on the site" shall do so in the manner further described in the code. Petitioners argue, in footnotes 16 and 30, that this "requirement" increases protection of inventoried significant vegetation areas and scenic areas.

The city responds that petitioners have not established that the city's landscaping requirements, including LUCU 9.6240(2), apply to any inventoried Goal 5 resource. We agree that petitioners' argument is insufficiently developed. Petitioners have not established that the city's landscaping requirements are part of the city's program to achieve the goal, or that the landscaping requirement potentially applies to any inventoried resource. Nor have petitioners explained why LUCU 9.6240(2) is a "requirement" that increases protection of VWWH or scenic areas. This subassignment of error is denied.

9. Drainageways

Petitioners contend, in footnotes 31 and 35, that provisions at LUCU 9.6510(1) change the level of protection afforded to drainageways, which petitioners argue are inventoried significant scenic and water resources.[49] Specifically, petitioners argue that

"(b) If no economically viable use is feasible under (2)(a), relax WP overlay zone requirements applicable to riparian areas as defined in [LUCU] 9.4720 Waterside Protection Areas, outside buffer setback areas. * * *

"(c) If no economically viable use is feasible under (2)(a) or (2)(b), reduce the buffer setback area to the minimum extent necessary to accommodate the development. * * *

[48] LUCU 9.4760(2) provides in relevant part:

> "To determine the extent to which an exception is allowed under [LUCU] 9.4760(1)(a), the planning director shall consider the following provisions:
>
> "(a) Where practical, relax other setbacks in order to accommodate buffer setbacks as defined in [LUCU] 9.4720 Waterside Protection Areas.

[49] LUCU 9.6510 deals with stormwater drainage, and requires in relevant part that conveyance of ownership or dedication of easements may be required where:

> "* * * the subject property in the proposed development is or will be periodically subject to accumulations of surface water or is traversed by any open drainageway, headwater stream, creek, wetland, spring, or pond * * *."

"(d) If no economically viable use is feasible under (2)(a), (2)(b), or (2)(c), allow alteration of the water feature(s) to the minimum extent necessary to accommodate the development. * * *"

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LUCU 9.6510(1) replaces EC 9.065, which required easement dedications if land is "subject to accumulations of surface water or is traversed by any water course, channel, stream or creek." According to petitioners, LUCU 9.6510(1) adds drainageways, headwater streams, wetlands, springs and ponds to the list of scenic and water resources that may require dedication.

The city does not respond to this subassignment of error. It is sustained.

10. Geotechnical Analysis

LUCU 9.6710 requires that applicants submit a geotechnical analysis to ensure that facilities in areas of known or potentially unstable soil conditions are located, designed and constructed safely. Petitioners argue that erosion hazards along steep slopes adjacent to stream channels or along the floodway fringe are inventoried significant water areas. *See* Response Brief App 121 and 125. According to petitioners, the requirements for a geotechnical analysis increase the level of protection afforded these Goal 5 resources.

The city does not respond to this subassignment of error. It is sustained.

11. Cluster Subdivisions

LUCU 9.8040 to 9.8055 provide for "cluster subdivisions," which apparently allow for greater density in return for providing for open space or protection to natural resources. LUCU 9.8055(2) and (3) require that 25 percent of a cluster subdivision be devoted to open space or protection of natural resources, including natural waterways or wetlands. Petitioners argue that that requirement increases Goal 5 protection for inventoried water areas.

The city does not respond to this subassignment of error. It is sustained.

III. Conclusion

We conclude, above, that a number of challenged LUCU provisions are substantive amendments that either decrease or increase the level of protection the city previously afforded inventoried Goal 5 resources, and therefore affect a Goal 5 resource. A remaining question is what must the city do to demonstrate that such amendments are consistent with

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Goal 5. The city's Goal 5 findings are conclusory, and its responses in its brief rely mainly on general defenses that we reject in whole or part. The short answer is that the city must demonstrate that, to the extent the LUCU amends programs that were previously adopted to protect significant Goal 5 resources, the challenged amendments comply with the Goal 5 rule. OAR 660-023-0250(3); *Pekarek v. Wallowa County*, 36 Or LUBA 494, 498 (1999) (where a plan or zoning ordinance amendment affects inventoried Goal 5 resources, the local government must apply the requirements of the Goal 5 rule and determine that the rule is satisfied). That does not necessarily mean that the city must repeat the entire Goal 5 process, or adopt new or amended ESEE analyses. Where the justification the city adopted to support its original Goal 5 programs also supports the amended Goal 5 programs, the city may simply explain why that is the case. However, where the original justification does not justify the amended Goal 5 program, part or all of the original justification will need to be amended to support the amended Goal 5 program.

For the foregoing reasons, we agree with petitioners that a number of LUCU provisions amend land use regulations protecting inventoried Goal 5 sites, and therefore the city must apply and find compliance with Goal 5 and the Goal 5 rule in adopting those amendments.

The second assignment of error (Home Builders) and the fourth assignment of error (Chamber) are sustained, in part.

SECOND AND THIRD ASSIGNMENTS OF ERROR (CHAMBER)

Chamber argues in these assignments of error that the city adopted a number of resource preservation requirements that have the effect of reducing the city's inventories of commercial, industrial and residential lands, without addressing whether those inventories continue to comply with Goals 9 and 10. Chamber also challenges LUCU 9.9500, which incorporates into the city's zoning ordinance specified refinement plan policies.

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I. Goals 9 and 10

According to Chamber, Goal 9 and its interpretative rule requires that the city "[p]rovide for at least an adequate supply of sites of suitable sizes, types, locations and service levels for a variety of industrial and commercial uses[.]" Chamber argues that where the city adopts plan or zoning amendments that further restrict development of industrial and commercial lands so that the supply of such lands is effectively reduced, the city must determine that the land designated for industrial and commercial use remains consistent with Goal 9 requirements. *See Volny*, 37 Or LUBA at 510-11 (amendment that increases required right-of-way on city streets could reduce the amount of commercial or residential lands in a manner that implicates Goals 9 and 10); *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670, 691 (1995) (legislative zone changes from industrial and commercial to mixed use requires that the city demonstrate compliance with Goal 9 requirement for an adequate inventory of commercial and industrial sites).

Chamber makes a similar argument under Goal 10, which requires that "[b]uildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed housing units." Chamber argues that where the city adopts plan or zoning amendments that reduce the supply of buildable residential lands, the city must determine that the remaining supply is consistent with Goal 10. *Volny*, 37 Or LUBA at 510-11; *Mulford v. Town of Lakeview*, 36 Or LUBA 715, 731 (1999) (rezoning residential land for industrial uses); *Gresham v. Fairview*, 3 Or LUBA 219 (same).

According to Chamber, the city's decision adopts several new requirements that individually and cumulatively function to reduce the amount of land that is available for industrial, commercial and residential uses. The chief focus of Chamber's argument is a set of new tree protection measures that require that any development activity preserve a minimum of 20 to 60 percent of "significant trees" on the site, which the LUCU defines as trees with a minimum diameter at breast height of eight inches. LUCU 9.6885(2); 9.0500.

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Moreover, development must protect at least 70 percent of the "critical root zone" of each significant tree retained. The critical root zone (CRZ) is defined to include an area with a radius of 18 times the diameter at breast height of the tree. According to Chamber, each minimum eight-inch tree thus has a CRZ with a radius of 12 feet, and an unbuildable area of 452 square feet, while the CRZ for a 20-inch tree has a radius of 30 feet and an unbuildable area of 2,826 feet. Chamber notes that according to the city's urban forest plan, the city has about 200,000 trees that meet or exceed the LUCU definition of "significant tree." Chamber

argues that the number of acres potentially rendered unbuildable by these provisions could be several thousand acres.

Chamber makes similar arguments with respect to new Open Waterway Protection zones, which mandate a minimum 50-foot buffer between open waterways and development for all conditional use permits, subdivisions, PUD and site review approvals. *See e.g.* LUCU 9.8100(3)(c). Other provisions require a minimum 100-foot buffer between rare plant populations or rare animal populations. *See e.g.* LUCU 9.8100(3)(a) and (b). Chamber argues that the city has made no effort to quantify how much buildable land has been effectively rendered unbuildable under these provisions, or whether the remaining supply is sufficient to satisfy Goals 9 and 10.

The city offers a number of responses. With respect to Goal 9, the city argues first that the city need not comply with the Goal 9 rule, OAR chapter 660, division 9, until periodic review. OAR 660-009-0010(2). Therefore, the city reasons, it need not undertake any review of the adequacy of its Goal 9 inventory outside periodic review. Second, the city argues that the EC previously contained a number of preservation requirements and that the disputed tree retention, CRZ requirements and other buffers cited by petitioners do not "increase" the limitations on buildable lands compared to the EC and thus trigger evaluation of the city's land inventories. The city next argues that petitioners have not established that the tree retention, CRZ requirements and other buffers in fact reduce the city's inventories of

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industrial, commercial or residential land, much less that those reductions threaten the city's ability to comply with Goals 9 and 10.[50] The city argues also that other LUCU provisions actually *increase* the number of industrial, commercial or residential uses that might be developed.[51] Finally, with respect to Goal 10, the city cites to a 1992 residential land supply study that found a surplus of 1,415 acres of residential land above that needed during the period 1992 to 2015. The city concludes that, given increased opportunity for industrial, commercial and residential uses under the LUCU, and the excess supply of residential land, the record supports a finding that the city's inventories of such lands continue to satisfy Goals 9 and 10, even assuming that the cited LUCU provisions reduce the supply of buildable industrial, commercial or residential lands, as petitioners allege.

We agree with petitioners that the cited LUCU provisions trigger an obligation on the part of the city to evaluate whether its Goal 9 and 10 inventories continue to comply with those goals. The city's responses do not alter that conclusion. That the Goal 9 rule does not apply to the city's decision does not mean that that decision need not comply with Goal 9 itself. *DLCD v. City of Warrenton*, 37 Or LUBA 933, 960 (2000). Petitioners advance arguments under the goal, not the rule. The city may be correct that the EC contained some kind of tree and natural resource preservation requirements, and that the disputed LUCU provisions do not "increase" the restrictions previously imposed under the EC. However, the city does not cite us to any such EC provisions, nor dispute that the tree retention, CRZ, and buffer requirements have no counterparts in the EC.

[50] The city also points out that the buffers cited by petitioners, using LUCU 9.8100(3)(a), (b) and (c) as examples, relate to applications for residential uses, and thus those restrictions do not impact the city's inventory of Goal 9 lands. The city is correct that LUCU 9.8100(3) relates to conditional use permits for residential development, specifically needed housing. However, we note that conditional use permits for non-residential development are subject to similar restrictions. *See e.g.* LUCU 9.8090(5).

[51] For example, the city notes that various LUCU provisions allow for additional home occupations, or create residential zones that allow for higher densities.

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Further, we disagree with the city that petitioners have failed to demonstrate that the disputed LUCU provisions might impact the supply of industrial, commercial and residential lands. Petitioners have made a facially plausible showing that the disputed provisions are likely to reduce the supply of buildable lands. Under such circumstances, the city has an obligation to demonstrate that despite any such reductions in development potential for industrial, commercial and residential lands the city's inventories continue to comply with Goals 9 and 10. *Volny*, 37 Or LUBA at 510-11; *Opus Development Corp.*, 28 Or LUBA at 691. The city's effort in its brief to do so fails because it makes no effort to quantify how much land, if any, may be rendered unbuildable under the disputed provisions. Neither does the city's brief make any reviewable attempt to compare the disputed LUCU provisions' effect on development potential with the effect on development potential by replaced EC provisions. Until the city makes some attempt to make that comparison, the city is in no position to conclude that its inventories continue to comply with Goals 9 and 10.[52] This subassignment of error is sustained.

II. ORS 197.195

ORS 197.195 requires that a "limited land use decision" shall be consistent with applicable provisions of a city or county comprehensive plan.[53] However, the statute goes on to provide:

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"* * * Within two years of September 29, 1991, cities and counties shall incorporate all comprehensive plan standards applicable to limited land use decisions into their land use regulations. A decision to incorporate all, some, or none of the applicable comprehensive plan standards into land use regulations shall be undertaken as a post-acknowledgment amendment under ORS 197.610 to 197.625. If a city or county does not incorporate its comprehensive plan provisions into its land use regulations, the comprehensive plan provisions may not be used as a basis for a decision by the city or county or on appeal from that decision." ORS 197.195(1)

At LUCU 9.9500 to 9.9710, the city's zoning ordinance sets forth a large number of selected refinement plan policies that, according to LUCU 9.9500, "shall be used when applicable for purposes of evaluating applicable adopted plan policies pertaining to subdivisions, partitions, and site review." Chamber argues that the city erred in doing so, for several reasons.

---

[52] The city protests that any such evaluation would require inventorying each of the 200,000 significant trees in the city to determine how much buildable land if any is consumed in protecting them. However, we see no reason why any quantification that may be necessary to compare the impacts of the old and new regulations should present any difficulty that could not be overcome. In originally adopting the city's inventories of industrial, commercial and residential land, the city presumably applied assumptions, expressly or implicitly, regarding how much land is available or buildable for particular uses, given restraints such as steep slopes, floodplains, setbacks, and public improvements such as streets. Similarly, the city could develop assumptions regarding how much the disputed tree retention, CRZ and buffers are likely to reduce development potential on inventoried industrial, commercial and residential lands. In so doing, we see no reason why the city could not, if it chose, also develop assumptions regarding how much other LUCU provisions are likely to *increase* density or opportunity for industrial, commercial or residential uses, and determine if such increases offset any reductions caused by the tree retention, CRZ and buffers.

[53] ORS 197.015(12) defines a "limited land use decision" as:

> "[A] final decision or determination made by a local government pertaining to a site within an urban growth boundary which concerns:
>
> "(a) The approval or denial of a subdivision or partition, as described in ORS chapter 92.
>
> "(b) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review."

First, Chamber argues that it is not clear if the adopted plan policies are intended to apply as *approval criteria*, where relevant, to subdivision, partition and site review applications under ORS 197.195. Chamber suggests that the city's purpose may instead be to provide context for interpretation or application of other, undisputable approval criteria. That uncertainty is compounded, Chamber argues, by the fact that some of the adopted plan policies contain terms that "recommend" or "encourage" various actions. Chamber argues that such precatory comprehensive plan language is an indication that the city did not intend the plan policies to constitute mandatory approval criteria applicable to individual limited land use decisions. Finally, Chamber argues, if these plan policies are intended as approval criteria, the imposition of a large body of new approval standards

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constitutes a substantial new burden on Goal 9 and 10 inventoried lands. Chamber contends that such new burdens must be evaluated against Goals 9 and 10.

The city responds that its adoption of the disputed refinement plan policies is intended to satisfy ORS 197.195, and to allow the city to apply such policies as approval criteria for subdivisions, partition or site review applications. While the above-quoted sentence from LUCU 9.9500 is awkwardly written, we agree with the city that the apparent intent and purpose of adopting the disputed policies is to make it possible to apply them as approval criteria, pursuant to ORS 197.195.

With respect to Goals 9 and 10, Chamber does not argue that application of these refinement policies to subdivision, partition or site review applications reduces the development potential of industrial, commercial or residential lands in a manner that effectively reduces the *supply* of such lands. Instead, we understand Chamber to argue that adoption of new, additional approval standards applicable to development of industrial, commercial and residential lands is an additional regulatory *burden* on development of those lands and therefore must be evaluated for consistency with Goals 9 and 10. However, Chamber cites no authority for that proposition. Chamber does not identify in this subassignment of error any requirement under Goals 9 or 10 that local governments not increase regulatory burdens or that local governments refrain from imposing any particular level of regulatory burden. Even assuming such a requirement exists or can be implied, Chamber makes no effort to explain why adoption of the challenged refinement plan policies as approval criteria to certain development in certain areas of the city threatens to violate that requirement. Absent a more developed argument from Chamber, we cannot say that the city's adoption of refinement policies pursuant to ORS 197.195 requires greater or different evaluation under the goals than the city performed here. This subassignment of error is denied.

The second and third assignments of error (Chamber) are sustained, in part.

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FIRST ASSIGNMENT OF ERROR (CHAMBER)

Chamber argues that the city's decision violates Statewide Goal 2 (Land Use Planning), because (1) the decision is not supported by adequate explanations of compliance with applicable goals; (2) the decision is not supported by an adequate basis in fact; (3) the city failed to adopt ultimate policy choices; and (4) the city failed to adequately coordinate its decision with affected agencies and local governments, as required by Goals 2 and 10. With the exception of the coordination argument, Chamber's arguments under the first assignment of error appear to be entirely derivative of other arguments in other assignments of error, and do not provide an independent basis for reversal or remand. Accordingly, we address only the coordination argument.

Goal 2 requires that "[e]ach plan and related implementation measure shall be coordinated with the plans of affected governmental units." The Goal 10 rule at OAR 660-008-0030 requires that "[e]ach local government shall consider the needs of the relevant region in arriving at a fair allocation of housing types and densities."[54] Petitioners argue that the city's decision effectively restricts the city's ability to meet its "fair share" of regional residential, commercial and industrial growth, with the result that nearby cities, such as Springfield, Junction City, Cottage Grove, Harrisburg, Monroe and Creswell, may have to accommodate more than their fair share. *See Creswell Court LLC v. City of Creswell*, 35 Or LUBA 234 (1998) (limits on new manufactured home parks violate the Goal 10 coordination requirements, where the city failed to coordinate with nearby jurisdictions that might have to

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accommodate Creswell's share of demand for such housing). According to petitioners, there is little evidence in the record that the city coordinated with other cities, or attempted to balance the needs of these governmental units as well as the needs of its citizens. The city points out that the Goal 2 coordination requirement is limited to "affected governmental units," which Goal 2 defines to include only governments with "programs, land ownerships or responsibilities within the area included in the Plan." Goal 2 does not require, as Goal 10 arguably does, that the city coordinate with governments outside the plan area. The city cites to evidence that it notified and coordinated with every government within the plan area, and argues that the Goal 2 coordination requirement was satisfied. We agree.

With respect to Goal 10, the city argues that the Goal 10 coordination requirement applies only if the city amends its plan or implementing regulations in a manner that affects the city's "allocation of housing types and densities." The city submits that the LUCU does not affect the allocation of housing types or housing density, and thus adoption of the LUCU does not trigger an obligation to coordinate with nearby cities under Goal 10. We agree that no identified LUCU provision affects the "fair allocation of housing types or density" within the meaning of OAR 660-008-0030(1). Not all local government programs with arguable impacts on housing or Goal 10 compliance trigger the coordination requirement at OAR 660-008-0030(1), only those that affect the allocation of housing types or density, as was the case in *Creswell*. OAR 660-008-0030(2) may impose a coordination obligation with respect to such broader impacts, but it imposes that obligation on the local coordination body. Chamber does not argue that the city is the local coordination body. The first assignment of error (Chamber) is denied.

The city's decision is remanded.

[54] OAR 660-008-0030 provides:

"(1) Each local government shall consider the needs of the relevant region in arriving at a fair allocation of housing types and densities.

"(2) The local coordination body shall be responsible for ensuring that the regional housing impacts of restrictive or expansive local government programs are considered. The local coordination body shall ensure that needed housing is provided for on a regional basis through coordinated comprehensive plans."

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ROGUE VALLEY ASSOCIATION OF REALTORS, Petitioner,
v.
CITY OF ASHLAND, Respondent.

LUBA No. 97-260.
Oregon Land Use Board of Appeals.

September 24, 1998.

Appeal from City of Ashland.

David J. Hunnicutt, Tigard, filed the petition for review and argued on behalf of petitioner.

Paul Nolte, City Attorney, Ashland, filed the response brief and argued on behalf of respondent.

GUSTAFSON, Board Chair; HANNA, Board Member, participated in the decision.

REMANDED.

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

FINAL OPINION AND ORDER

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Opinion by Gustafson.

NATURE OF THE DECISION

Petitioner challenges a legislative post-acknowledgment decision that amends the city's acknowledged land use regulations.

FACTS

The city's acknowledged land use regulations include a chapter titled "Physical and Environmental Constraints." City of Ashland Land Use Ordinance (ALUO) Chapter 18.62. ALUO 18.62 includes definitions for "Floodplain Corridor Lands," Riparian Preserve Lands," "Erosive and Slope Failure Lands," "Wildfire Lands" and "Severe Constraint Lands." Development in any of these defined areas requires a "physical constraints review permit." ALUO 18.62.060 requires that the city adopt maps showing each of these defined lands. ALUO 18.62.040.E imposes criteria for approval of physical constraints review permits. In addition, "for all land use actions which could result in development in" any of these defined lands, specific development standards must be met.[1]

The decision challenged in this appeal (the Hillside Development Ordinance, or HDO) amends ALUO 18.62 in a number of ways. For purposes of this appeal, the more significant

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changes are as follows:

[1] ALUO 18.62 imposes different development standards for each of the defined types of land. ALUO 18.62.070 (Floodplain Corridor Lands); 18.62.075 (Riparian Preserve Lands); 18.62.080 (Erosive and Slope Failure Lands); 18.62.090 (Wildfire Lands); 18.62.100 (Severe Constraint Lands). These standards apply in addition to any requirements imposed by the underlying zone.

1. Buildable area. The former definition of "buildable area" excludes lands with a slope of greater than 40%. The revised definition of "buildable area" excludes lands with a greater than 35% slope.[2]

2. Hillside Lands. Erosive and Slope Failure Lands are renamed "Hillside Lands," and the definition of such lands is expanded.[3]

3. New and more stringent development standards for Hillside Lands are adopted in place of the existing development standards for Erosive and Slope Failure Lands.[4]

MOTION TO STRIKE

Petitioner moves to strike a letter attached to respondent's brief. The letter is not included in the local government record in this appeal and is not subject to

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official notice. The motion to strike is granted.

FIRST ASSIGNMENT OF ERROR

Petitioner contends the HDO violates certain provisions in ORS 197.295 through 197.312, which impose statutory obligations and limitations regarding "needed housing." A threshold issue under this assignment of error is whether the housing that the parties appear to agree will or may be affected by the regulations adopted by the challenged decision constitutes "needed housing." We turn to that question first.

A. Needed Housing Defined

As relevant in this appeal, ORS 197.303(1) provides:

"As used in ORS 197.307, until the beginning of the first periodic review of a local government's acknowledged comprehensive plan, `needed housing' means housing types determined to meet the need shown for <u>housing within</u> an urban growth boundary <u>at particular price ranges and rent levels</u>. On and after the beginning of the first periodic review of a local government's acknowledged comprehensive plan, `needed housing' also means:

"(a) Housing that includes, but is not limited to, <u>attached and detached single-family housing</u> and multiple family housing for both owner and renter occupancy;

"(b) Government assisted housing;

"(c) Mobile home or manufactured dwelling parks * * *; and

"(d) Manufactured homes on individual lots planned and zoned for single-family residential use * * *." (Emphases added.)

Under ORS 197.303(1), the first inquiry is whether a local government has identified a need "for housing within an urban growth boundary at particular price ranges and rent levels."

---

[2] As a result of this change, lands with between 35% to 40% slopes, which were considered buildable before the change, are no longer considered buildable.

[3] Hillside Lands include: (1) lands that are "highly visible from other portions of the city" and (2) lands with a slope exceeding 25%. The existing definition of Erosive and Slope Failure Lands only includes lands with a slope of 40% or greater. With the challenged amendment, properties with a slope of between 25% and 40%, which were formerly excluded from the definition of "Erosive and Slope Failure Lands," are now included within the definition of "Hillside Lands."

[4] The development standards imposed on Hillside Lands under the challenged decision are discussed in more detail below.

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If a local government does so, any housing types the local government determines to be necessary to meet the identified need is considered "needed housing."[5]

B. The Ashland Comprehensive Plan

The Ashland Comprehensive Plan (ACP) includes a "Housing Element." ACP Chapter VI. The ACP uses census information to identify household income ranges. ACP VI-3, Table VI-3. The plan assumes "25% of the monthly gross income would be applied towards rent" and that "28% of the monthly gross income would be used to make [mortgage] payments." ACP VI-4. The city then identifies the following housing categories as needed to satisfy the identified demand for housing: (1) "Subsidized or Shared Housing;" (2) "Rental;" (3) "Moderate Cost Purchase;" and (4) "High Cost Purchase". Immediately after identifying these four categories of housing,[6] the comprehensive plan identifies the following "housing types" as "housing types [that] have a place in Ashland:"

"a) Multi-family, multi-unit apartments

"* * * * *

"b) Townhouses

"* * * * *

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"c) Mobile or manufactured homes

"* * * * *

"d) Attached single-family homes

"* * * * *

"e) Detached single-family homes[.]" ACP VI-6 through VI-9.[7]

Finally, the comprehensive plan includes a table that identifies the total number of housing units needed within each of the four housing categories identified above. The identified needed number of housing units within each housing category is then allocated among four "land categories."[8] Each of the four land categories accommodates one or more of the four

[5] ORS 197.303(1)(a)-(d) limits the discretion certain local governments have to exclude certain housing types as "needed housing." For purposes of this appeal, cities like Ashland with populations of 2,500 or more must include detached single-family housing and the other specified housing types as "needed housing."

[6] The ACP refers to these four categories of housing as "types of housing." We will refer to them as categories of housing to avoid confusion with the statutory term "housing types."

[7] Under ORS 197.303 there is no "needed housing" until a local government determines a need for housing "at particular price ranges and rent levels." The above-described ACP language is as close as the city comes to specifying particular price ranges and rent levels in the comprehensive plan itself. We do not know whether the plan language described in the text is derived from more specific background information concerning housing price ranges and rent levels. No issue is raised by any party regarding whether the city has determined a need for housing "at particular price ranges and rent levels." Therefore, for purposes of this opinion, we assume the plan language described in the text identifies the housing types that are needed to meet the city's future need for housing "at particular price ranges and rent levels."

[8] Those land categories are MFR (Multi-family); SR (Suburban Residential); SFR (Single-family Residential) and LDR (Low density Residential). The MFR and SFR categories are composed of more than one zoning district; the SR and LDR categories are composed of a single zoning district.

housing categories.[9] The identified needed number of housing units within each land category is then used to determine the number of acres of land needed within each land

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category. ACP VI-10, Figure VI-2. These calculations are summarized below:

MFR 750 housing units (54 acres) (Subsidized and Rental).

SR 660 housing units (83 acres) (Rental and Moderate Cost).

SFR 1,550 housing units (388 acres) (Rental, Moderate Cost and High Cost).

LDR 190 housing units (127 acres) (High Cost). ACP VI-10, Figure VI-2.

In summary, the ACP identifies multi-family, multi-unit apartments, townhouses, mobile or manufactured homes, attached single-family homes and detached single-family homes as "needed housing" types. The above-noted acres of MFR, SR, SFR and LDR lands are required under the ACP to supply the needed number of housing units.

C. The City's General Defenses

The city's first general defense is that the statutory, Goal 10 (Housing) and OAR chapter 660, division 8, "needed housing" restrictions are inapplicable to "luxury residential hillside lots." Respondent's Brief 6. This defense is not available to the city for at least two reasons. First, the ACP identifies "a need * * * for housing within [the] urban growth boundary at particular price ranges and rent levels," as required by ORS 197.303(1) and 197.307(3)(a). High-cost housing is included in the housing needs identified in the ACP. Therefore, even if the city is correct that high-cost or luxury housing could be excluded from its identified needed

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housing, the city has not done so in the ACP. Second, even if the ACP did exclude luxury housing from its needed housing, it does not appear that only luxury housing development will be affected by the HDO.

In addition, while we need not reach the question in this appeal, we question whether high-cost or luxury housing could be excluded as a needed housing type. The needed housing statutes were first adopted in 1981. Or Laws 1981, chapter 884, sections 5 and 6 (SB 419). SB 419 essentially codified LCDC`s then-existing St. Helens Housing Policy. Testimony, Senate Environment and Land Use Committee, SB 419, June 10, 1981, Ex A (Testimony of F. Van Atta). The initial purpose behind that policy appears to have been to foreclose local government attempts to exclude certain housing types that traditionally satisfied lower, moderate or "least cost" housing needs.[10] However, OAR chapter 660, division 8, which was adopted in part to "implement ORS 197.303 through 197.307," appears to take an all-inclusive approach to "needed housing." OAR 660-008-0010 provides, in part, that "[t]he mix and density of needed housing is determined in the housing needs projection." OAR 660-008-0005(5) provides, in part:

"`Housing Needs Projection' refers to a local determination, justified in the plan, of the mix of housing types and densities that will be:

[9] The entire need for "subsidized" housing will be met on "MFR" lands. "Rental" housing needs will be met as follows: 40% on "MFR" lands, 30% on "SR" lands and 30% on "SFR" lands. Twenty percent of "moderate cost" housing need will be met on "SR" lands, and 80% will be met on "SFR" lands. Fifty percent of the "high cost" housing needs will be met on "SFR" lands, and 50% will be met on "LDR" lands.

[10] This purpose is reflected in ORS 197.307(1), which states "[t]he availability of affordable, decent, safe and sanitary housing opportunities for persons of lower, middle and fixed income, including housing for seasonal and year-round farmworkers, is a matter of statewide concern."

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"(a) Commensurate with the financial capabilities of present and future area residents of all income levels during the planning period[.] * * *" (Emphasis added.)

In view of these rule provisions, we question whether high-cost or luxury housing could be excluded from "needed housing."[11]

The city's second general defense is that "buildable lands" for "needed housing" need not include lands with slopes over 25%.[12] Since one of petitioner's main objections to the HDO is that it defines properties with slopes of between 35% and 40% as unbuildable, when such properties were formerly considered buildable, the city argues petitioner's "needed housing" arguments should be rejected for that reason alone.

We do not agree. Petitioner's arguments are not limited to the increased regulation of lands with steep slopes. More importantly, the ACP specifically includes steeply sloped lands (up to 40% slopes) within its buildable lands inventory for single-family residential housing.[13] Under the OAR 660-008-0005(2)

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definition of "buildable land," the city could map and distinguish between residentially zoned land that exceeds 25% slopes and land with lesser slopes, and rely exclusively on the latter to provide buildable land for needed housing. However, the ACP Buildable Lands Inventory (BLI) does not do so. The city has included lands with slopes exceeding 25% in the lands included in the BLI that are required for needed housing; the fact that it was not required to do so is irrelevant.[14]

D. Subassignments of Error

Petitioner alleges three subassignments of error, which we address separately below.

1. The Requirement for Sufficient Buildable Land for Needed Housing

ORS 197.307(3)(a) provides:

---

[11] A second potential obstacle to treating an identified need for high-cost housing as something other than "needed housing" is the approach taken in the ORS 197.303(1), Goal 10 and OAR 660-008-0005(11) definitions of "needed housing." Those definitions all define "needed housing" in terms of housing "types" and specifically require that certain housing types (including owner-occupied, detached, single-family housing) be considered "needed housing." The current ACP assumes all "high cost" housing will be owner-occupied, detached, single-family housing.

[12] LCDC`s administrative rules implementing Goal 10 and ORS 197.303 through 197.307 appear at OAR chapter 660, division 8. OAR 660-008-0005 includes a definition of "buildable land" and provides, in part, that "[l]and with slopes of 25% or greater unless otherwise provided for at the time of acknowledgment * * * is generally considered unbuildable for purposes of density calculations."

[13] ACP XII-2 provides that "land which was over 40% average slope was not included in the buildable lands inventory." The parties cite nothing in the ACP which indicates the city attempted to exclude lands with 25% to 40% slopes from the inventory of buildable lands that the city relies upon to supply land for needed housing. To the contrary, it is clear that the buildable lands that the city will rely upon to provide needed housing do include lands with such slopes and the disputed decision imposes regulations affecting lots and parcels with such slopes.

[14] It may be that the city could amend the ACP to distinguish between two categories of residentially zoned lands: (1) those with slopes of 25% percent or greater and (2) those with slopes of less than 25%. In that event, the city would be in a position to designate a sufficient number of residentially zoned acres with less than 25% slopes to satisfy identified "needed housing" requirements. If the city were to adopt such an approach, any additional residentially zoned acres (i.e. residentially zoned acres beyond the number of acres required for "needed housing") with slopes of 25% or greater would not be subject to statutory or OAR chapter 660, division 8, restrictions on planning for and regulation of "needed housing." Of course, any inclusion of excess residentially zoned acres would have to be justified under Goal 14 (Urbanization).

"When a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, needed housing * * * shall be permitted in one or more zoning districts or in zones described by some comprehensive plans as overlay

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zones with sufficient buildable land to satisfy that need."

As explained above, the ACP identifies the number of housing units needed within each of the four land categories and the resulting number of acres within each land category that are needed to supply the required number of housing units. ACP Table XII-3 states that there are 342 acres of buildable SFR lands within the current city limits, or 46 acres less than the 388 acres of SFR land needed. However, Table XII-3 shows there are 160 additional acres of buildable, vacant SFR lands available outside the current city limits but inside the city's urban growth boundary. Table XII-3 shows this results in a surplus of 114 SFR zoned acres.[15]

The challenged decision recognizes that the HDO will reduce the amount of buildable land available for needed housing within city limits. However, based on a memorandum prepared by the city planning staff in response to concerns about the impact of the HDO on the BLI, the city found that the impact would not exceed a loss of 33 housing units.[16] The challenged decision points out there are many more acres of

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residentially zoned land within the UGB than are needed to satisfy the 5-year supply required by ACP Policy XII-1.[17]

Petitioner advances several arguments why it believes the city cannot rely on the projected loss of only 33 housing units in concluding that the BLI remains adequate following adoption of the challenged decision. Petitioner first argues there is no "de minimis" exception to the requirement of ORS 197.307(3)(a) for a sufficient amount of appropriately zoned buildable land to meet housing needs. The city responds, and we agree, that it did not rely on a "de minimis" exception.

Petitioner next argues the city's analysis, which led to the conclusion that, at most, the residential development potential would be reduced by 33 units, was improperly limited to an analysis of vacant lands. Petitioner contends the analysis of the HDO`s impact on buildable lands must include underdeveloped lands that may have their development potential reduced by the challenged ordinance.

The city responds that the ACP only includes vacant lands in the BLI, and it was therefore appropriate to limit the analysis to impacts on vacant parcels. The ACP explains the methodology used to determine the amount of buildable land:

"The final totals shown on Table XII-2 are the City's best estimates of the lands which are vacant

[15] Table XII-3 also shows there is a surplus of 129 acres of LDR lands already within city limits. Although there is a shortage of SR and MFR lands currently within city limits, if all buildable lands outside the city limits but inside the UGB are considered, there is a surplus of 6 acres and 8 acres of SR lands and MFR lands, respectively.

[16] The planning staff's methodology and conclusions are set out at Record 39. The planning staff estimated that the HDO would result in the following losses in development potential: 5 units on SFR lands, 26 units on LDR lands and 2 units on Woodland Resource zoned lands.

[17] ACP Policy XII-1 states: "The City shall strive to maintain at least a 5-year supply of land for any particular need in the City limits. * * *" (Emphasis added.)

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and available for building sites in the City limits." (Emphasis added.)[18] ACP XII-4.

In view of the above plan language, we reject petitioner's assertion that the city's analysis is flawed because it did not consider the impact of the challenged decision on underdeveloped land. The city apparently does not include underdeveloped lands in its BLI.

Petitioner next argues the city's analysis is flawed because it is not supported by substantial evidence. If we understand petitioner correctly, it contends the planning staff memorandum that the city council relied on in adopting the HDO does not constitute substantial evidence because there is an inadequate explanation for how determinations were made and how certain calculations were made.

We have previously held that planning staff testimony can constitute substantial evidence. Scott v. City of Portland, 17 Or LUBA 197, 202 (1988); Grover's Beaver Electric Plumbing v. Klamath Falls, 12 Or LUBA 61, 64 (1984); Meyer v. City of Portland, 7 Or LUBA 184, 197 (1983), aff'd 67 Or App 274 (1984). Petitioner does not explain why the explanation of the determinations and calculations in the staff memorandum are inadequate or what additional information would be required to adequately explain how those calculations were made. We conclude a reasonable decision maker would have

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relied on the evidence in the planning staff memorandum to reach the conclusions the city council reached. Younger v. City of Portland, 305 Or 346, 358-60, 752 P2d 262 (1988).

Finally, petitioner argues the city's findings do not establish that the 160 acres of SFR lands located outside the city limits but inside the UGB are "suitable or sufficient to allow the development of single family residential housing at the density levels needed to satisfy the loss of single family residential housing resulting from the adoption of the HDO." Petition for Review 7.

The city concedes the challenged decision could result in a reduced development potential of 33 residential units within the city limits; five of those lost units will be on SFR-zoned lands. The city did not consider the loss of development potential on SFR lands or other lands outside city limits but inside the UGB. The 160 acres of SFR lands inside the UGB but currently outside city limits will be relied on to supply a sufficient number of housing units to offset (1) the five-unit impact of the HDO on SFR lands inside city limits and (2) the existing 46-acre shortage of SFR lands. It seems unlikely that the 160 acres of SFR-zoned land located outside city limits but inside the UGB are so unsuitable for residential development that the HDO will render those lands unable to provide a sufficient number of residential units to meet these needs, even if the HDO makes some of those 160 acres unbuildable. Nevertheless, the challenged decision fails to

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address that question, and we are in no position to perform that analysis.

This subassignment of error is sustained, in part. On remand the city must demonstrate that the 160 acres of unincorporated SFR lands outside city limits but inside the urban growth boundary can be developed under the HDO with a sufficient number of units (1) to offset the

[18] The figures in Table XII-2 are also used in Table XII-3. As noted above in the text, it is Table XII-3 that establishes that there is a surplus of buildable land zoned for SFR housing, if all buildable lands within the UGB are considered.

loss of 5 units on SFR zoned lands within the city limits under the HDO and (2) to address the existing 46-acre shortage of SFR lands within city limits.

2. The General Requirement for Clear and Objective Standards for Needed Housing

ORS 197.307(4) provides that while local governments must identify and plan for "needed housing," they retain the authority to:

"(a) Set approval standards under which a particular housing type is permitted outright;

"(b) Impose special conditions upon approval of a specific development proposal; or

"(c) Establish approval procedures."

However, the rights preserved by ORS 197.307(4) are conditioned by ORS 197.307(6):

"Any approval standards, special conditions and the procedures for approval adopted by a local government shall be clear and objective and shall not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."[19]

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If the purpose of the requirement for "clear and objective" standards is to ensure certainty in the decision-making process, the requirement is a problematic way to achieve that purpose.[20]

LCDC`s first administrative rule adopted to implement Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources) required that certain programs adopted to limit uses which conflicted with inventoried Goal 5 resources contain "clear and objective" standards. OAR 660-016-0010(3). The Court of Appeals concluded a local code criterion that prohibited conflicting uses if they would have "any adverse impact" was sufficiently clear and objective under OAR 660-016-0010(3). 1000 Friends of Oregon v. LCDC (Hood River County), 91 Or App 138, 144, 754 P2d 22 (1988). The court's decision in Hood River County appears to be based on the absolute prohibition on "adverse effects" and does not expressly recognize or discuss the possible uncertainty that could be presented in determining whether an identified effect is "adverse" and therefore prohibited.

A somewhat different analytical approach to considering whether land use criteria are "clear and objective," was noted

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and followed in Callison v. LCDC, 145 Or App 277, 284 n 8, 929 P2d 1061 (1996). In that case the court concluded that clear and objective standards are not rendered otherwise simply because the local code also provides an optional, alternative set of approval standards that are not clear and objective.[21]

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[19] A substantively identical requirement for clear and objective "standards, special conditions and procedures" appears at OAR 660-008-0015.

[20] It may be obvious that numerical or absolute standards are clear and objective. For example, requirements that a building be set back 20 feet from a lot line or be no higher than 40 feet tall may be both clear and objective. However, even height limitations are not always entirely clear, because one must determine the point on the ground where height measurements begin. Because the ground elevation around a building and roof designs can vary significantly, zoning codes frequently include very complicated formulas for determining the reference points from which building heights are measured. See Wood v. City of Lake Oswego, 26 Or LUBA 121 (1993).

[21] In 1997 revisions to ORS 197.307, the legislature expressly authorized the technique of providing an approval process with clear and objective approval standards, and an optional approval process with standards that are not

However, even if particular numerical or absolute standards are clear and objective, once one departs from the relatively small and shallow safe harbor of numerical and absolute standards, few tasks are less clear or more subjective than attempting to determine whether a particular land use approval criterion is clear and objective.[22] LCDC largely abandoned the requirement for clear and objective standards that is included in OAR 660-016-0010(3) when the new Goal 5 rule was adopted in 1996. OAR chapter 660, division 23. With this understanding of the difficulty presented in determining whether land use standards are "clear and objective," we turn to ORS 197.307(6).

An examination of the wording and context of ORS 197.307(6) is the first step in determining what is meant by clear and objective standards, special conditions and

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procedures. PGE v. Bureau of Labor and Industries, 317 Or 606, 610-11, 859 P2d 1143 (1993). In addition to being clear and objective, the standards, special conditions and procedures regulated by ORS 197.307(6) and OAR 660-008-0015 must "not have the effect, either of themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay." The legislative concern that apparently forms the basis of the statutory and rule prohibition is that standards, special conditions and procedures that are not clear and objective may be applied in a way that will discourage needed housing through unreasonable cost or delay. Dictionary definitions of "clear" and "objective" suggest that the kinds of standards frequently found in land use regulations lack the certainty of application required to qualify as "clear" or "objective."[23]

Neither the language nor the context of ORS 197.307(6) and OAR 660-008-0015 offers much assistance in the task of

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determining whether a particular land use standard, condition or procedure is clear and objective. We therefore turn to legislative history.

The legislative history confirms that the central concern of the legislature in adopting ORS 197.303 and 197.307 was that local governments should not be able to use their land use regulations to exclude certain housing types, particularly manufactured housing, which the legislature believed was needed to satisfy low and moderate-income housing demand. The

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clear and objective, when regulating "needed housing" or "housing development" based on "appearance or aesthetics." ORS 197.307(3)(d).

[22] Absent a statutory or rule requirement that land use standards be clear and objective, land use standards can be, and frequently are, unclear, subjective and highly discretionary. See e.g. Oswego Properties, Inc. v. City of Lake Oswego, 108 Or App 113, 814 P2d 539 (1991); Lee v. City of Portland, 57 Or App 798, 802, 646 P2d 662 (1982); Opus Development Corp. v. City of Eugene, 28 Or LUBA 670, 685-86 (1995).

[23] Webster's Third New International Dictionary includes the following definition for "clear":

"[e]asily understood: without obscurity or ambiguity: thoroughly understood or comprehended: easy to perceive or determine with certainty: sharply distinguished: readily recognized: unmistakable * * *" Webster's Third New Int'l Dictionary, 419 (unabridged ed 1981).

The definition for "objective" includes the following:

"[e]xisting independent of mind: relating to an object as it is in itself or as distinguished from consciousness or the subject: belonging to nature or the sensible world: publicly or intersubjectively observable or verifiable esp. by scientific methods: independent of what is personal or private in our apprehension and feelings: of such a nature that rational minds agree in holding it real or true or valid * * *[.]" Webster's Third New Int'l Dictionary, 1556 (unabridged ed 1981).

legislative history also confirms that the current statute and administrative rule were derived (in many instances word-for-word) from the Land Conservation and Development Commission's St. Helens Housing Policy. A copy of the St. Helens policy is included in the legislative record of Oregon Laws 1981, chapter 884, sections 5 and 6 (SB 419). House Committee on Environment and Energy, SB 419, April 24, 1981, Ex E (Land Conservation and Development Housing Policy) (hereafter cited as "St. Helens Housing Policy").

The discussion on pages one through three of the St. Helens Housing Policy is difficult to follow.[24] However the discussion makes it reasonably clear that under the St. Helens Housing Policy "needed housing" may be subjected to numerical requirements ("one and one-half parking spaces per unit") or

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very clear requirements such as "access to a paved public street." St. Helens Housing Policy 2 (Discussion of Approval Standards). The policy goes on to explain that special conditions may also be imposed, provide they are not used "as a device to exclude a need housing type, delay construction, or to push the cost of a proposal beyond the financial capabilities of the households for whom it was intended." Finally, the policy explains:

"A third type of conditional use is where approval is discretionary and dependent upon vague criteria such as `no adverse impact on the neighborhood,' or `compatible with surrounding development.' Such criteria are inappropriate as a means for providing for a needed housing type. Discretionary criteria would be permissible only upon assurance that there is adequate buildable land to accommodate the need for a particular housing type in other zones in which discretionary criteria do not apply." St. Helens Housing Policy 3 (Discussion of Discretionary Criteria) (emphases added).

The above quoted discussion gives two explicit examples of standards that are not clear and objective. An attachment to the St. Helens Housing Policy provides additional examples of clear and objective approval standards[25] and conditions[26] as well as examples of discretionary criteria that are

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inconsistent with the St. Helens Housing Policy.[27] An unmistakable picture emerges from the St. Helens Housing Policy discussion and the examples given therein. "Needed housing" is not to

[24] This discussion attempts to clarify the Oregon Supreme Court's attempt in Anderson v. Peden, 284 Or 313, 316, 587 P2d 59 (1978), to articulate three different meanings that may be conveyed by the term "conditional use."

[25] Each of the examples of clear and objective standards is either numerical ("landscaping exceeds 15% of lot area") or unambiguous (e.g. "the park is located on either a collector or arterial street paved to city standards.")

[26] The examples of clear and objective special conditions, while somewhat less objective than the examples of clear and objective approval standards, are also reasonably unambiguous ("screen unsightly development such as trash [receptacles], mechanical apparatus, storage areas, or windowless walls," "require staggering of units to avoid a `barrack-like' effect").

[27] Examples of discretionary criteria that are not to be applied to "needed housing" are as follows:

"-be in harmony with the surrounding neighborhood;

"-preserve and stabilize the value of adjacent properties;

"-encourage the most appropriate use of the land;

"-have a minimal adverse impact on the livability, value and appropriate development of abutting properties and the surrounding area compared with the impact of development that is permitted outright;

"-preserve assets of particular interest to the community;

be subjected to standards, conditions or procedures that involve subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community. Such standards, conditions or procedures are not clear and objective and could have the effect "of discouraging needed housing through unreasonable cost or delay."

Petitioner argues that a number of provisions included in the HDO are not clear and objective. We address each of the challenged provisions separately below:

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a. ALUO 18.62.040(H)(m)

ALUO 18.62.040(H)(m) simply requires submission of a plan that shows certain specified natural features on the property, as well as "natural features" on "adjacent properties" that are "potentially impacted by the proposed development."

ALUO 18.62.040(H)(m) is a requirement for a plan or information to be submitted with the application rather than an approval criterion. Whether ALUO 18.62.040(H)(m) is one of the city's "procedures for approval," within the meaning of ORS 197.307(6), is a closer question. For purposes of this opinion, we will assume that it is.

While we tend to agree with petitioner that the city has not clearly and objectively described the nature of the plan and information that must be submitted, we do not believe that failure is fatal. Under ORS 227.178(2), when the city reviews an application for a permit, the city is required to "notify the applicant of exactly what information is missing within 30 days of receipt of the application," in the event an applicant fails to provide information the city believes is needed under ALUO 18.62.040(H)(m). We believe the ORS 227.178(2) requirement that the city's notice specify "exactly what information is missing" is itself a clear and objective requirement. The city's "procedure" for requiring application information, when viewed in context with ORS 227.178(2), is

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sufficiently clear and objective to comply with ORS 197.307(6).[28]

b. ALUO 18.62.040(J)

ALUO 18.62.040(J) authorizes the city "to amend [the applicant's] plans to include any of the following conditions if it is deemed necessary to mitigate any potential negative impact caused by the development:

"1. Require the retention of trees, rocks, ponds, wetlands, springs, water courses and other natural features.

"2. Require plan revision or modification to mitigate possible negative or irreversible effect upon the topography or natural features that the proposed development may cause.

"3. Require a performance guarantee as a condition of approval.

"-not be detrimental or injurious to property and improvement in the neighborhood or to the general welfare of the community;

"-will not unduly impair traffic flow or safety in the neighborhood." St. Helens Housing Policy 4 (Examples of Standards and Conditions).

[28] For the same reason, we reject petitioner's challenge to ALUO 18.62.080(D)(2) (which requires information about whether inventoried existing trees are suitable for conservation) and 18.62.100(D) (which requires a detailed engineering geologic study for development of Severe Constraints Lands).

"4. Require special evaluation by a recognized professional. * * * A fee for these services shall be charged to the applicant in addition to the application fee."

The fundamental flaw in ALUO 18.62.040(J) is that it gives the city authority to impose potentially significant and costly changes in an application to construct "needed housing," and thereby discourage construction of such housing. The only limit on the city's authority to require such changes is highly discretionary and subjective, i.e., that the changes

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be "deemed necessary to mitigate any potential negative impact caused by the development."

We recognize that the conditions the city might actually impose under ALUO 18.62.040(J)(1) and (2) could turn out to be clear and objective. Similarly the conditions the city might actually impose under ALUO 18.62.040(J)(3) and (4) need not necessarily discourage housing through "unreasonable cost or delay." Nevertheless, under ORS 197.307(6) and OAR 660-008-0015, "any * * * procedures for approval adopted by a local government shall be clear and objective * * *." ALUO 18.62.040(J) is not a "clear and objective" procedure, within the meaning of ORS 197.307(6) and OAR 660-008-0015.

c. ALUO 18.62.080(B)(4)(c)

ALUO 18.62.080(B)(4)(c) governs hillside grading and requires a planting plan to revegetate cut slope terraces:

"The vegetation used for these areas shall be native or species similar in resource value which will survive, help reduce the visual impact or the cut slope, and assist in providing long term slope stabilization."

We believe ALUO 18.62.080(B)(4)(c) is a clear and objective standard within the meaning of ORS 197.307(6) and OAR 660-008-0015. ALUO 18.62.080(B)(4)(c) requires the use of "native vegetation." That is a sufficiently clear and objective "standard" under ORS 197.307(6) and OAR 660-008-0015. The city's extension to the applicant of the option to use "similar species" under the specified conditions does not

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render the clear and objective requirement for native vegetation otherwise.[29] Callison, 145 Or App at 284 n 8.

d. ALUO 18.62.080(B)(8)

ALUO 18.62.080(B)(8) governs site grading of hillside lands and requires that such grading "shall consider the sensitive nature of these areas," "[retain] exiting grades to the greatest extent possible [and] avoid an artificial appearance by creating smooth flowing contours of varying gradients." In addition, terraces "should be designed with small incremental steps," and "[p]ads for tennis courts, swimming pools and large lawns are discouraged."

The standards imposed by ALUO 18.62.080(B)(8) are not "clear and objective" within the meaning of ORS 197.307(6) and OAR 660-008-0015.

[29] Petitioner also challenges ALUO 18.62.080(B)(5)(d), which requires use of native vegetation to revegetate fill slopes. However, ALUO 18.62.080(B)(5)(d) also provides the applicant the option to use non-native vegetation, provided it is similar in resource value and will survive and stabilize the surface. For the same reason we find ALUO 18.62.080(B)(4)(c) to be clear and objective, we find ALUO 18.62.080(B)(5)(d) is clear and objective.

e. ALUO 18.62.080(D)(3)

ALUO 18.62.080(D)(3) requires that trees of a particular diameter be "incorporated into the project design whenever possible." Development must preserve "the maximum number of existing trees * * *." "Building envelopes [must] be located and sized to preserve the maximum number of trees * * *."

In particular cases, ALUO 18.62.080(D)(3) may be a difficult or onerous standard. While it is not as clear or

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objective as a numerical setback or an absolute prohibition on cutting trees, it requires that trees must not be cut, unless it is not possible to build without doing so. If trees must be cut to build, no more trees may be cut than must be cut to build. While a "save if possible" standard may not be sufficiently clear and objective in all contexts, we conclude ALUO 18.62.080(D)(3) is a sufficiently clear and objective standard to comply with ORS 197.307(6) and OAR 660-008-0015.[30]

f. ALUO 18.62.080(D)(4)(e)

ALUO 18.62.080(D)(4)(e) authorizes the city to require compensation for any losses that may result if there is encroachment into a tree protection area, after a development proposal has been approved and construction has begun or been completed. ALUO 18.62.080(D)(4)(e) is therefore an after-the-fact enforcement provision to be used if tree protection areas required by an approved permit for residential development are violated. For that reason, ALUO 18.62.080(D)(4)(e) could not violate ORS 197.307(6) and OAR 660-008-0015, which only limit "standards, special conditions and procedures" for "approval" of needed housing.

g. ALUO 18.62.080(D)(5)

ALUO 18.62.080(D)(5) provides, in part,

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"Development shall be designed to preserve the maximum number of trees on a site, when balanced with other provisions of this chapter * * *."

The balancing that is required by ALUO 18.62.080(D)(5) is not a clear and objective criterion.

h. ALUO 18.62.080(D)(6)(a)

ALUO 18.62.080(D)(6)(a) requires that "replacement trees shall be of similar resource value as the trees removed." We agree with petitioner that ALUO 18.62.080(D)(6)(a) is not a clear and objective standard.

i. ALUO 18.62.080(D)(6)(c)

ALUO 18.62.080(D)(6)(c) grants the city the discretion to require a revegetation plan in lieu of replacement trees. We agree with petitioner that ALUO 18.62.080(D)(6)(c) does not include clear and objective standards for when the revegetation plan may be required or what it must include.

[30] We caution, however, that the city's application of ALUO 18.62.080(D)(3) in the future to impose "special conditions" requiring changes in an application to preserve trees could nevertheless run afoul of the prohibition in ORS 197.307(6) and OAR 660-008-0015 against discouraging needed housing through "unreasonable cost or delay." We only conclude here that ALUO 18.62.080(D)(3) passes the statutory and rule requirement that the approval standard itself be clear and objective.

j. ALUO 18.62.080(E)(2)(b)

ALUO 18.62.080(E)(2)(b) imposes the following requirement on building design: "Cut buildings into hillsides to reduce visual bulk." A diagram is included with ALUO 18.62.080(E)(2)(b). That diagram makes it clear that ALUO 18.62.080(E)(2)(b) requires that where cutting or filling is necessary to develop a level building pad, the level building pad is to be achieved by cutting rather than (1) filling or (2) a combination of cutting and filling. Viewed in context with the diagram, ALUO 18.62.080(E)(2)(b) is clear and objective.

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k. ALUO 18.62.080(E)(2)(g)

ALUO 18.62.080(E)(2)(g) recommends "that color selection for new structures be coordinated with the predominate colors of the surrounding landscape * * *." We are uncertain whether ALUO 18.62.080(E)(2)(g) is simply a suggestion, that applicants are free to ignore, or a standard that must be satisfied. If ALUO 18.62.080(E)(2)(g) is merely a suggestion, it need not comply with ORS 197.307(6) and OAR 660-008-0015. If ALUO 18.62.080(E)(2)(g) is an approval standard, it violates ORS 197.307(6) and OAR 660-008-0015 because it is not clear and objective. If the city determines on remand that ALUO 18.62.080(E)(2)(g) is a standard, it must amend ALUO 18.62.080(E)(2)(g) to make it clear and objective.

l. ALUO 18.62.080(A)(4)

ALUO 18.62.080(A)(4) requires a detailed geotechnical study for all applications on hillside lands. Petitioner argues this requirement "could cost the landowner thousands of dollars and delay projects for an inordinate amount of time." Petition for Review 15. We agree. However the possibility that ALUO 18.62.080(A)(4) "could" result in cost or delay does not mean that it will, or that such cost or delay would be "unreasonable." We therefore reject petitioner's contention

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that ALUO 18.62.080(A)(4) must be invalidated on the basis that it may result in delay or an increase in cost.[31]

It is not clear whether petitioner also argues ALUO 18.62.080(A)(4) violates the statutory and rule requirement for clear and objective standards and procedures for approval. If so, we conclude that ALUO 18.62.080(A)(4) is a requirement for information rather than a standard. Assuming ALUO 18.62.080(A)(4) is one of the city's "procedures for approval," the city is obligated to quickly and clearly identify any failure on the applicant's part to include all required information in the initial submittal and thereafter to allow the applicant an opportunity to make the application complete. ORS 227.178(2). In view of ORS 227.178(2), even if the ORS 197.307(6) and OAR 660-008-0015 requirement for clear and objective procedures for approval applies, ALUO 18.62.080(A)(4) does not violate the statute or rule.

m. ALUO 18.62.080(B)(5)(a)

ALUO 18.62.080(B)(5)(a) requires that "fill slope angles shall be determined in relationship to the types of materials of which they are composed." The city may intend to refer to standard tables that establish acceptable fill slope angles based on material type. However, ALUO 18.62.080(B)(5)(a) does

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[31] For the same reason we reject petitioner's challenge to ALUO 18.62.080(B)(7)(b), which requires a performance bond or other financial guarantee to guarantee completion of required erosion control measures.

not identify such a table or any other standard that the city proposes to use to determine acceptable fill slope.

ALUO 18.62.080(B)(5)(a) does not satisfy the ORS 197.307(6) and OAR 660-008-0015 requirement for clear and objective standards and procedures.

This subassignment of error is sustained, in part.[32]

3. The Requirement for Clear and Objective Standards When Regulating Appearance or Aesthetics

ORS 197.307 was amended in 1997 to add a further refinement of the "clear and objective" requirement in ORS 197.307(6). ORS 197.307(3) repeats the requirement of ORS 197.307(6) that "approval standards or special conditions" be "clear and objective" and adds the requirement that such "standards or conditions shall not be attached in a manner that will deny the application or reduce the proposed housing density." The restrictions imposed on local governments under ORS 197.307(3) apply both to "needed housing" and to permits for "residential development" generally.

We have already concluded that certain ALUO provisions identified by petitioner are not "clear and objective" and, for that reason, violate ORS 197.307(6). Those provisions

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therefore also may violate the ORS 197.307(3) requirement for clear and objective standards or special conditions "regulating appearance or aesthetics."

On remand the city potentially could correct the conflict between those ALUO provisions and ORS 197.307(6) by making them inapplicable to "needed housing." However, if those ALUO provisions remain applicable to "residential development" and constitute regulations of "appearance or aesthetics," they would continue to violate ORS 197.307(3).

We do not reach the question of whether the regulations petitioner believes constitute "appearance or aesthetics" regulations actually constitute regulations of "appearance or aesthetics." However, petitioner appears to contend that if a standard or special condition applied to housing has any effect on appearance or aesthetics or in any way is intended to affect appearance or aesthetics, it necessarily is the kind of standard or special condition regulated by ORS 197.307(3). We reject that contention.

ORS 197.307(3) only regulates standards or special conditions applied to needed housing or residential development generally, <u>if</u> the standards or special conditions regulate <u>only</u> for appearance or aesthetic purposes. In other words, if there are other planning purposes for such residential regulations, the fact that the regulations may <u>also</u> regulate for appearance or aesthetic purposes does not make ORS 197.307(3) applicable. On remand, the city will have

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an opportunity to explain whether its HDO provisions regulate for purposes other than appearance or aesthetics. This subassignment of error is sustained.

[32] Summarizing our review of the plan sections challenged by petitioner under these subassignments of error, we conclude ALUO 18.62.040(J); 18.62.080(B)(8); 18.62.080(D)(5); 18.62.080(D)(6)(a); 18.62.080(D)(6)(c) and 18.62.080(B)(5)(a) are not clear and objective standards or procedures, as required by ORS 197.307(6) and OAR 660-008-0015. ALUO 18.62.080(E)(2)(g) is not clear and objective, but we remand to the city to determine in the first instance whether it is an approval standard or merely a suggestion.

4. Petitioner's Remaining Arguments.

Petitioner argues that the revised standards adopted in ALUO 18.62.080 are "unnecessary" and that the city failed to demonstrate that "existing protections are inadequate." Petition for Review 15.

Petitioner cites no authority for the proposition that the city must establish that its existing regulations are inadequate or that new hillside regulations are necessary before it may amend its land use regulations to include revised hillside regulations. We are aware of no such authority or requirement and reject the argument.

This subassignment of error is denied.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

ORS 92.040(2) provides:

"After September 9, 1995, when a local government makes a decision on a land use application for a subdivision inside an urban growth boundary, only those local government laws implemented under an acknowledged comprehensive plan that are in effect at the time of application shall govern subsequent construction on the property unless the applicant elects otherwise." (Emphasis added.)

Petitioner alleges the city may apply the HDO to construction of previously approved subdivisions, in violation of ORS 92.040(2).

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ORS 92.040(2) limits a city's authority to apply new land use regulations to construction of subdivisions that were approved after September 9, 1995. ORS 92.040 would prohibit application of the HDO to "construction" of a subdivision that was approved (1) after September 9, 1995, and (2) before the HDO was adopted. The city contends there is no reason to believe the city intends to apply the HDO contrary to ORS 92.040(2), and we agree.

Petitioner also argues that applying the HDO to construction of previously approved subdivisions would violate ORS 227.178(3). ORS 227.178(3) provides:

"If the application [for a permit, limited land use decision or zone change] was complete when first submitted * * * and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

ORS 227.178(3) applies to decisions on applications for subdivision approval.[33] As the city correctly notes, ORS 227.178(3) does not apply to construction or development standards that may be adopted after an application for subdivision approval is granted.

The second assignment of error is denied.

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THIRD ASSIGNMENT OF ERROR

Petitioner argues the HDO violates Goals 5 and 10 and LCDC administrative rules that implement those Goals.

[33] The definitions of "permit" and "limited land use decision" expressly include subdivisions. ORS 197.015(12)(limited land use decision); 227.160(2)(permit); 227.215(1)(development).

A. Goal 5

Petitioner's Goal 5 argument is based on an alleged failure to comply with LCDC`s new Goal 5 administrative rule. OAR chapter 660, division 23. That rule is potentially applicable to post-acknowledgment plan amendments. OAR 660-023-0000. OAR 660-023-0010(5) defines "post-acknowledgment plan amendments" (PAPAs) as including amendments to acknowledged "land use regulations." However, OAR 660-023-0250(3) specifically provides that "[l]ocal governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource." OAR 660-023-0250(3) goes on to state that "a PAPA would affect a Goal 5 resource only if:

"(a) The PAPA creates or amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5;

"(b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list; or

"(c) The PAPA amends an acknowledged UGB and factual information is submitted demonstrating that a resource site, or the impact areas of such a site, is included in the amended UGB area."

Although neither petitioner nor respondent address OAR 660-023-0250(3)(a), (b) or (c), it does not appear that the

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HDO qualifies under any of those subsections. The HDO amends existing land use regulations, but does not create or amend "a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5." Nor does the HDO allow any new uses or amend the UGB.

Petitioner has not established that Goal 5 applies to the HDO. This subassignment of error is denied.

B. Goal 10

The only two Goal 10-related provisions petitioner contends the HDO violates are OAR 660-008-010 and 660-008-015. Those provisions are in all material respects identical to the needed housing statutory requirements for sufficient buildable lands to satisfy needed housing requirements and for "clear and objective" standards and procedures. ORS 197.307(3)(a) and 197.307(6). We have already concluded that the HDO either violates or has not been shown to comply with those statutory provisions. If petitioner is correct that Goal 10 applies directly to the HDO, the HDO violates these Goal 10 rule provisions, as well.

The ALUO is a "land use regulation," as that term is defined by ORS 197.015(11). The HDO amends the ALUO. LUBA is required to "reverse or remand an amendment to a land use regulation" that is not consistent with one or more statewide planning goals, if:

"The comprehensive plan does not contain <u>specific</u> policies or other provisions which provide the basis

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for the regulation, and the regulation is not in compliance with the statewide planning goals." (Emphasis added). ORS 197.835(7)(b) (emphasis added).

In other words, where the comprehensive plan includes specific policies or other provisions that provide the basis for the regulation, the statewide planning goals do not apply.

We explained in Melton v. City of Cottage Grove, 28 Or LUBA 1, 6 (1994), that comprehensive plan provisions that generally urged planning for tourist-commercial activities were not specific policies that could provide a basis for a particular interstate-oriented major retail facility. Similarly, in Ramsey v. City of Portland, 23 Or LUBA 291, 299, aff'd, 115 Or App 20, 836 P2d 772 (1992), we concluded a general provision urging conservation of natural resources did not amount to a specific plan policy that could provide the basis for a newly adopted procedure for case-by-case evaluation of development applications. However, in our recent decision in Cuddeback v. City of Eugene, 32 Or LUBA 418, 422-23 (1997), we explain that the requirement in ORS 197.835(7)(b) for "specific policies or other provisions which provide the basis for the regulation" does not require that the comprehensive plan policy or provision specify exactly how the plan is to be implemented.

The challenged decision includes 10 pages of findings that identify numerous plan policies, goals and other provisions. Record 33-43. The city specifically finds in its decision that these plan policies and other provisions

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constitute the kind of "specific policies" required by ORS 197.735(7)(b), making the statewide planning goals inapplicable to the challenged decision. Record 33. The policies cited by the city are somewhat more specific than the policies the cities attempted to rely upon in Melton and Ramsey to contend that statewide planning goals did not apply directly to the decisions challenged in those appeals.[34] Petitioner does not assign error to the city's finding that the cited plan policies and other provisions satisfy the requirement under ORS 197.735(7)(b) for "specific policies or other provisions which provide the basis for the regulation." At oral argument, petitioner contended the cited policies were not sufficiently specific, but did not explain why it believed the cited policies and other provisions lack the requisite specificity under ORS 197.735(7)(b).

In view of the city's unchallenged finding that the cited plan policies and other provisions make the statewide planning

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goals inapplicable to the HDO, we reject petitioner's contention that the HDO violates Goal 10 and the Goal 10 administrative rule.[35]

FOURTH ASSIGNMENT OF ERROR

In its final assignment of error, petitioner argues the HDO is inconsistent with a number of comprehensive plan provisions and for that reason must be reversed or remanded under ORS 197.835(7)(a).

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[34] The following examples are representative of the plan policies and other provisions the city cites in its decision:

"Areas of steep slope on highly erosive granitic soils are very sensitive to development activities. The best control to erosion is to limit development in areas that are sensitive." Record 34.

"[D]evelopment [must] be accommodated to natural topography, drainage, and soils and make maximum use of existing vegetation to minimize erosion." Record 35.

"Require site-preparation procedures and construction practices which minimize erosion and sedimentation." Id.

"Restrict any new partitioning or subdivision of land on slopes greater than 40%." Record 36.

[35] Our conclusion here that the cited plan policies are sufficient to make the statewide planning goals inapplicable provides an additional basis for rejecting petitioner's allegations that the city should have applied Goal 5 when it adopted the HDO.

A. ACP Chapter XII

As explained under the first assignment of error, the BLI includes "buildable lands presently available in the City limits." ACP XII-2. Table XII-3 shows there is a sufficient number of acres of land to meet identified land needs in each of the identified land categories. Petitioner contends the HDO will reduce development potential on SFR lands, making buildable lands shown on Table XII-3 inadequate to meet projected needs for single-family housing units.

We have already sustained petitioner's subassignment of error D(1) under the first assignment of error. On remand, the city will have to demonstrate that the 160 acres of SFR lands outside city limits but inside the UGB (which will also be subject to the HDO) are capable of supplying a sufficient number of housing units to (1) offset the impact of the HDO on

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SFR lands currently within the city and (2) address the current shortage of 46 acres of SFR lands already within the city. If the city is unable to do so, we agree with petitioner that the BLI will have to be amended to add a sufficient number of acres of SFR lands to meet those needs.

This subassignment of error is sustained.[36]

B. ACP Chapter XII, Policies 2 and 3

Petitioner makes arguments that the HDO, by making certain lands within the city limits unbuildable, will violate ACP Chapter XII, Policies 2 and 3. Petitioner's arguments are based on a strained and incorrect understanding of what those policies mean and how they would have to be applied following adoption of the HDO. We reject petitioner's arguments concerning these policies without discussion.

This subassignment of error is denied.

The fourth assignment of error is sustained, in part.

The city's decision is remanded.

[36] The city once more attempts to rely on OAR 660-008-0005 for the proposition that its BLI is not required to include slopes in excess of 25% to meet identified housing needs. Again, this confuses what the city may do with what it in fact has done in the ACP. The BLI includes lands with greater than 25% slopes to meet identified housing needs. The HDO renders some of those lands included on the BLI unbuildable. The city may not avoid addressing that impact of the HDO by claiming it need not have included the affected acres in the BLI in the first place. The bottom line is that in adopting the HDO the city must ensure that it continues to have a sufficient number of acres of buildable land in its BLI to meet identified land needs.

In addition we are uncertain of the legal significance of the city's argument that Policy 1 at ACP XII-6, which states the city will strive to maintain a 5-year supply of land for any particular need in the city limits," is met. The relationship between that policy and Tables XII-1, XII-2 and X-II-3, which address land needs and vacant buildable lands for a longer planning period and consider lands outside city limits, is not clear.

Land Use Board of Appeals State of Oregon

THE ROBERT RANDALL COMPANY, Petitioner,
vs.
THE CITY OF WILSONVILLE, Respondent.

LUBA No. 86-016

Remanded October 6, 1986

*1 Kenneth H. Fox, Portland, filed the Petition for Review and argued on behalf of petitioners. With him on the brief were O'Donnell, Ramis, Elliott and Crew.

Michael E. Kohlhoff, Wilsonville, filed a response brief and argued on behalf of respondent.

Michael A. Holstun, Salem, filed a state agency brief on behalf of the Department of Land Conservation and Development.

BAGG, Referee; DuBAY, Chief Referee; participated in the decision. KRESSEL, Referee, Concurring.

Opinion by Bagg.

NATURE OF THE DECISION

Petitioner appeals denial of its request for a zone change to permit construction of a mobile home park in the City of Wilsonville. Petitioner asks us to reverse the decision.

FACTS

Petitioner applied for a zone change from RA-1 (Residential Agricultural) to PDR (Planned Development Residential) for a 21 acre parcel.[1] Petitioner's request was heard and approved by the Wilsonville Planning Commission in December 1985. The approval was submitted to the city council for final action. However, the council found that the application did not comply with the city's comprehensive plan and denied the requested change. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> *2 "The Wilsonville City Council misconstrued its own Comprehensive Plan and zoning ordinance by denying that a mobile home park is an outright permitted use in an area designated for medium density residential development on the Comprehensive Plan. LCDC has already ruled that the applicable standard governs *how*, but not *whether* such a development is to be approved." (Emphasis in original.)

The city based its denial on Objective 4.3.3 of the comprehensive plan. Under the objective, the city must:

> "Encourage the development of diverse housing types, but maintain a balance in the types and location of housing available, both currently and during future development. Such housing types shall include, but not be limited to, apartments, single family detached, commonwall single family, manufactured homes, mobile homes, and condominiums in various structural forms." City of Wilsonville Comprehensive Plan, Objective 4.3.3.

Citing this plan objective, the council stated that

[1] The PDR zone allows mobile home parks as permitted uses.

> "Wilsonville is out of balance in the number of mobile homes placed within the city limits." Record at 23. The city council concluded that it was justified in denying the development.

Petitioner argues the city's design violates the comprehensive plan. Petitioner states that under the comprehensive plan, the subject property is a Medium Density Residential (MDR) area, and adds that the following comprehensive plan provision requires the city to approve the application:

> "The city will provide for development of mobile home parks and subdivisions by establishing them as outright permitted uses in urban medium density residential areas. Where economically feasible and where adequate compatible provisions can be made existing mobile home parks shall be protected and allowed to continue." City of Wilsonville Comprehensive Plan, Policy 4.4.2.

Petitioner also argues that acknowledgement of the city's plan by the Land Conservation and Development Commission was predicated, in part, on LCDC's understanding that mobile home development proposals in MDR areas on the plan would be treated as permitted uses by the city. According to petitioner, the plan, as acknowledged, requires an upzone to PDR upon application for any property within a medium density residential area over 2 acres. *See* Record at 519.

Intervenor Department of Land Conservation and Development seconds petitioner's complaints and states that during the acknowledgement process, the city represented to LCDC that it was the intent of the plan to allow mobile homes outright in medium density areas.[2] *See* "Summary Analysis of Findings Related to LCDC Acknowledgement Review Report" submitted by the Wilsonville Planning Commission on March 24, 1982, page 15. The department insists that the plan is clear and unambiguous in its grant of permitted use status to mobile homes in the MDR areas.[3]

The city defends by stating it is entitled to determine when development authorized by the plan is to be allowed. The city argues it found too many mobile homes now exist in the area sought to be developed. Under the city's plan calling for a balance of housing types, the city claims it is entitled to deny the development so as to maintain a balance between mobile homes and other housing types.

*3 1 We find the city was entitled to consider this application against its comprehensive plan objective calling for a balance of housing types. The city's plan is divided into goals, objectives, and policies. The plan provides that

> "[W]hen any ambiguity or conflict appears to exist, Goals shall take precedence over Objectives, Policies, Text and Map; Objectives shall take precedence over Policies, Text and Map; Policies shall take precedence over Text and Map."

In this case, the plan policy that mobile homes be treated as permitted uses in urban medium density residential areas is a clear statement appearing to require approval of this application. The policy is stated in mandatory terms. Objective 4.3.3, however, also requires the city to "maintain a balance in the types and location of housing available…." Maintaining a balance of housing types is also obligatory. The plan objective, then, is placed in conflict with the plan policy by the application for a mobile home park. Satisfaction of one provision will violate the other.

[2] Medium density is 5 to 12 units per acre.

[3] We are aware of no authority requiring us to interpret the city's plan in the light of a DLCD acknowledgement report. The "Summary Analysis of and Findings Related to LCDC Acknowledgement Review Report" relied upon by the department in support of its interpretation of the city plan is a planning commission document, not a statement of the governing body.

Where provisions are conflict, the plan itself provides a method to resolve the conflict - the objective controls over the policy.

We conclude the city was justified in applying Objective 4.3.3 to this application. The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "The Wilsonville City Council went beyond its authority under its own zoning ordinance by applying Comprehensive Plan objective 4.4.3 [sic] to Petitioner's application."

Aware that the city rests its decision on a plan objective, petitioner next argues the city code does not require a zone change to satisfy a comprehensive plan "Objective." Petitioner asserts the rezoning criterion provides that a proposed development must be "consistent with all applicable *policies* in the comprehensive plan." (Emphasis added) Wilsonville City Code, Section 4.187. Record at 271.

2 The code does not state clearly that either plan "objectives" *or* "policies" must be satisfied. Rather, the zoning code appears to require compliance with the comprehensive plan, generally. We decline to find the city in error simply because it considered objectives as well as policies.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

> "The Wilsonville City Council misconstrued LCDC's area of special concern designation."

In making its decision, the city council found that the subject property was entitled to protection as an "area of special concern." The council also found that design criteria in the comprehensive plan protects the environment in areas of special concern. Petitioner argues the area of special concern criteria are not applicable to this application for the same reasons that its application should be considered an outright permitted use.

3 We understand the city plan to designate particular geographical areas as "areas of special concern." The areas are given a number designation, and within each particular geographical area, certain plan provisions must be applied.

*4 The city's order states

> "The Comprehensive Plan further, emphasizes protection and enhancement of the pleasant, comfortable living environment presently enjoyed by local residents. It specifically designates this area as an Area of Special Concern and sets forth design criteria to protect the existing suburban low-density development in this area. Therefore, in interpreting compliance and balance, it is necessary for the Council to consider both subjective and objective factors." Record 23.

The city's order does not identify within which area of special concern petitioner's property lies. We are therefore unable to determine the particular criteria applicable, or potentially applicable, to petitioner's application. Indeed, it is not clear that the city applied any area of special concern criteria to this application. It is also not clear that the area of special concern criteria may be used to deny an application.

Without further guidance on which of the several areas of special concern is applicable to this development and upon what criteria the city measures this application, we are unable to sustain the city's use of this particular portion of its plan.

The first assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

> "The Wilsonville City Council has violated the applicable laws by amending its Comprehensive Plan without following statutory procedures."

Petitioner argues the City of Wilsonville failed to comply with the procedural requirements for amending comprehensive plans found in ORS 197.610-650. Petitioner claims the statutory notice requirements were not adhered to. Petitioner also states the following:

> "The first time its new interpretation of the Comprehensive Plan was made public was upon acceptance of the findings which denied Petitioner's application. This is in violation of the procedures established for plan amendments and should not be permitted." Petition for Review at 18.

4 We understand petitioner to argue that the city has effectively amended its comprehensive plan by interpreting away (or effectively writing out) a comprehensive plan policy requiring mobile homes be treated as permitted uses in urban medium density zones. According to petitioner's theory, the alleged "amendment" was not preceded by appropriate notice; and, therefore, the city is in violation of procedural requirements governing amendments to the comprehensive plan.

We reject this challenge. The city has not amended its plan. It has denied a zone change request. The alleged misinterpretation of the plan is not a plan amendment.

FIFTH ASSIGNMENT OF ERROR

> "The Wilsonville City, Council has interpreted its Plan in a manner that violates the state's "St. Helens" policy as codified at ORS 197.295 et seq."

Petitioner claims the city's denial of the mobile home development on property designated Urban Medium Density Residential is a violation of the LCDC acknowledgement and a violation of state policy codified at ORS 197.295 - ORS 197.312. The quoted statutes require local governments to provide affordable, decent, safe and sanitary housing for persons of lower, middle and fixed income. When a need has been shown for such housing within an urban growth boundary, such needed housing must be permitted under ORS 197.307(3). The local government approval process must be under "clear and objective" standards. ORS 197.307(5). These statutes are commonly known as the state's "St. Helen's" policy.

*5 The Department of Land Conservation and Development joins in this assignment of error and also asserts that the city's interpretation of its plan "results in a failure to provide needed housing in a zone or zones with sufficient buildable lands to satisfy housing needs…."[4] The Department states that the city's action is not based on clear and objective standards, in violation of ORS 197.307(5); and, indeed, the city's action discourages provision of needed housing.

The City of Wilsonville argues that nothing in the record shows the city does not have a sufficient inventory of lands to meet housing needs.

5 The statute requires that a need must be shown before the local government is obliged to provide for certain kinds of housing. We are cited to nothing in the record showing a need for additional mobile home subdivisions or similar housing for low, middle or fixed income. Without showing need, petitioner's challenge under ORS 197.295 *et seq* must fail.

The fifth assignment of error is denied.

[4] The Department does not cite us to any city housing inventory which might show whether the city's action affects its ability to provide needed housing.

SIXTH ASSIGNMENT OF ERROR

> "The Wilsonville City Council's findings do not support the Council's conclusion and are not supported by substantial evidence in the record."

SEVENTH ASSIGNMENT OF ERROR

> "The Wilsonville City Council failed to define the standard which must be met to obtain approval of a zone change application for a mobile home park development."

In these two assignments of error, petitioner argues that the city may not use its "balance" objective because the city did not define the objective. According to petitioner, the city council did not inform petitioner of how the standard could be met, and petitioner was left in the position of trying to second guess the council as to what evidence it must present in order to show compliance with the balance criterion. Further, petitioner argues that the city's findings do not show that too many mobile homes now exist in the city or that the proposed development would upset any balance which does exist between mobile homes and other housing types.

The city does not fully explain what it means by a "balance of housing types." The city's order states that its comprehensive plan "seeks a *diversity* and *balance* in housing types with a starting point of 24 percent mobile homes." Record at 23. We are cited to nothing in the plan that discloses what "balance" means. The plan cites a housing "report" showing that mobile homes "are distributed at about 25 percent per housing type as of May 19, 1979." City of Wilsonville Comprehensive Plan, Objective 4.3.2. However, there is no plan provision establishing 24 percent or (25 percent) as a desirable "balance" of mobile homes to other housing types.

In addition, we do not understand the city's order to state that a ratio of 24 percent mobile homes to other kinds of housing is an appropriate balance under the city's plan. The findings only state that the plan seeks diversity and balance in housing types "with a *starting point* of 24 percent mobile homes." (Emphasis supplied.)

6 We therefore agree with petitioner. The comprehensive plan is quite vague on the matter of what is an appropriate "balance" of housing types. Similarly, the city's order does not articulate what constitutes a proper balance. The city has not even given a range of ratios or balances between housing types that it would consider acceptable under its plan. In order to effectively use this criterion, the city must explain what it means by an appropriate or proper balance of housing types. *Commonwealth Properties v. Washington County,* 35 Or App 387, 582 P2d 1384 (1978).[5]

*6 The sixth and seventh assignments of error are sustained.

EIGHTH ASSIGNMENT OF ERROR

> "The Wilsonville City Council's decision is outside the range of discretion allowed under its Comprehensive Plan and zoning code, in violation of ORS 197.840."

Petitioner here urges us to order approval of the application. ORS 197.835(9) requires us to approve a development where petitioner shows the local government "is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances." Petitioner claims that the city's decision clearly flies in the face of the provisions of its plan. Petitioner also claims that we should assess attorney fees against the city under this same statute.

[5] The city has not explained why it chose this particular geographical area when discussing its housing type balance. On remand, the city's choice of area of study should be explained.

7 In order to agree with petitioner's request, we must find that the city was obliged to rezone petitioner's property for the reasons claimed in the first assignment of error. We do not accept this view. We find the city was entitled to apply plan Objective 4.3.3. The fact that it may have done so improperly, however, does not mean that petitioner must be given approval for the rezone. We therefore deny this assignment of error.

This assignment of error is denied.

This matter is remanded to the City of Wilsonville for a complete explanation and application of its balance criteria. Also, the city should explain any application of the "area of special concern" in the plan provisions.

Kressel, Concurring.

I differ with the majority's reasoning (but not the result) in the first assignment of error. The majority believes that Plan Policy 4.4.2 is "mandatory". By that I assume they mean the policy would entitle petitioner to the requested rezoning, but for the conflicting plan objective. This analysis gives more weight to the plan policy than is warranted by its text.

Policy 4.4.2 declares that

> "The city will provide for development of mobile home parks and subdivisions by establishing them as outright permitted uses in urban medium density residential areas. Where economically feasible and where adequate compatible provisions can be made existing mobile home parks shall be protected and allowed to continue."

Insofar as pertinent in this case, the text says nothing more than that the city *will* allow certain uses in the medium density areas of the plan. Neither this policy nor any other regulation cited by petitioner dictates *when* the city will take this action. More to the point in this case, the plan leaves completely unanswered the question of whether land shown on the plan map as "medium density residential," but currently zoned for less intensive use (e.g., Residential-Agricultural) must automatically be "upzoned" to accommodate a proposed mobile home park. That is precisely the question raised in this case.

Petitioner argues that the requested upzoning is dictated by policy 4.4.2 but the text of the policy does not go that far. The policy does not say *when* the zone must be brought into conformance with the plan. There is no statutory or other rule barring the city from maintaining property in a zoning district less intensive than shown on the plan. *See Pohrman v. Klamath County,* 25 Or App 613, 618-19, 550 P2d 1236 (1976). As a result, I believe the city could deny the rezoning application, supporting the denial by citation to other segments of the plan designed to have legal effect (i.e., objectives and policies).

*7 My objection to the majority's stance is that it paves the way for a practice I believe can erode much of a city's plan. That practice, which petitioner has *some* reason to believe is at work in this case, is the use of highly general plan "objectives" to override or eviscerate more specific, mandatory portions of a plan whenever the specific mandate proves to be unpopular. If the text of Policy 4.4.2 clearly supported petitioner's claim to an automatic rezoning for a mobile home park (as the majority seems to believe), the city should not be permitted to negate that text by invoking a "conflict" with the hierarchically superior, but far more general, plan objective. In land planning law as in other areas of the law, specific provisions should govern over general ones. This principle is incautiously overlooked by the majority opinion.

Chapter 9

Presentation Slides: Frequent Filers: Basic Priority of Statutory Liens in Oregon

Ian Kyle
Fidelity National Title
Portland, Oregon

Frequent Filers:

Basic priority of statutory liens in Oregon

Friday, August 11, 2023 Oregon RELU Conference

Riverhouse on the Deschutes

Breakout E (Real Estate), 3:00 PM

Outline

- Definition of statutory lien
- Construction liens
- Tax liens
- Homeowners Association (HOA) liens and Condominium Assn. (COA) liens
- Judgment liens
- Priority lien in fixtures (Purchase money priority)

Lien defined

- ORS Chapter 87, Statutory Liens, gives no general definition of a lien.
- Black's Law Dictionary:
  - **lien** (leen *or* **lee**-ən) *n.* A legal right or interest that a creditor has in another's property, lasting usu. until a debt or duty that it secures is satisfied. • Typically, the creditor does not take possession of the property on which the lien has been obtained. Cf. PLEDGE (3). — **lien,** *vb.* — **lienable, liened,** *adj.*
- Oregon Supreme Court quoted Black's definition of a lien in *Westwood Homeowners Association, Inc. v. Lane County*, 318 Or. 146 (1993) (previous version)

And what do you do with a lien?

- Must be foreclosed by judicial process.
- Is a recorded claim of lien presumed valid?
  - Say statutory pre-requisites not met. (Failure to maintain CCB license)
- If lien not allowed, any other options?
  - On contract, personal judgment against owner.
  - Lien provides remedy to claimant without having to first obtain judgment and provides protection (priority) vs. later claiming creditors.
- Statutory priority is not the last word on validity.
- We only discuss real property liens.

Statutory liens in Oregon. Exhaustive list?

- ORS 87.920, Recording of document not to create lien, affect title or constitute notice except as authorized by law
- Except where filing of the document is specifically required or authorized by statute, no document filed for recording or otherwise with any public officer in this state before or after October 15, 1983, shall create a lien or encumbrance upon or affect the title to the real or personal property of any person or constitute actual or constructive notice to any person of the information contained therein. [1983 c.763 §62]

Presumption: First in time, first in right

- Common law principle:

  An earlier lien is entitled to satisfaction before a subsequent lien. See *Director of Veterans' Affairs v. Vickery*, 299 Or. 315, 318 (1985) (mortgage vs. city nuisance lien)
- Satisfaction: payment out of proceeds of sale of collateral.
- Statutes make life interesting by deviating from this presumption.

Statutory lien

- **statutory lien.** (1827) **1.** A lien arising solely by force of statute, not by agreement of the parties. • Examples are federal tax liens and mechanic's liens. **2.** *Bankruptcy.*[omitted]

Black's Law Dictionary (11th ed. 2019)

Why it matters.

- We are discussing statutory liens because they sometimes deviate from the common-law presumption of first in time (to record), first in right.
- Want to avoid surprises for our clients.

Oregon's Construction Lien Law

- Themes: non-voluntary liens arising by statute.
  - Construction (or mechanics) liens were not recognized in English common law. Creatures of statute.
  - ORS 87.001 to 87.060; Oregon's Construction Lien Law
- In what sense involuntary?
  - In Oregon subcontractors, material providers etc. may lien real estate without contractual privity with the owner.
  - And in fact owner may have paid GC (general contractor) already.

Oregon's Construction Lien Law

- ORS 87.010 who is entitled to a lien, and scope of lien
- Liens on land:
  - (2) (equipment rental for site prep)
  - (6) (architect site preparation plans)
- Lien on improvement:
  - (1) (person providing labor, material, or transportation of material to work of improvement)
  - (4) (trustees of employee benefit plan for laborers)
  - (5) (architect's lien for plans or supervision of improvement)
    - But see also: ORS 87.015(1) extending lien on improvement under these subsections (1), (4), and (5) to land

ORS 87.025, Priority of perfected const. liens

- ORS 87.025(2), Priority of perfected liens
  - Except as provided in subsections (3) and (6) of this section, a lien created under ORS 87.010 (Construction liens) (1), (4) or (5) and perfected under ORS 87.035 (Perfecting lien) upon any improvement shall be preferred to all prior liens, mortgages or other encumbrances upon the land upon which the improvement was constructed.
- The common law principle of first in time (to record), first in right, is upset.
- What is a perfected lien?

Perfection of a lien.

- General definition:
  Validation of a security interest as against other creditors, usually by filing a statement with some public office or by taking possession of the collateral. *Blacks Law Dictionary* (11th ed. 2019)
- ORS 87.035, perfection of a construction lien, simplified:
  - (1) Within earlier of 75 days of claimant ceasing to provide service or completion of construction,
  - (2) the claimant must record a claim of lien.
- Discussion:
  - Claim of lien may be recorded after construction.

Case study: *SERA Architects v. Klahowya Condominium, LLC,* 253 Or. App. 348 (2012)

Dispute between lien claimant (SERA) and lender (Shorebank) following aborted construction that never went vertical.

- SERA's claim of lien recorded after the mortgage.

- However the GC began work (site clearing) before mortgage recorded.

- Shorebank argued that SERA's lien only had priority as to improvement under ORS 87.025(2), so no priority over Shorebank.

Requoting 87.025(2) (from two slides ago):

Except as provided in subsections (3) and (6) of this section, a lien created under ORS 87.010 (Construction liens) (1), (4) or (5) and perfected under ORS 87.035 (Perfecting lien) upon any improvement shall be preferred to all prior liens, mortgages or other encumbrances upon the land upon which the improvement was constructed.

SERA case study, continued.

- SERA argued that ORS 87.025(7) gives its lien priority, relating back to when overall work began; priming lien over Shorebank.
- ORS 87.025(7) reads in relevant part:
  - "The perfection of a lien under ORS 87.035 (Perfecting lien) relates to the date of commencement of the improvement as defined in ORS 87.005 (Definitions for ORS 87.001 to 87.060 and 87.075 to 87.093). […]"
- Commencement of improvement defined:
  - "The first actual preparation or construction upon the site or the first delivery to the site of materials of such substantial character as to notify interested persons that preparation or construction upon the site has begun or is about to begin." ORS 87.005(1)

SERA outcome:

Commencement of improvement was not the date that SERA performed the work or recorded its claim of lien.

Holding: ORS 87.025(7) restates the common law rule of equal priorities for perfected lien claimants, relating back to the commencement of improvement.

Outcome: SERA Architects' lien granted priority over Shorebank mortgage. Oregon SC denied review.

Construction lien parting thoughts.

A construction lien can prime a recorded mortgage or defeat the interest of a bona fide purchaser for value (BFP) of the property.

Caution when reading ORS 87.025 priority statutes.

Real Property (ad valorem) taxes

- Statutory lien arising July 1 in the year the taxes are assessed. ORS 311.405
- 311.405(9)(a) priority of lien:
  - […] The liens for ad valorem taxes, including and not limited to the general lien provided by subsection (3)(a)(B) of this section, created under this section are superior to, have priority over and shall be fully satisfied before all other liens, judgments, mortgages, security interests or encumbrances on the property without regard to date of creation, filing or recording.
- Any requirement to perfect the lien?

Real Property (ad valorem) taxes

- Example, effect of priority:
  - Mortgage records in 2006
  - Taxes assessed in 2023 and unpaid
  - Who has priority?
- May county initiate foreclosure over a later recorded lien?
  - ORS 312.010(1) requires three years of delinquency.
  - Redemption period following tax FC.

Real Property (ad valorem) taxes

- Treatment of current fiscal year lien of property taxes; roll not yet certified (file closed August 15, 2022):

SPECIFIC ITEMS AND EXCEPTIONS:

6. Property taxes in an undetermined amount, which are a lien but not yet payable, including any assessments collected with taxes to be levied for the fiscal year 2022-2023.

Real Property (ad valorem) taxes

- Farm/forest land special assessment rate. ORS 308A.083
- Potential additional taxes noted on tax statement. ORS 308A.706(3).
  - Additional taxes are assessed upon disqualification from special assessment. 308A.703.
- Even if disqualified from special assessment, payment of additional taxes is deferred so long as the land is still compatible with a return to farm/forest use. ORS 308A.706(1)(a).
- Note: citations are for specially assessed land outside of EFU (exclusive farm use) zones.

Deferral of additional taxes example

- Homeowner had hobby-sized vineyard in area zoned not exclusive farm use; applied for and received special farm assessment
- Disqualified in 2014 for failure to meet income requirements ($650/yr.):

06/09/2015	06/09/2015 16:28:00	Current Use Removal--To Year Value Set	LACK OF INCOME DECLASS ORS 308A.116-Effective to year 2014 Farm Deferral by [redacted]
06/12/2012	06/12/2012 10:55:00	Property Use Approval	.96 Acres for 2012 -Approved Farm Deferral by [redacted]

- Vineyard removed, lots marketed for sale for residential infill development. Not yet paved over.
- Additional taxes shown on tax roll.
- Not yet due and payable but parties had option to pay voluntarily. 308A.715

Other scenarios

- Senior citizens / disabled citizen deferral.
- DOR lien notice recorded. State pays counties during deferral.
- Omitted property.
- Title Insurance exception:

1) Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records; proceedings by a public agency which may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the public records.

Effect of real property tax priority.

- *Westwood Homeowners Association, Inc. v. Lane County*, 318 Or. 146 (1993)
- County maintained that super-priority of tax lien granted by ORS 311.405(9) meant it could eliminate CC&Rs in a tax foreclosure and wipeout its obligation to pay post-foreclosure assessments to the HOA.
- Held: No. Taxes have priority over other liens; held CC&Rs are not themselves liens.
- Segue: HOA and COA liens.

HOA and COA assessments.

- HOA assessments under the Planned Community Act.
- HOA lien is generally prior but not to first position mortgage:

ORS 94.709:

Whenever a homeowners association levies any assessment against a lot, the association shall have a lien upon the individual lot for any unpaid assessments. The lien includes interest, late charges, attorney fees, costs or other amounts imposed under the declaration or bylaws or other recorded governing document. The lien is prior to a homestead exemption and all other liens or encumbrances upon the lot except:

(a)Tax and assessment liens; and

(b)A first mortgage or trust deed of record.

HOA and COA assessments.

- Condominium (COA) lien is generally prior, but not to first mortgage lien.
  - ORS 100.450(1) provides in part:

    Whenever an association of unit owners levies any assessment against a unit, the association of unit owners shall have a lien upon the individual unit and the undivided interest in the common elements appertaining to such unit for any unpaid assessments.[…] The lien is prior to a homestead exemption and all other liens or encumbrances upon the unit except:

    (a)Tax and assessment liens; and

    (b)A first mortgage or trust deed of record []:
- But read on …

COA assessments.

- ORS 100.450(7) allows the COA / AUO lien to prime a first mortgage when (paraphrasing):
  - The AUO has given written notice to the lender that the unit owner is in default on payment of assessments;
  - The notice contains the following warning:

    NOTICE: The lien of the association may become prior to that of the lender pursuant to ORS 100.450 (Association lien against individual unit).

  - The lender has not initiated foreclosure or accepted a DIL of foreclosure "prior to the expiration of 90 days following the notice by the unit owners' association". 100.450(7)(c).
  - The borrower is in default on the mortgage obligation.

COA assessments.

- The condo declaration perfects the COA's lien. However notice of claim of lien is required to be separately recorded in order to foreclose. ORS 100.450(2).

CONDOMINIUM ASSOCIATION NOTICE OF CLAIM OF LIEN

Lien of Condominium Association Against Condominium Unit
Pursuant to ORS 100.450

KNOW ALL PERSONS: The undersigned, on behalf of [redacted] **Unit Owners Association** hereby claims a lien for unpaid assessments and charges (as noted below) against the individual lot noted below and the undivided interest in those common elements appertaining to lot.

COA assessment priming.

- Extent of lien primed?
  - Contrast other states' Uniform Condominium Acts; 6 months of priority.

Bank of New York Mellon v. Sulemanagic (Tanglewood Condominium Owners Association), 357 Or. 537 (2021)

- July 30, 2013: Bank filed foreclosure against condo unit naming Mountain Park HOA as defendant. (Priority over PCA/HOA lien?)
- Jan. 31, 2014: 5 months later complaint amended to include Tanglewood Condominium Owners Association as defendant.
- May 14, 2014: Plaintiff files proofs of service on Tanglewood COA.
- May 16, 2014: Court nonetheless dismissed Tanglewood COA as a defendant under UTCR 7.020(5) for plaintiff's failure to prosecute case.

Bank of New York Mellon v. Sulemanagic (Tanglewood Condominium Owners Association), 357 Or. 537 (2021), continued.

- October 1, 2014: Tanglewood COA gave notice to lender under ORS 100.450(7), statute discussed above, to attempt to prime lien.
- May 4, 2015: Bank filed motion to reinstate case against Tanglewood, which was ultimately granted over Tanglewood's objections.
- Note: More than 90 days passed from the COA notice to lender until the reinstatement of the case against the COA.
- Bank's priority argument prevailed at trial court and Court of Appeals.
- Oregon Supreme Court, sitting en banc, reversed.

Bank of New York Mellon v. Sulemanagic (Tanglewood Condominium Owners Association), 357 Or. 537 (2021)

- Holding:
  - The bank failed to revive the foreclosure against the COA within 90 days of the ORS 100.450(7) notice.
  - As the bank argued, the foreclosure had been "initiated" (the other defendants were not dismissed) prior to the COA's notice which is all that the statue seems to require; however, the text, context, and legislative history of ORS 100.450(7) make clear that the bank is supposed to act within 90 days of the notice by reinstating the foreclosure against the COA.

Bank of New York Mellon v. Sulemanagic (Tanglewood Condominium Owners Association), 357 Or. 537 (2021)

- Legislative history sidebar. The priority statute 100.450(7) was introduced by OSB RELU.
- The foreclosing plaintiff may not have noticed that the unit was subject to a COA (Tanglewood) as well as an HOA (Mountain Park) and that each lien has different priority laws under ORS 94.709 and 100.450 respectively.

Judgment lien.

- ORS 18.150
  - Judgment entered in circuit court containing a money award against a defendant imposes a lien upon all real property of defendant in that county upon notation by the clerk that judgment imposes a lien.
    - And binds later-acquired property, too.
  - Support (spousal and child support), equalizing awards – common problems in title world.
  - Duration of CHSU lien: 35 years from entry. Or Laws, Ch 212, sec. 20.
    - Judgment accruing vs. judgment duration.
- ORS 18.165(1)(d), Purchase-money mortgage exceptions.
  - PMM takes clear of judgment liens against buyer.
  - Not so on refinance or sale-out. Explain.

PMSI interest in fixtures

A fixture filing security interest that meets the following four requirements has priority over a conflicting encumbrance or ownership interest, without respect to recording dates, except as against a previously recorded construction mortgage and except as to ordinary building materials incorporated into an improvement on land:

(1) The debtor has an interest of record in or is in possession of the real property;

(2) The security interest is a purchase-money security interest;

(3) The interest of the conflicting party arises before the goods become fixtures; and

(4) The security interest is perfected by a fixture filing, that is, by recording, before the goods become fixtures or within 20 days thereafter.

ORS 79-0334 [UCC 9-334].

Chapter 10

Practical Considerations for LUBA Practitioners

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Practical Considerations for LUBA Practitioners

I. Recent LUBA Rule Amendments

A. Appearance and Representation

1. Let LUBA know when counsel changes and how, including adding attorneys within the same law firm and withdrawing from an appeal.
2. If there is more than one attorney, designate a lead attorney to receive documents.
3. Let LUBA know if your contact information changes. File a notice of change of address in every active appeal, or one notice listing all of your active appeals.
4. Let LUBA know if another proceeding at LUBA or elsewhere involves closely related matters or legal issues.

B. Filing and Service

1. Documents may be filed and served by commercial delivery service (Fedex, UPS, etc.). The filing and service date (for NITAs and other documents) is when the document is deposited with or dispatched for delivery by the service, as shown by a receipt or the service's online tracking service.
2. LUBA's rules used to allow filing and service by first-class, certified, and registered mail. First-class mail is only available up to certain weights. LUBA's rules now allow filing and service by first-class and priority mail.

C. Record

1. If a meeting is recorded by the local government, then the recording must be included in the record, even if the local government was not required to create the recording.

D. Briefs

1. You only have to file an original and one copy of your brief, not four copies.
2. Petitioner(s) may file one petition for review, even if two cases with the same petitioner(s) are consolidated.
3. Respondents and intervenors-respondents may each file one brief, even if there are multiple petitions for review or intervenor-petitioner's briefs. However, the word limit in such cases is increased from 11,000 to 15,000.
4. Parties may still ask the board for permission to file overlength briefs.

E. Motions

1. LUBA's 2022 rule amendments detail more fully the requirements for motions to take official notice, motions to intervene, and filings when an appeal is transferred from circuit court.
2. All motions must be filed as separate documents.

II. Practice Tips for Practitioners

A. LUBA's Internal Procedures

1. How LUBA processes a case after a NITA is submitted.
2. The board member who is assigned a case issues orders on motions.
3. The board members review briefs generally no more than a day or two before oral argument.
4. The board members have access to the local record but will not have reviewed it in any great detail before oral argument.
5. Board members rely heavily on citations to the record in the briefing.

B. LUBA's Rules

1. Read the rule; read the rule; read the rule.
2. Corollary to above: Read the right rule.

C. Local Record

1. As a local government attorney, follow the rules for preparing and submitting the record.
2. Responses to record objections.
3. Be familiar with the record.

D. Briefing

1. Petition for Review
    a. For each assignment, include preservation of error statement, with record citations, or explain why preservation not required. File a reply brief where preservation is contested.
    b. Where an assignment of error contains multiple allegations of error, set them out separately with distinct standards of review.
    c. Set out assignments that have different standards of review as separate assignments of error or sub-assignments of error.
    d. Relate arguments to an applicable approval criterion.
    e. Allegations of procedural error: Demonstration of prejudice to substantial rights is required.
2. General Briefing Guidelines
    a. For amended pleadings, explain what is being changed from the original pleading.
    b. Coordinate briefing.
    c. Acknowledge when a statute or provision is ambiguous.
    d. Cross petitions for review and cross-assignments of error.

E. Oral Argument

1. Don't merely repeat the brief.
2. Focus on the issues upon which the appeal turns.
3. Supplement the record citations found in the brief, if applicable.
4. Prepare.

F. Etiquette

1. Always be kind and professional when communicating with LUBA support staff.

Chapter 11

Presentation Slides: Environmental Due Diligence

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Environmental Due Diligence

Fabio Dworschak
Miller Nash LLP

Oregon State Bar
August 11, 2023

Why Perform Environmental Due Diligence?

- To understand what is being purchased
- To satisfy lenders, investors, and/or insurers
- To protect against potential federal and state liability for historic environmental contamination on the property being purchased

What Are the Possible Liabilities for Historic Contamination under Federal Law?

- Federal Liability—CERCLA (42 U.S.C. § 9601 *et seq.*)
  - CERCLA renders several potentially responsible parties (or PRPs), including current owners, liable for any hazardous substance contamination on the property (§ 9607(a)(1))
    - *Note:* hazardous substances do not include petroleum (§ 9601(14))
  - CERCLA is a strict liability statute. *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 608 (2009)

How to Avoid Liability for Historic Contamination under Federal Law?

- CERCLA Defenses (§ 9607(b) & (r))
  - Act of God
  - Act of War
  - Acts or omissions of third-parties under certain circumstances
    - *Innocent Landowner**
  - Any combination of these three
  - Bona fide prospective purchase*

- Innocent Landowner Defense (§ 9607(b)(3) + § 9601(35))
  - § 9607(b)(3): an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that
    - (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and
    - (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions

- Innocent Landowner Defense (§ 9607(b)(3) + § 9601(35))
  - § 9601(35): (A)The term "contractual relationship," for the purpose of section 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds, easements, leases, or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:
    - (i)At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.
    - (ii)The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.
    - (iii)The defendant acquired the facility by inheritance or bequest.
  - In addition to establishing the foregoing, the defendant must establish that the defendant has satisfied the requirements of section 9607(b)(3)(a) and (b) of this title, provides full cooperation, assistance, and facility access to the persons that are authorized to conduct response actions at the facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action at the facility), is in compliance with any land use restrictions established or relied on in connection with the response action at a facility, and does not impede the effectiveness or integrity of any institutional control employed at the facility in connection with a response action.

- Innocent Landowner Defense (§ 9607(b)(3) + § 9601(35))
  - § 9601(35): (B) Reason to know.
    - (i) All appropriate inquiries—To establish that the defendant had no reason to know of the matter described in subparagraph (A)(i), the defendant must demonstrate to a court that:
      - (I) on or before the date on which the defendant acquired the facility, the defendant carried out all appropriate inquiries, as provided in clauses (ii) and (iv), into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices; and
      - (II) the defendant took reasonable steps to:
        - (aa) stop any continuing release;
        - (bb) prevent any threatened future release; and
        - (cc) prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance.
    - (ii) Standards and practices—Not later than two (2) years after January 11, 2002, the Administrator shall by regulation establish standards and practices for the purpose of satisfying the requirement to carry out all appropriate inquiries under clause (i).

- Bona Fide Purchaser Defense (§ 9607(r) + § 9601(40))
  - § 9607(r): (1)Limitation on liability
    - Notwithstanding subsection [§9607](a)(1), a bona fide prospective purchaser whose potential liability for a release or threatened release is based solely on the bona fide prospective purchaser being considered to be an owner or operator of a facility shall not be liable as long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration.

- Bona Fide Purchaser Defense (§ 9607(r) + § 9601(40))
  - § 9601(40)):
    - (A) In general. The term "bona fide prospective purchaser" means, with respect to a facility—
      - (i)a person who
        - (I)acquires ownership of the facility after January 11, 2002; and
        - (II)establishes by a preponderance of the evidence each of the criteria described in clauses (i) through (viii) of subparagraph (B); . . .
    - (B) Criteria.The criteria described in this subparagraph are as follows:
      - (i) Disposal prior to acquisition. All disposal of hazardous substances at the facility occurred before the person acquired the facility.
      - (ii) Inquiries.
        - (I)In general. The person made all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices in accordance with subclauses (II) and (III).
        - (II)Standards and practices. The standards and practices referred to in clauses (ii) and (iv) of paragraph (35)(B) shall be considered to satisfy the requirements of this clause.

- All Appropriate Inquiries (40 C.F.R. Part 312)
  - 40 CFR § 312.20: regulatory standard;
  - ASTM international Standard E1527–21 entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process."; or
  - ASTM International Standard E1527–13 entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process." (but only until 2/13/24)

What Are Possible Liabilities for Historic Contamination under Oregon Law?

- Oregon Liability—Oregon's Superfund Law (ORS 465.200 *et seq*.)
  - As with CERCLA, the Superfund law imposes strict liability. ORS 465.255(1)

- Oregon's Superfund Law Liability (ORS 465.255(1)):
  - (a) Any owner or operator at or during the time of the acts or omissions that resulted in the release.
  - (b) Any owner or operator who became the owner or operator after the time of the acts or omissions that resulted in the release, and who knew or reasonably should have known of the release when the person first became the owner or operator.
    - *Note: Prospective Purchaser Agreement*
  - (c) Any owner or operator who obtained actual knowledge of the release at the facility during the time the person was the owner or operator of the facility and then subsequently transferred ownership or operation of the facility to another person without disclosing such knowledge.
  - (d) Any person who, by any acts or omissions, caused, contributed to or exacerbated the release, unless the acts or omissions were in material compliance with applicable laws, standards, regulations, licenses or permits.
  - (e) Any person who unlawfully hinders or delays entry to, investigation of or removal or remedial action at a facility.

How to Avoid Liability for Historic Contamination under Oregon Law?

- Oregon's Superfund Law Defenses (ORS 465.255(2)):
  - (a) Any owner or operator who became the owner or operator after the time of the acts or omissions that resulted in a release, and who did not know and reasonably should not have known of the release when the person first became the owner or operator.
  - (b) Any owner or operator if the release at the facility was caused solely by one or a combination of the following:
    - (A) An act of God. "Act of God" means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.
    - (B) An act of war.
    - (C) Acts or omissions of a third party, other than an employee or agent of the person asserting this defense, or other than a person whose acts or omissions occur in connection with a contractual relationship, existing directly or indirectly, with the person asserting this defense. As used in this subparagraph, "contractual relationship" includes but is not limited to land contracts, deeds or other instruments transferring title or possession.
  - *See also* ORS 465.255(3)

- Oregon's Prospective Purchaser Agreement (ORS 465.327(1)):
  - In order to facilitate cleanup and reuse of contaminated property, the Department of Environmental Quality (DEQ) may, through a written agreement, provide a party with a release from liability under ORS 465.255, ORS 465.640, and ORS 468B.310 if:
    - (a) The party is not currently liable under: ORS 465.255; ORS 466.640; ORS 467B.310 for an existing release or spill of hazardous substance
    - (b) Removal or remedial action is necessary at the facility to protect human health or the environment;
    - (c) The proposed redevelopment or reuse of the facility will not contribute to or exacerbate existing contamination, increase health risks or interfere with remedial measures necessary at the facility; and
    - (d) A *substantial public benefit* will result from the agreement, including but not limited to:
      - (A)The generation of substantial funding or other resources facilitating remedial measures at the facility in accordance with this section;
      - (B)A commitment to perform substantial remedial measures at the facility in accordance with this section;
      - (C)Productive reuse of a vacant or abandoned industrial or commercial facility; or
      - (D)Development of a facility by a governmental entity or nonprofit organization to address an important public purpose.

Thank You

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Chapter 12

Intersection Between Ethics and Technology

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Oregon State Bar Real Estate/ Land Use Section

Intersection Between Ethics and Technology

David J. Elkanich, delkanich@bucahlter.com
Professional Responsibility Group

Real Estate and Land Use Conference
Oregon State Bar – August 11, 2023

Buchalter

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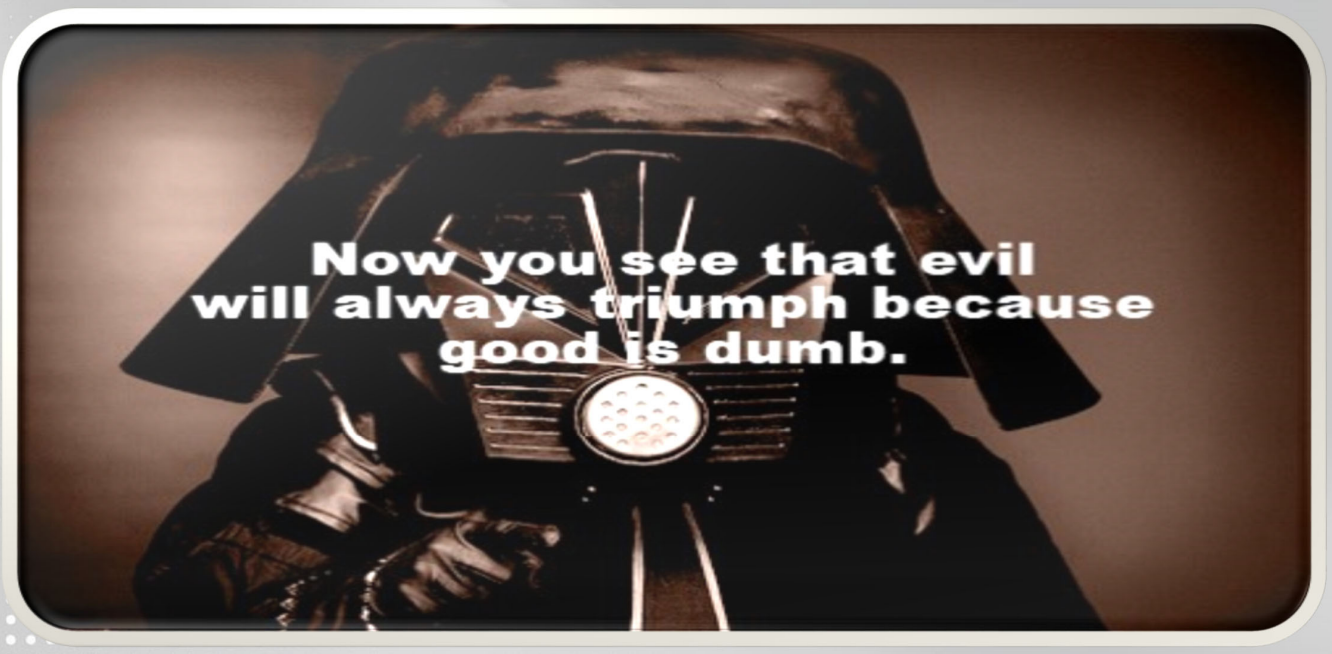
The Agenda for Today

- Data security
- Mobile Lawyering
- UPL issues on the Road
- Cloud computing
- Touch of AI

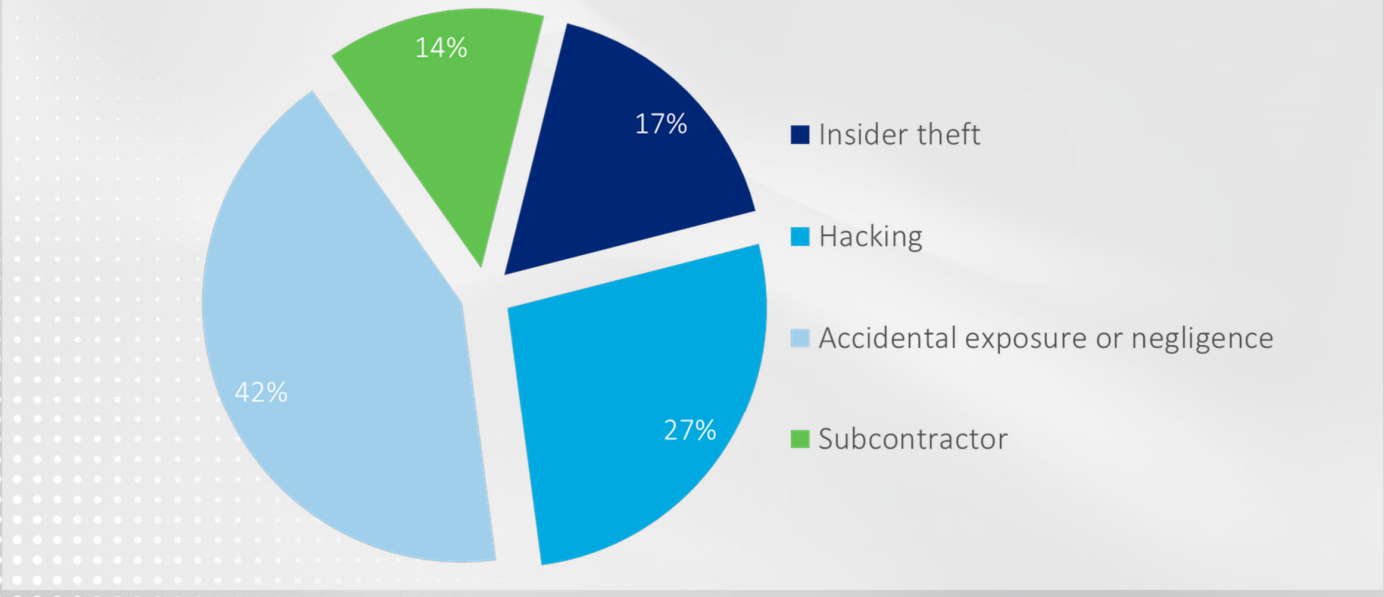
- Disclaimers
- Questions

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No. 1: Data Security Risks and Mobile Lawyering



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Phishing and Malware



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Lessons Learned from Self-Inflicted Exposure

- **Learn to identify risk**
  - —Remote lawyering
  - —Device usage
  - —Not having, or noncompliance with, firm policies (aka, your cybersecurity is only as strong as its weakest link).
- **Learn how to mitigate risk**
  - —Have policies and procedures in place
  - —Train, train, train
  - —Enforcement through compliance testing
- **Learn how to respond when the inevitable exposure happens**
  - —Breach planning and response

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A Word About Cyber Insurance

- Do you need cyber security insurance?
- What does it cover?
  - —First party – direct financial impact of a breach
  - —Third party – protects liability claims in event of breach
- Consider your need. Review excess carrier options.
- PLF Cyber Liability & Breach Endorsement

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Primary Risks of Mobile Lawyering

- Physical access to lost or stolen device by unauthorized user
- Hackers accessing confidential information
  - —Unencrypted data over an unsecured wireless network

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Primary Risks of Mobile Lawyering

- Physical access to lost or stolen device by unauthorized user
- Hackers accessing confidential information
  —Unencrypted data over an unsecured wireless network

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10 Ways to Minimize Risk

- Use secure networks, where possible
- Use encrypting technology
- Inactivity timer
- Location services
- Remote wipe (and wipe on attempts)
- URLs and QRs
- Update your device
- Don’t jailbreak or root
- Terms of Service – malicious apps
- Virtual assistants

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#2: Avoid UPL in Remote Practice

- Issue: Can you live in one state while you work in another?
- Assume:
  - —Lawyer has no business office in the other state
  - —She will not represent any client in other state
  - —She will not solicit work in other state
  - —She will have no public presence in other state
  - —She will have disclaimers everywhere regarding her licenses
  - —She will use the firm's mailing address
  - —She will not do any work involving the law of the other state

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- RPC 5.5(a): A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
- RPC 5.5(b): A lawyer who is not admitted to practice in this jurisdiction shall not:
  - —(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
  - —(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

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- ABA Opinion 495 (December 16, 2020)

  [I]in the absence of a local jurisdiction's finding that the activity constitutes the unauthorized practice of law, a lawyer may practice the law authorized by the lawyer's licensing jurisdiction for clients of that jurisdiction, while physically located in a jurisdiction where the lawyer is not licensed if the lawyer does not hold out the lawyer's presence or availability to perform legal services in the local jurisdiction or actually provide legal services for matters subject to the local jurisdiction, unless otherwise authorized.

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OSB Formal Op. 2022-200

- Lawyer A is actively licensed in another state (Other State) but not in Oregon. Lawyer A moves to Oregon and becomes an Oregon resident. Lawyer A, however, continues to practice law exclusively in Other State from Oregon
- Lawyer B is actively licensed in Oregon but not in Other State. Lawyer B moves to Other State and becomes a resident of Other State. Lawyer B, however, continues to practice law exclusively in Oregon from Other State
- Is Lawyer A or B engaged in the unauthorized practice of law

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- "[A]s long as Lawyer A practices exclusively the law of jurisdictions in which Lawyer A is licensed or otherwise authorized to practice law on behalf of non-Oregon residents and Lawyer A does not hold themself out as being authorized and available to handle matters in Oregon, Lawyer A has not engaged in the unauthorized practice of law in Oregon under Oregon RPC 5.5(a)–(b)."

- For Lawyer B: Look to law of other state

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- Other States:
  - —Washington, D.C. Op. 24-20 (2020): yes, "during the pandemic"
  - —Phil./Penn Joint Op. 2021-100: yes, adopts ABA Op. 495
  - —Florida Op. SC20-1220 (2021): yes, doesn't implicate RPC 5.5(b)

- See also:
  - —OR Op 2021-198 (law school graduates pending bar admission)
  - —In re Harris, 366 OR 475 (2020) (practice authorized pending bar admission)
  - —See RPC 5.5(c), allowing "temporary practice"

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And Constitutional Issues

- See In re Jones, 123 N.E.3d 877 (Ohio 2018)
  - —Under RPC 5.5(c), lawyer was able to engage in the temporary practice of law in Ohio pending Bar admission
- But see the concurrence: "The majority reaches the correct result[.] *** The problem is that *** the rule is irrational and arbitrary and cannot constitutionally be enforced."
  - —Violates the Ohio and US Constitutions
  - —Arbitrary and unreasonable
  - —No rational relationship to any discernable state interest.

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#3: Cloud Computing

- **Formal Opinion No. 2011-188**
- **Question presented**: May Law Firm contract with third-party vendor to store client files and documents online on remote server so that Lawyer and/or Client could access the documents over the Internet from any remote location.
- **Answer**: Yes, qualified.
- 1. The lawyer must take reasonable steps to ensure that the storage company will reliably secure client data and keep information confidential.
- 2. Under certain circumstances, this may be satisfied through a third-party vendor's compliance with industry standards relating to confidentiality and security.

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Formal Opinion No. 2011-188

- Reasonable steps may require:
  - —Ensuring the service agreement requires the vendor to preserve the confidentiality and security of the materials.
  - —Requiring vendor to notify lawyer of any unauthorized third-party access to the materials.
  - —Investigating how the vendor backs-up and stores its data and metadata to ensure compliance with the lawyer's duties.
- Technology changes = reasonableness may change as well, causing technology to become obsolete or less secure
- Lawyers may be required to reevaluate the protective measures used by the third-party vendor to safeguard the client materials

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Cloud Computing Summary Considerations

- Financial security
- Limits on staff access
- Protection from 3d parties
- Reasonable amount of assurance
- Comparable technology
- Server locations

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No. 4: The Robots Are Not Taking Over Just Yet

5. That in response to defendant's motion to dismiss, your affiant performed all of the legal research which was included in plaintiff's affirmation in opposition.

6. As the use of generative artificial intelligence has evolved within law firms, your affiant consulted the artificial intelligence website Chat GPT in order to supplement the legal research performed.

7. It was in consultation with the generative artificial intelligence website Chat GPT, that your affiant did locate and cite the following cases in the affirmation in opposition submitted, which this Court has found to be nonexistent:



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8. That the citations and opinions in question were provided by Chat GPT which also provided its legal source and assured the reliability of its content. Excerpts from the queries presented and responses provided are attached hereto.

9. That your affiant relied on the legal opinions provided to him by a source that has revealed itself to be unreliable.

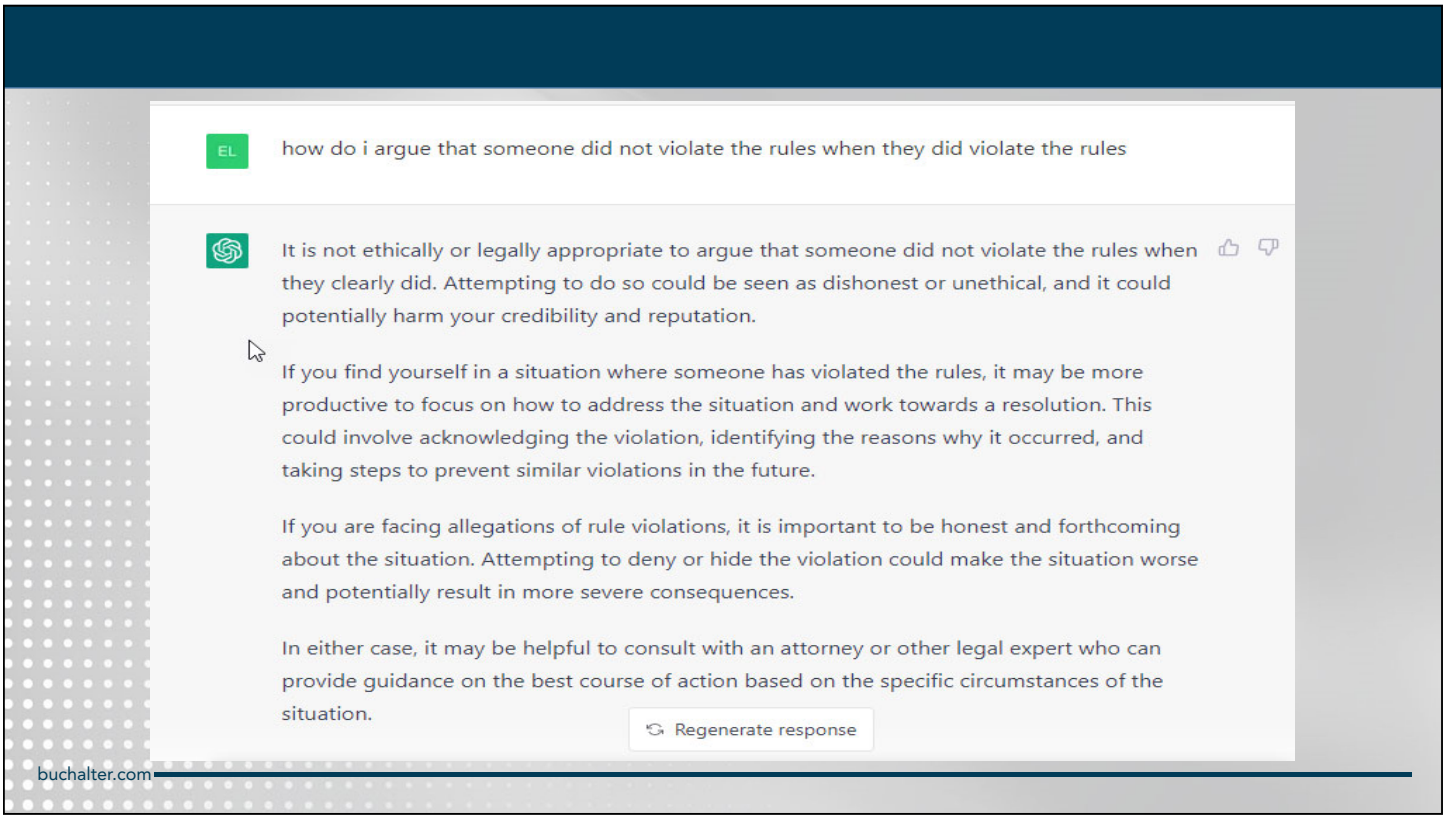


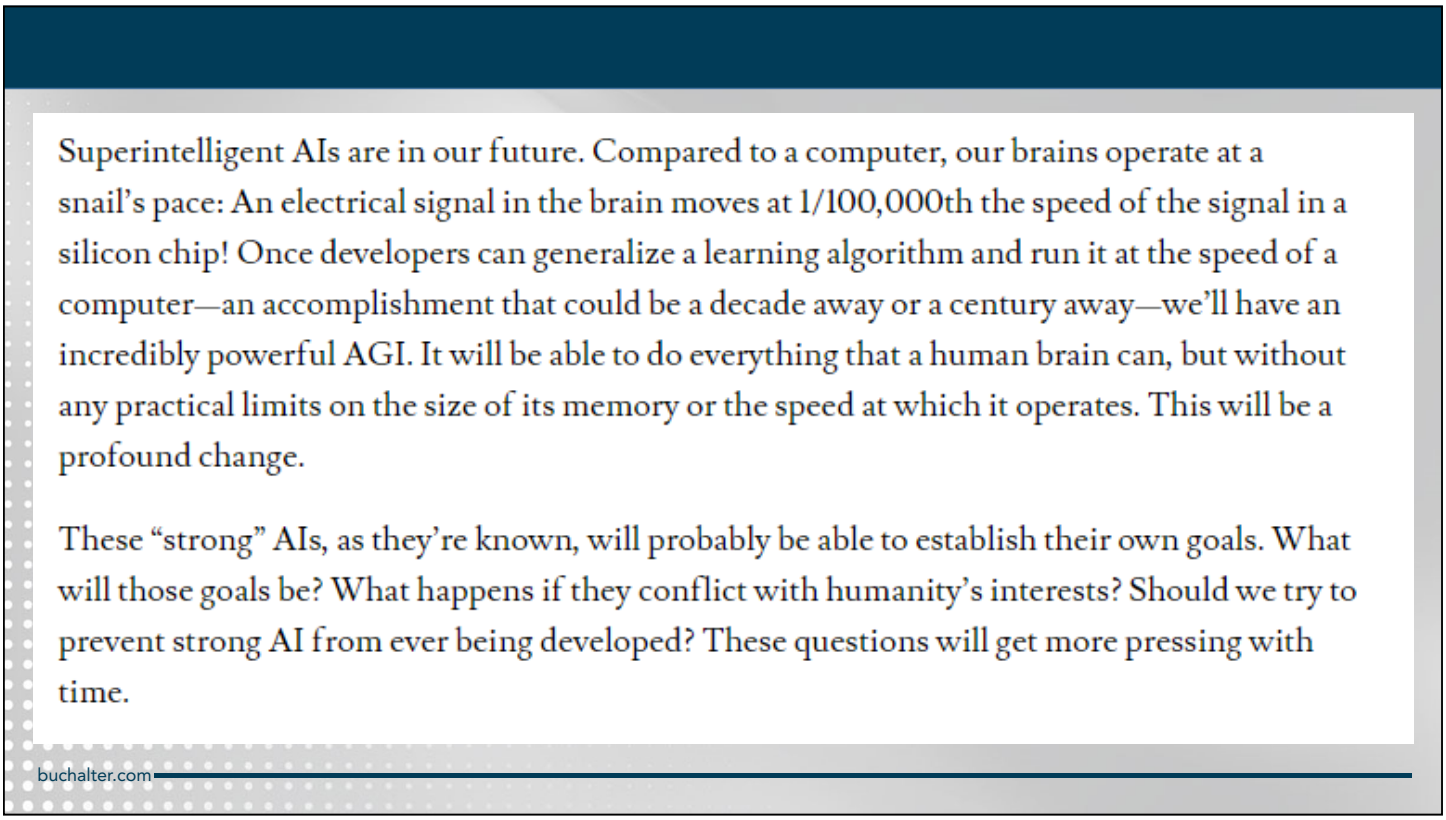
10. That your affiant has never utilized Chat GPT as a source for conducting legal research prior to this occurrence and therefore was unaware of the possibility that its content could be false.

11. That is the fault of the affiant, in not confirming the sources provided by Chat GPT of the legal opinions it provided.

10. That your affiant had no intent to deceive this Court nor the defendant.

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EL
how do i argue that someone did not violate the rules when they did violate the rules
It is not ethically or legally appropriate to argue that someone did not violate the rules when they clearly did. Attempting to do so could be seen as dishonest or unethical, and it could potentially harm your credibility and reputation.
If you find yourself in a situation where someone has violated the rules, it may be more productive to focus on how to address the situation and work towards a resolution. This could involve acknowledging the violation, identifying the reasons why it occurred, and taking steps to prevent similar violations in the future.
If you are facing allegations of rule violations, it is important to be honest and forthcoming about the situation. Attempting to deny or hide the violation could make the situation worse and potentially result in more severe consequences.
In either case, it may be helpful to consult with an attorney or other legal expert who can provide guidance on the best course of action based on the specific circumstances of the situation.
Regenerate response
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Superintelligent AIs are in our future. Compared to a computer, our brains operate at a snail's pace: An electrical signal in the brain moves at 1/100,000th the speed of the signal in a silicon chip! Once developers can generalize a learning algorithm and run it at the speed of a computer—an accomplishment that could be a decade away or a century away—we'll have an incredibly powerful AGI. It will be able to do everything that a human brain can, but without any practical limits on the size of its memory or the speed at which it operates. This will be a profound change.
These "strong" AIs, as they're known, will probably be able to establish their own goals. What will those goals be? What happens if they conflict with humanity's interests? Should we try to prevent strong AI from ever being developed? These questions will get more pressing with time.
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Runaway AI Is an Extinction Risk, Experts Warn

"Mitigating the risk of extinction from AI should be a global priority alongside other societal-scale risks, such as pandemics and nuclear war," reads a one-sentence statement, released today by the Center for AI Safety, a nonprofit.

The idea that AI might become difficult to control, and either accidentally or deliberately destroy humanity, has long been debated by philosophers. But in the past six months, following some surprising and unnerving leaps in the performance of AI algorithms, the issue has become a lot more widely and seriously discussed.

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Huge Number Of Practical And Ethics Issues Here

- What obligations do attorney have to clients to adopt new technologies that allow for increased productivity and decreased billing?
- Must an attorney understand how AI functions before adopting it to use in their legal practice?
- Concerns re: competency, confidentiality and supervision?

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Yes, Competency Matters

- RPC 1.1: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- ABA Cmt [8]: Lawyer must "maintain" competence by keeping abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**, engage in continuing study and education.

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Supervisory Responsibility

- RPC 5.3 – Responsibilities Regarding Nonlawyer Assistance
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer

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David Elkanich is the Managing Shareholder of Buchalter's Portland office and chairs the Firm's Professional Responsibility Group. David focuses his practice on legal ethics, risk management, and discipline defense. David advises both lawyers and law firms in a wide range of professional responsibility matters

David is an avid speaker and tweets (occasionally) at @DavidElkanich.

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FORMAL OPINION NO 2011-188

[REVISED 2015]

Information Relating to the Representation of a Client: Third-Party Electronic Storage of Client Materials

Facts:

Law Firm contracts with third-party vendor to store client files and documents online on remote server so that Lawyer and/or Client could access the documents over the Internet from any remote location.

Question:

May Lawyer do so?

Conclusion:

Yes, qualified.

Discussion:

With certain limited exceptions, the Oregon Rules of Professional Conduct require a lawyer to keep client information confidential. *See* Oregon RPC 1.6.[1] In addition, Oregon RPC 5.3 provides:

---

[1] Oregon RPC 1.6 provides:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;
>
> (2) to prevent reasonably certain death or substantial bodily harm;
>
> (3) to secure legal advice about the lawyer's compliance with these Rules;

With respect to a nonlawyer employed or retained, supervised or directed by a lawyer:

---

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer's clients, except to the extent reasonably necessary to carry out the monitoring lawyer's responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

2016 Revision

> (a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
>
> (b) except as provided by Rule 8.4(b), a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a nonlawyer if:
>
> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Lawyer may store client materials on a third-party server as long as Lawyer complies with the duties of competence and confidentiality to reasonably keep the client's information secure within a given situation.[2] To do so, the lawyer must take reasonable steps to ensure that the storage company will reliably secure client data and keep information confidential.[3] *See* Oregon RPC 1.6(c). Under certain circumstances, this may be satisfied through a third-party vendor's compliance with industry

---

[2] Some call the factual scenario presented above "cloud computing." *See* Richard Acello, *Get Your Head in the Cloud*, 96-Apr ABA Journal 28, 28–29 (April 2010) (providing that "cloud computing" is a "sophisticated form of remote electronic data storage on the Internet" and "[u]nlike traditional methods that maintain data on a computer or server at a law office or other place of business, data stored 'in the cloud' is kept on large servers located elsewhere and maintained by a vendor").

[3] In 2014, leaked documents indicated that several intelligence agencies had the capability of obtaining electronic data and monitoring electronic communications between, among others, attorneys and clients through highly sophisticated methods beyond the capabilities of the general public. Oregon RPC 1.6(c) would not require an attorney to protect a client's data against this type of advanced interception, as it only requires an attorney to take reasonable steps to secure client data. Nevertheless, an attorney may want to take additional security precautions if he or she handles clients or matters that involve national security interests.

standards relating to confidentiality and security, provided that those industry standards meet the minimum requirements imposed on the Lawyer by the Oregon Rules of Professional Conduct. This may include, among other things, ensuring the service agreement requires the vendor to preserve the confidentiality and security of the materials. It may also require that vendor notify Lawyer of any nonauthorized third-party access to the materials. Lawyer should also investigate how the vendor backs up and stores its data and metadata to ensure compliance with the Lawyer's duties.[4]

Although the third-party vendor may have reasonable protective measures in place to safeguard the client materials, the reasonableness of the steps taken will be measured against the technology "available at the time to secure data against unintentional disclosure."[5] As technology advances, the third-party vendor's protective measures may become less secure or obsolete over time.[6] Accordingly, Lawyer may be required to

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[4] See OSB Formal Ethics Op No 2005-141 (rev 2015), which provides:

> As long as Law Firm makes reasonable efforts to ensure that the recycling company's conduct is compatible with Law Firm's obligation to protect client information, the proposed conduct is permissible. Reasonable efforts include, at least, instructing the recycling company about Law Firm's duties pursuant to Oregon RPC 1.6 and obtaining its agreement to treat all materials appropriately.

See also OSB Formal Ethics Op No 2005-129 (rev 2014); OSB Formal Ethics Op No 2005-44.

[5] *See* New Jersey Ethics Op No 701 (discussing electronic storage and access to files).

[6] *See* Arizona Ethics Op No 09-04 (discussing confidentiality, maintaining client files, electronic storage, and the Internet).

2016 Revision

reevaluate the protective measures used by the third-party vendor to safeguard the client materials.[7]

Approved by Board of Governors, April 2015.

[7] A lawyer's obligation in the event of a breach of security of confidential materials is outside the scope of this opinion.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 6.2-1 (confidentiality), § 13.3-3 (employment of nonlawyers), § 16.4-5(c) (third-party electronic storage of client materials) (OSB Legal Pubs 2015); and *Restatement (Third) of the Law Governing Lawyers* §§ 59–60 (2000) (supplemented periodically).

2016 Revision

FORMAL OPINION NO 2022-200

Remote Work and Unlawful Practice of Law

Facts:

Lawyer A is actively licensed in another state (Other State) but not in Oregon. Lawyer A moves to Oregon and becomes an Oregon resident. Lawyer A, however, continues to practice law exclusively in Other State from Oregon through technology such as email, mobile telephone, and video conferencing. Lawyer A does not do work for Oregon clients, does not solicit Oregon clients, and does not otherwise hold themself out to the public as admitted and available to practice law in Oregon.

Lawyer B is actively licensed in Oregon but not in Other State. Lawyer B moves to Other State and becomes a resident of Other State. Lawyer B, however, continues to practice law exclusively in Oregon from Other State through technology such as email, mobile telephone, and video conferencing. Lawyer B does not do work for Other State clients, does not solicit Other State clients, and does not otherwise hold themself out to the public as admitted and available to practice law in Other State.

Neither Lawyer A nor Lawyer B practice solely in federal forums.[1] Neither Lawyer A nor Lawyer B have applied for admission in, respectively, Oregon or Other State.[2]

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[1] *See* ABA Model RPC 5.5(d)(2) (addressing legal services performed by a lawyer who "is authorized by federal or other law or rule to provide in this jurisdiction"); Oregon RPC 5.5(d) (patterned generally on the corresponding ABA Model Rule); *see generally* Alaska Bar Ethics Op. 2010-1 (2010) (discussing exclusively federal forum practice by lawyer not licensed in Alaska).

[2] Out-of-state lawyers wishing to practice in Oregon pending admission should consult Oregon Admission Rule 13.70, which sets criteria for practicing in Oregon while an application for admission is pending with the Oregon State Bar. *See also In re Harris*, 366 Or 475, 466 P3d 22 (2020) (discussing temporary practice authorization pending admission). OSB Formal Ethics Opinion No. 2021-198 addresses the related topic of the scope of permissible activities that may be untaken by recent law school graduates pending admission.

2022

Questions:

1. Is Lawyer A engaged in the unauthorized practice of law in Oregon?

2. Is Lawyer B engaged in the unauthorized practice of law in Other State?

Conclusion:

1. No, qualified.[3]

2. See discussion.

Discussion:

1. Unlawful Practice of Law in Oregon

Oregon Rules of Professional Conduct 5.5(a)–(b) address the unauthorized practice of law:

> (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
>
> (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
>
> (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
>
> (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.[4]

---

[3] This opinion addresses unauthorized practice only. For a discussion of virtual practice generally, *see* ABA Formal Ethics Op No 498 (2021). *See also* OSB Formal Ethics Op No 2011-188 (rev 2015) (cloud computing), OSB Formal Ethics Op No 2016-191 (electronic files).

[4] ORS 9.160(1) also prohibits the unauthorized practice of law in Oregon. *See also* ORS 9.990(1) (criminal penalties for violating ORS 9.160).

2022

Neither the Oregon RPCs nor Oregon decisional law interpreting the Oregon RPCs have addressed the precise scenario posited in Question 1.[5] The American Bar Association, however, discussed this issue in Formal Opinion 495 (2020) under the corresponding provisions of the ABA Model Rules of Professional Conduct (ABA Model Rules) on which Oregon RPC 5.5(a)–(b) is patterned. ABA Formal Ethics Opinion No. 495 also reviews Maine and Utah ethics authorities on this emerging issue.[6]

ABA Formal Ethics Opinion No. 495, at 3–4, concludes under ABA Model Rules 5.5(a)–(b):

> The Committee's opinion is that, in the absence of a local jurisdiction's finding that the activity constitutes the unauthorized practice of law, a lawyer may practice the law authorized by the lawyer's licensing jurisdiction for clients of that jurisdiction, while physically located in a jurisdiction where the lawyer is not licensed if the lawyer does not hold out the lawyer's presence or availability to perform legal services in the local jurisdiction . . . unless otherwise authorized.

ABA Formal Ethics Opinion No. 495 reasons that, from the perspective of the ABA Model Rules, a lawyer working remotely in circumstances similar to Question 1 is not engaged in the practice of law in the remote location. Rather, a lawyer in those circumstances is practicing law in the lawyer's licensed jurisdiction—albeit from a physical location outside that jurisdiction.

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[5] The interpretation of substantive law is beyond the purview of an advisory ethics opinion. *See* OSB Bylaw 15.3 (addressing OSB formal opinions); Oregon RPC 8.6 (same). Oregon substantive law, however, is not inconsistent with the conclusions reached in this opinion.

[6] States have approached this issue in differing ways. Some, such as New Jersey and Utah, have issued ethics opinions. *See, e.g.,* N.J. Advisory Comm. on Prof. Ethics, Adv Op 742 (2021) (reaching conclusion similar to ABA Formal Ethics Opinion No. 495); Utah Ethics Op 19-02 (2019) (same). Others, such as Arizona and Florida, have enacted amendments to rules or comments. *See, e.g.,* Arizona E.R. 5.5(d) (rule amendment); Florida RPC 4-5.5 (comment amendment). These examples are not intended to be a comprehensive national list. This is a developing area of the law and lawyers are encouraged to closely review the legal authorities in the jurisdictions in which they are physically located.

2022

ABA Formal Ethics Opinion No. 495, at 3, notes that its conclusion is consistent with the underlying purpose of ABA Model Rule 5.5:

> The purpose of Model Rule 5.5 is to protect the public from unlicensed and unqualified practitioners of law. That purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible *as a lawyer* to a local jurisdiction where the lawyer is physically located, but not licensed. (Emphasis in original.)

ABA Formal Ethics Opinion No. 495 is persuasive and is consistent with the corresponding Oregon RPCs under the circumstances described in Question 1.

Therefore, as long as Lawyer A practices exclusively the law of jurisdictions in which Lawyer A is licensed or otherwise authorized to practice law on behalf of non-Oregon residents and Lawyer A does not hold themself out as being authorized and available to handle matters in Oregon,[7] Lawyer A has not engaged in the unauthorized practice of law in Oregon under Oregon RPC 5.5(a)–(b).[8]

2. Unlawful Practice of Law in Other State

ABA Formal Ethics Opinion No. 495 notes that the question of whether a lawyer is engaged in the unauthorized practice of law in a given

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[7] ABA Formal Ethics Opinion No. 495, at 2, discusses what constitutes "holding out":

> A lawyer practicing remotely from a local jurisdiction may not state or imply that the lawyer is licensed to practice law in the local jurisdiction. Again, information provided on websites, letterhead, business cards, or advertising would be indicia of whether a lawyer is "holding out" as practicing law in the local jurisdiction.

[8] This same conclusion would apply to a lawyer with a remote albeit less than permanent presence in Oregon, such as a lawyer who practices in Other State from a vacation home in Oregon. This opinion does not distinguish between lawyers in private practice and those working as internal counsel for organizations. Temporary authorized practice in Oregon on Oregon matters, in turn, is addressed in Oregon RPC 5.5(c). Temporary in-house practice in Oregon on Oregon matters is addressed by Oregon RPC 5.5(c)(5).

jurisdiction in which the lawyer is not licensed may depend on the law of the jurisdiction in which the lawyer is physically located or other choice of law considerations, and not the jurisdiction in which the lawyer is licensed.[9]

Therefore, whether Lawyer B has engaged in the unauthorized practice of law in Other State is determined by the law of Other State and not Oregon.[10]

Approved by Board of Governors, November 2022.

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[9] ABA Formal Ethics Opinion No. 495, at 1–2. notes in this regard:

> If a particular jurisdiction has made the determination, by statute, rule, case law, or opinion, that a lawyer working remotely while physically located in that jurisdiction constitutes the unauthorized or unlicensed practice of law, then Model Rule 5.5(a) also would prohibit the lawyer from doing so.

[10] Under Oregon RPC 8.5(a), the Oregon Supreme Court has disciplinary authority over Oregon-licensed lawyers regardless of where their conduct occurs.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 11.6, § 19.5 (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 1, § 3 (2000).

2022

Chapter 13A

2023 Real Estate Legislative Update

Kyle Grant[1]
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[1] Subcommittee members who contributed to this report or assisted with following legislation: Kyle Grant, Tonkon Torp—Chair; Kimberlee Stafford, Tonkon Torp—Executive Committee Liaison; Alan Brickley; Jesse Calm, McEwen Gisvold; Justin Carter, Chicago Title; Michelle D. Da Rosa, The Law Office of Michelle D. Da Rosa; Susan Glen, Dunn Carney; John Gibbon; Mick Harris, Tonkon Torp; Pat Ihnat, Fidelity National Title; Pete Meyers, Meyers Law LLC; Nancy Murray, Law Office of Nancy B. Murray; Thomas Ped, Williams Kastner; Scott Rennie, Schmidt & Yee; Emil Sadofsky, Samuels Yoelin Kantor LLP; and Rebecca Biermann Tom, Radler White Parks & Alexander.

Disclaimer: Note that all summaries are presented for information, education and discussion purposes only. These summaries should not be relied on as legal advice.

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1. Omnibus Bills

HB 3395 – Housing Grants, Changes to Planned Community Act and Condo Act, Discriminatory Provisions in Governing Documents, Land Use

HB 3395 was an omnibus real estate and housing bill that consolidated various related bills from earlier in the session.

Section 8 amends ORS 455.132, and requires the Department of Consumer and Business Services to consider updates to the Oregon Structural Specialty Code to allow midsize multifamily dwellings to be served by a single exit. This review must be completed by October 1, 2025, and must seek to reduce costs and other barriers to constructing midsize multifamily dwellings. The Department may condition code amendments on certification by local fire officials that they have sufficient firefighting resources.

Section 9 amends ORS 94.550-94.783 (the Planned Community Act), and provides that "Planned community" does not mean: A development established on or after January 1, 2024, in which each residential unit is either: (i) Subject to an affordability restriction, including an affordable housing covenant, as defined in ORS 456.270; or (ii) Owned by a public benefit or religious nonprofit corporation.

Section 10 amends ORS 100.015 (the Condominium Act), and provides that the Oregon Real Estate Commissioner has the exclusive right to regulate the submission of property to the provisions of the Act.

Section 11 amends ORS 100.022 and clarifies that local government bodies may not prohibit the condominium form of ownership or impose restrictions that it would not impose on other forms of ownership, including charges, taxes, fees or a review process of any condominium documents, conditions of approval, or other requirements.

Sections 12 and 13 amend ORS 100 and contain technical changes to the Condominium Act.

Section 14 amends ORS 100.105 to provide a condominium may not bear a name which is the same as or deceptively similar to the name of any other, *different* condominium located in the same county.

Section 15 modifies ORS 92.090, the statute that provides the requirements that must be met before a city or county will approve a subdivision plat. These requirements include a bond, irrevocable letter of credit, contract or other assurance that the subdivider must provide to the city or county confirming that a domestic

water supply system will be installed by or on behalf of the subdivider to every lot in the proposed subdivision. Section 15 allows cities and counties to accept (as other assurance) award letters from public funding sources made to a subdivider who is subdividing the property to develop affordable housing, that is or will be subject to an affordability restriction as defined in ORS 456.250 or an affordable housing covenant as defined in ORS 456.270, as long as the award amount exceeds the project cost.

Sections 24 and 25 provide a mechanism for planned community and condominium homeowners associations (individually, "HOA" or collectively, "HOAs") to amend the HOA's declaration or bylaws for the HOA to meet the nondiscrimination requirements of ORS 93.270(2). Notwithstanding any amendment requirements of the documents themselves or of the Oregon Planned Community Act or the Oregon Condominium Act, such an amendment can be adopted and recorded in the real property records of the county in which the planned community or condominium is situated without a vote of the owners or the board of directors of the HOA, provided that the president and secretary of the HOA sign the amendment.

The bill includes a form of cover sheet that must be included in the amendment. For condominiums, the HOA must provide a copy of the recorded amendment to the Real Estate Commissioner. Sections 26 and 27 of the bill extends the due date for HOAs to record a certification of compliance with ORS 93.270(2) to December 31, 2024 and limits the requirement to planned communities and condominiums formed prior to September 1, 2021. The law previously required such a certification be filed for all planned communities and condominiums on or before December 31, 2022, regardless of the date of HOA formation. The bill provides a form for the certificate of compliance. These sections of House Bill 3395 became effective on June 30, 2023.

Section 37. The Oregon Department of Administrative Services, in consultation with other agencies, shall provide grants to bridge information gaps, identify and secure resources, connecting producers and consumers and to work with historically underrepresented groups.

Sections 37-43 will generally not have any impact on land use or real estate law practitioners as it creates grants and loans for specified purposes. The following is a brief summary of the provisions. Please note that the funding provisions expire on January 2, 2034 and January 2, 2026 as identified below.

Section 40. The Housing and Community Services Department is to grant to the Network for Oregon Affordable Housing (NOAH) sums to establish a loan fund to provide first time home buyers with additional funding for purchases, subject to specified limitations set forth in the statute. NOAH is required to establish that they have dedicated private funding of $7,500,000 prior to receiving any grant under this provision.

Sections 44-47 require the Housing and Community Services Department (the "Department") to develop an Affordable Housing Loan Guarantee Fund (the "Fund") to be used by community development financial institutions ("CDFIs") to support investment in constructing affordable housing. HB 3395 appropriates $20,000,000 to the Fund and the Fund terminates on January 2, 2026. The Fund may only be used to guarantee the repayment of loans to finance the construction of housing subject to an affordable housing covenant for low or moderate income households, as described in ORS 456.270 to 456.295 and as further defined by the Department by rule. The Department and the State of Oregon are not guarantors of any loan guaranteed by a nonprofit corporation issued from the Fund and the following restrictions apply:

1. The term of a loan may not exceed five years.

2. To be eligible for a grant under this section, a nonprofit corporation must:

    a. Be exempt from income taxes under section 501(c)(3) or (4) of the Internal Revenue Code; and

    b. Demonstrate to the satisfaction of the Department that the corporation is a CDFI that operates statewide to support investment in the construction of affordable housing.

Section 48 amends existing law (ORS 458.650) to include companion animal expenses (pet food, veterinary services, crates and kennels) to the list of costs covered by emergency housing assistance programs for low-income individuals.

Michelle D. Da Rosa, Alan Brickley, Jesse Calm, Mick Harris, Rebecca Tom

2. Construction and Contractors

HB 3194 – Taxation of "Minor Construction" Improvements

This bill increases the thresholds of ORS 308.149 in determining whether the value of real property improvements constitute more than "minor construction" so as to trigger a reevaluation for county taxation purposes. As of 1997, the thresholds were $10,000 per year and $25,000 over a rolling five-year period. Under the amendments, the new thresholds are $18,200 per assessment year or $45,000 over five years. The new thresholds are indexed for inflation in subsequent years.

Thomas A. Ped, Susan Glen

HB 2292 – Cancellation of Landscaping Contracts

This bill provides for a right of a property owner to rescind a written contract for landscaping services within three business days of executing the agreement. It requires the landscaping business to provide written notice of the right to rescind, and permits the Oregon Landscape Contractors Board to specify the form and content of the notice. The new law is added to and made a part of ORS 671.510 to 671.760.

Thomas A. Ped

3. Insurance

HB 2982 – Insurance for Major Disasters

House Bill 2982 amends ORS 742.053 to make it easier for covered insureds to obtain insurance proceeds for the contents of a residence lost to a Governor-declared "major disaster." In the event that a covered party experiences a total loss of the contents of a residence as a result of a "major disaster" in an area in which the Governor has declared a state of emergency under ORS 401.165 and the loss is directly related to the emergency that was the subject of the Governor's declaration, the insured may now recover a minimum of 70% of the coverage the insured purchased without being required to submit a written inventory of the loss. The amendments also address timing requirements for the insurance companies to pay for covered debris removal and covered loss of trees, shrubs and landscaping. The changes are operative as of January 1, 2024.

Rebecca Biermann Tom

HB 3385 (Failed) – Retention for Residential Contractors

House Bill 3385 failed, but would have prohibited certain "major residential contractors" from collecting or retaining more than 50 percent of the original contract price before substantial completion of remodeling or repair of an owner-occupied one- or two-family residential structure if the original contract price exceeds $40,000. If the property owner agrees in writing to contract changes increasing the original contract price by $20,000 or more, the contractor may collect or retain up to 50 percent of the price increase as well. If the materials, supplies and subcontractor costs to the general contractor exceed 50 percent of the total contract price, the contractor may require the owner to pay progress payments to cover those expenses. The bill defined a "major residential contractor" as a residential general contractor that offers securities registered with the US Securities and Exchange Commission.

Rebecca Biermann Tom

4. Fair Housing and Accessibility

HB 3309 – Accessibility to Residential Units

House Bill 3309 amends portions of ORS Chapter 456 governing the Oregon Housing and Community Services Department. The amendments add a definition of an "accessible unit" of housing and require OHCS to provide a report by September 15th of each year (starting in 2024) to an "appropriate interim committee of the Legislative Assembly" documenting the number and percentage of dwelling units funded by OHCS loans, grants or other awards that include accessibility features recognized under the state building codes. The bill adds "persons with disabilities and disability services or advocacy organizations" to the parties from whom OHCS must consider advice on housing and community service programs. The bill also requires the Housing Stability Council established by OHCS to include incentives designed to increase the quality and quantity of accessible units wherever possible in housing development funding offerings. The bill takes effect on September 24, 2023.

Rebecca Biermann Tom

SB 599 and HB 2468 – Child Care Facilities

SB 599 allows a tenant to use their dwelling unit as a family child care home if the home is certified under ORS 329A.280 and the tenant has notified the landlord. A landlord must take reasonable steps to cooperate with the tenant. A tenant may enforce these last two requirements as they would enforce a landlord's habitability duties under ORS 90.360.

If a landlord refuses to allow this use, it is a retaliation trigger under ORS 90.385(1).

That said, it is not a retaliation trigger if a tenant needs or wants to modify the dwelling in order to be certified and a landlord requires a tenant to front the costs of those modifications. Nor is it a retaliation trigger if a landlord prohibits a use for the dwelling unit that is not allowed under the zoning rules or a homeowner's association's governing documents, or if that use is not allowed under the Early Learning Council's rules.

By the way, HB 2468 expands ORS 329A.280 to allow the Early Learning Council to establish reasonable requirements for landlords and tenants who operate a family child care home. However, these rules may not consider the tenant's own children between ages 10 and 12 when deciding capacity or adult-to-child ration requirements unless a tenant's child has special needs or disabilities.

A landlord can require a release from the parents of the children in the home in which the parents agree that the landlord is not liable for losses from injuries to the children or guests connected with the operation of the home. As an alternative, a landlord can require those parents to simply acknowledge that the provider (the tenant) does not have liability coverage for such losses from injuries.

Instead of a release, a landlord can require a tenant to carry and maintain a reasonable surety bond or a liability policy that covers injuries to children and guests because of a tenant's negligence or a tenant's employees' negligence. The bond or policy must name the landlord, owner, or association, as an additional insured. (Note that this insurance is in addition to any tenant's insurance under ORS 90.222.) That said, tenants need not carry other insurance unless a landlord requires it under this subsection.

None of these requirements apply to housing for older persons as defined in ORS 659A.421.

Pete Meyers

HB 3294 – Removing Discriminatory Provisions from Public Records

This legislation deals with discriminatory provisions that exist in some recorded conditions and restrictions that affect real property. It was determined that existing provisions were inadequate and this legislation was adopted to remedy the deficiencies.

The process begins with a filing of a Petition in Circuit Court. The legislation identifies the form and requirements for the petition, including the attachment of a copy the document in question and other substantive requirements of the Petition and Order, if issued.

If the Court finds that the document contains provisions that are void they are to issue an order finding that the provision(s) are not enforceable as violation of ORS 93.270(1)(a) and that they are deleted from the public record. The certified copy of the final order is then presented to the County Clerk.

The Clerk is to record the order, modify the index to show the recording of the modified document, and to maintain the original or copy document of the document for archival or historic purposes. The electronic search of the clerk's records will only reflect and provide the modified document for review.

Prior to January 1, 2025 the Department of Justice is to create a template for the documents to be used in this process. In addition, prior to January 1, 2026, on motion

of a Petitioner, the Court may enter an order conforming to ORS 93.274 entered on or before the effective date of this act.

Alan Brickley

5. Tribal Lands

HB 2737 – Simplified Process for Transfer of State & Local Government Property to Enrolled Tribes Adopted

Transfers of State-owned property to Oregon's 9 enrolled Tribal government can now occur in the same manner as transfers to local government agencies. This allows agencies to seek management economies when the tribal governments are best positioned to provide that to specific pieces of property. The agency or political subdivision can set the terms of the transfer to enrolled tribes independent of statutory requirements for transfers to private parties and may include mineral and geothermal rights in the transfer.

John Gibbon

6. Wildfires

SB 644 – Standards Adopted to Allow Continued Development of ADUs in Rural Residential Area Prone to Wildfire

In order to continue the effort to respond to the statewide housing shortage by allowing ADU development in Rural Residential areas specific residential structure standards have been added to the strict locational and service requirements that apply to this housing option. This legislation provides that ADUs that meet the R327 standard of the residential structure code can continue to be developed while state wildfire hazard mapping issues are resolved. (Chapter 76, 2023 Laws – Effective Date 5/8/23)

John Gibbon

SB 82 – Home Insurers Use of State Wildfire Risk Map to Make Coverage Decisions Restricted

Responding to concerns that the controversial Wildfire Risk map was the sole cause of cancellation of homeowners insurance policies in areas with significant wildfire exposure the legislature passed legislation early in the session prohibiting this use of the map. SB 82 also recognized that insurers have this not renew a policy so it required that going forward notices of such decisions must be provided with a transparent explanation of the information the insurer used to reach the decision and with advice regarding wildfire hardening steps for the property that could reduce the premium increase or reverse the cancellation or declination. Insurers are now required to make their underwriting guidelines and rate tables related to wildfire publicly available and account for an insured use of fire hardening techniques on their property. (Chap. 67, 2023 Laws -Effective Date 1/1/24). Note that at the end of the session the Legislature passed SB 80 that directed the Department of Forestry to recast of the Wildfire Risk Map into a Wildfire Hazard map that, when adopted after substantial local government interaction together notice and opportunity to comment by impacted property owners, will be subject to review under provisions of the State APA.

John Gibbon

7. Taxation

SB 919B – Middle Housing Allowed a Limited Property Tax Exemption

Some tax support was provided for certain types of middle housing, specifically ADUs associated with single occupancy homes and conversions of those homes into 2- 4 occupancy structures, by this legislation. Intended as method to help offset the costs of achieving code compliance for these types middle housing construction when the units are used for permanent housing a 5 year property tax exemption to the unit occupied by a resident owner can be granted. The program requires ordinance adoption by the responsible city or county and support for the exemption by taxing districts constitute 51 % of the total tax rate. Annual applications to renew the exemption are required by the resident owner occupant.

John Gibbon

HB 2086 – Correction to Assessed Value of Real Property

HB 2086 affects a County's obligation to correct clerical errors in the maximum assessed value of a property See Land Use Legislative Update.

8. Landlord-Tenant

HB 2001 – Termination of Residential Tenancies

Historically, ORS 90.394 required a residential landlord to give a tenant a written 72-hour notice if the landlord wanted to terminate for nonpayment. That ground began to shift when COVID-19 hit. From 2020 through September 2022, a few bills changed that ORS 90.394 scheme to 10 days' written notice. At the end of September 2022, the last of those bills sunset and landlords could now return to the 72-hour scheme.

HB 2001 returns to the grounds of the COVID-19-era rules. "Nonpayment" means rent, charges (including all tenant-paid utilities), and fees, but not deposits or nonpayment by tenant of property damage that tenant caused. The 72-hour notice is now the 10-day notice. Any termination notice for nonpayment must have statutory language of where a tenant can get help with the eviction. A summons for a nonpayment eviction must include that same language. The biggest change, however, is that the landlord might have to accept rent at least up to and through First Appearance.

Where HB 2001 breaks new ground is in how it changes the FED procedure. First, after the landlord files the nonpayment eviction complaint (under ORS 90.392 or .394), the First Appearance date is no earlier than the 15th day after filing (other FEDs are still 7 days). At First Appearance, the judge decides whether the nonpayment complaint complies and if not, dismisses it sua sponte. If the notice lacks the statutory language, the court will dismiss. If the landlord "caused the tenant to not tender rent" or did not "reasonably participate" with a rental assistance program, or the tenant actually succeeded in tendering rent "under the notice," the court will dismiss.

The section of HB 2001 discussing this is written in the timeless present, leading several interpreters to conclude that the tenant can pay the rent due under the notice at any time short of entry of judgment (at the end trial, for the most extreme example). Language in § 55(4) supports this belief: "Notwithstanding ORS 105.137 (4), if a claim for possession is dismissed under subsection (3)(c) of this section and the payment was tendered after the action was commenced, the tenant is not entitled to prevailing party fees, costs or attorney fees." As we know, the entire point of a 10-day notice is for the tenant to tender within that period. A nonpayment notice now is merely a ticket to First Appearance.

HB 2001 also changes a common scene at First Appearance: In the past, if the tenant does not appear, then the landlord gets a default judgment. Now, in addition to the

usual ORCP 69 declaration, a landlord must also offer a declaration or testimony that they do not know that the tenant has vacated and reasonably believes the tenant continues to hold possession to the landlord. Only then will the landlord get their default judgment—for all chapter 90 FEDs, not just nonpayment.

If both parties appear and either wants a trial on the nonpayment of rent notice, it is no longer within 14 days, as in times of yore, but no earlier than 15 days and no later than 30.

HB 2001 does not apply to no-cause notices and behavior-based for-cause notices (except for that new declaration).

Sealing eviction records

Each justice and circuit court must, on its own, set aside judgments and seal the records of an eviction if: (1) The judgment does not contain a money award, or the money award has been satisfied or discharged, and the judgment is at least five years old; or (2) the judgment was judgment by stipulation and at least 12 months have passed since entry of judgment. As always, a tenant may apply to expunge their judgment under ORS 105.163.

Pete Meyers, Emil Sadofsky

HB 2634 – Definitions for RV Parks and Vacation Occupancy

HB 2634 amends ORS 90.100 to define Recreational Vehicle Park as that term is defined in ORS 197.492.

HB 2634 amends ORS 90.100 to include an alternative definition of Vacation Occupancy: (1) the occupancy is for rental of space in a recreational vehicle park on which a recreational vehicle owned by the occupant will be located, (2) the occupant rents the unit for vacation purposes, (3) the occupant has a principal residence other than the space, (4) the period of occupancy does not exceed 90 days, (5) the recreational vehicle is required to be removed from the park at the end of the occupancy, (6) a written agreement is signed by the occupant that substantially states that the occupancy is vacation occupancy not subject to the Oregon Residential Landlord and Tenant Act.

HB 2634 amends ORS 90.120 to exempt recreational vehicles located inside or outside of a facility from the provisions of ORS 90.505 to 90.850 (manufactured homes and floating homes).

HB 2634 amends ORS 90.425 to set the threshold market value at which or below a landlord may destroy or otherwise dispose of an abandoned recreational vehicle to $4,000.

The Amendments in HB 2634 have retroactive effect.

Pete Meyers, Emil Sadofsky

HB 2680 – Tenant Screening

HB 2680 amends ORS 90.295, the tenant-screening statute, to require that a landlord provide an applicant with confirmation that the landlord has actually done the screening (by a tenant screening company or consumer credit reporting agency). The landlord shall do this promptly and include a copy of a receipt from the screening company. It also adds gender identity to the list of items in a landlord's nondiscrimination policy, if any, that a landlord must give tenant notice of if the landlord requires payment for the screening, and the applicant's right to a refund and right to recover the below-noted damages. HB 2680 also changes the screening-charge refund deadline to 30 days. This 30-day requirement applies if the landlord fills the vacant dwelling unit before screening or has not screened the applicant before they withdraw the application. Finally, it changes the penalty from $150 to $250 if the landlord violates the screening procedure or does not refund the screening charge within the above-noted 30 days.

Pete Meyers

HB 3042 – Prohibitions on Certain Landlord Remedies

HB 3042 adds new provisions to ORS 456.255 to 456.265. The new provisions prohibit landlords from taking the following actions during the three-year period starting on the date the landlord stops providing publicly supported housing: A) terminating the tenancy under ORS 90.427 (3)(b), (4)(b), or (5); B) providing rent increase notices more than once in any calendar year; C) failing to comply with ORS 90.323 and requirements adopted OHCS and applicable to affordable rental housing managed by the OHCS that govern rent increases. The prohibitions only apply to tenancies that existed on the date the landlord withdrew the housing from the publicly supported housing program. The new provisions impose a civil penalty not to exceed $5,000 on a landlord that fails to comply with the prohibitions.

HB 3042 allows OHCS to record an extension of affordability restrictions if a landlord does not timely provide the notice of withdrawal from affordable housing required by ORS 456.259 or 456.260.

HB 3042 amends ORS 456.259 to require the landlord to provide notice of withdrawal from publicly supported housing to all prospective purchasers and tenants during the 20-month period prior to the withdrawal date. The amendment requires landlords that fail to provide the notice to extend the date of withdrawal from publicly supported housing by 20 months.

HB 3042 amends ORS 456.262 to extend the time periods during which a qualified purchaser may record its right of first refusal, extend the duration of the right of first refusal to three years, and allow OHCS to record a right of first refusal without making purchase offer to the landlord.

HB 3042 is effective on passage. HB 3042 applies to all participating properties with a withdrawal from publicly supported housing date on or after the effective date of the act, except where the withdrawal date is earlier than 20 months after the effective date of the act, in which case the notices required under ORS 456.259 must be given no later than 30 days after the effective date.

Pete Meyers

HB 3417 – Financial Assistance for Landlords

HB 3417 expands the range of landlords who may apply for financial assistance for damages (property damage, unpaid rent, and other damages) from tenants housed by a landlord under certain rehousing initiatives under HB 5019.

Pete Meyers

HB 3151 – Prohibitions on Certain Charges in Manufactured Dwellings

HB 3151 amends ORS 90.514 to prohibit landlords of manufactured dwellings from requiring the tenant, as part of the improvements contemplated under a rental agreement, (1) to pay a fee to the landlord for improvements, (2) to pay any system development charges, (3) to construct or repair an improvement that cannot be reasonably removed and owned by the tenant at the end of the tenancy except for certain enumerated improvements and those necessary to safely and lawfully install the manufactured dwelling.

HB 3151 amends Section 9, Chapter 625, Oregon Laws 2019 to expressly allow OHCS to provide legal assistance in the form of outreach, education, advice, case representation, and similar efforts.

HB 3151 amends ORS 197.308 to include an additional definition of affordable housing: a manufactured dwelling parks that serves households of 120 percent or less of the area median income. The amendment also allows nonprofit corporations whose purpose is affordable housing development and housing authorities to develop affordable housing without a zone change or conditional use permit.

Pete Meyers

SB 611 – Rent Increases

SB 611 changes some of the rules on residential rent increases.

It amends ORS 90.324, which sets the maximum rent increase a residential landlord can impose. The increase formula had been seven percent plus the year-over-year change in the Consumer Price Index for the West Region. Now the maximum is that formula or ten percent, whichever is less.

SB 611 also amends ORS 90.323, which sets the notice requirement, to incorporate this new maximum formula. Significantly, now landlords cannot raise the rent more than once in any 12-month period (under former ORS 90.323, they simply could not raise the rent to exceed the amount from the formula, whether once per year or more). Another significant change is that ORS 90.323 no longer applies to tenancies for manufactured homes or floating homes, which have their single rule change at section 5 (eliminating ban on charging new tenants rent in excess of amount a landlord could have raised the rent to for current tenants).

These changes apply to rent increase notices served beginning on July 6, 2023.

Pete Meyers, Mick Harris

SB 1069 – Notices to Landlords and Tenants

SB 1069 amends ORS 90.155 to allow residential landlords and tenants to agree that both parties may deliver written notice under ORS Chapter 90 via email. The agreement to accept notice by email must be an addendum to the rental agreement which specifies (1) the email addresses both parties will use to send and receive notices, (2) allows the tenant to terminate email notices with no less than 3 days' written notice, and (3) contains a notice to tenant in substantially the same form as set out in the bill. SB 1069 allows email delivery of a termination notice only if that notice is also sent by first class mail and email.

SB 1069 amends ORS 90.160 to start the clock for calculating notice periods that are measured in hours immediately upon service unless the notice is a termination notice, in which case the clock starts running on 11:59 p.m. on the day that notice is mailed and emailed.

SB 1069 amends ORS 90.300 to allow tenants and landlords to agree that a landlord can return a security deposit and prepaid rent via electronic delivery to the tenant's bank account. SB 1069 also amends ORS 90.412 and .414 to allow a landlord to refund rent by these means. These means must also be in the above-mentioned addendum to be allowed.

Pete Meyers, Emil Sadofsky

9. Environmental

SB 326 – Cleanup of Marijuana and other Production Facilities

SB 326 adds provisions to ORS 475C.005: upon notice from a law enforcement agency that a site contains waste (defined as marijuana plant matter, irrigation systems, greenhouses and other structures, and chemicals used for the manufacture of marijuana), the owner must undertake cleanup. However, the owner need not clean up any of the above that are the property of the owner, located on a site that was leased to a third party tenant, or the owner elects to retain ownership of the irrigation systems, greenhouses and structures.

An owner that fails to comply within 30 days of notice creates a public nuisance. The city or county may maintain civil proceedings to enforce cleanup, authorize the city or county to cleanup, enjoin further violations. Prevailing party's attorney fees are available in civil proceedings under this statue. The governing body may also attach a lien to the site by filing notice with recording office.

SB 326 prohibits water storage, ground water use, or well use on properties that contain waste and any unregistered property where marijuana is grown. SB 326 amends ORS 536.900 to allow the Water Resources Commission to impose a $2,000 per occurrence penalty on the above water violations.

SB 326 authorizes law enforcement officers to use mobile device tracking warrants, interception of oral communication warrants, and wiretaps for probable cause of violations of the act.

SB 326 makes possession of 32 times the applicable maximum a class B felon if the violation involves reckless or knowing unlawful conduct, and is marijuana offense.

SB 326 elevates marijuana violations to Class B Felonies if the violation involves the manufacture of more than 100 plants, or involves reckless unlawful conduct or a knowing unlawful conduct.

SB 326 amends ORS 475C.353 to elevate the sentencing guidelines for marijuana offenses that involve knowing and reckless unlawful conduct. The amendment defines knowing and reckless unlawful conduct as conduct that includes a variety of abusive labor and immigration practices. See Act for enumerated list of practices.

Justin Carter, Emil Sadofsky

SB 594 – Wages for Removal of Hazardous Waste

SB 594 expands the scope of construction activities that are subject to prevailing wage requirements if the project cost exceeds the applicable threshold and is contracted for or carried on by a public agency. The scope of activities is expanded to include demolition and removal of hazardous waste. Effective 91 days after sine die.

Susan Glen

10. Land Use

SB 1013 – Recreational Vehicles

SB 1013 adds provisions to ORS Chapter 215. The additional provisions give counties the discretion to allow rural real property owners to site one recreational vehicle on their property for residential purposes, provided that (1) the property is not designated an urban reserve under ORS 195.137, (2) the property owner occupies single family dwelling sited on the property as the owner's primary residence, (3) the single family residence is the only other dwelling unit on the property and no part of the residence is rented as a residential tenancy, (4) the recreational vehicle is not used for vacation occupancy, as defined in ORS 90.100, or other short-term use, (5) the recreational vehicle is owned or leased by the tenant, and (6) the owner provides essential service to the recreational vehicle.

SB 1013 allows the county to impose registration, lease, rent amount, and appearance requirements on the tenancy. A recreational vehicle satisfying the above requirements is not subject to the state building code.

Emil Sadofsky

SB 643 – Homemade Food Production and Sale

SB 643 expands the types of homemade food (i.e. "cottage food") that may be sold without state inspection and licensing requirements. The previous version of the law only allowed baked goods and confections, and limited annual gross sales to $20,000. Many other non-perishable items are now permitted, e.g. coffee beans, popcorn, jam, honey, syrups, nuts, dehydrated foods, and powdered drink mixes. The annual gross sales maximum is increased to $50,000. The law also provides guidelines for cottage food to be sold to retailers and displayed in stores.

Jesse Calm

SB 473A (Failed) – Food Production in HOAs

SB 437A is a bill that failed but is a concept that may re-appear in a future session. The concept was introduced in 2021 and again in 2023. SB 437A would have mandated that HOAs may not prohibit or "restrict" the production of food products through gardening, hen-keeping, or bee-keeping on an owner's lot as long as such activities are conducted in a "competent and proficient manner" and consistent with applicable law.

Susan Glen

11. Public Records

HB 2029 – Font Size for Recorded Documents

HB 2029 amends ORS 205.232 by increasing the required font size from 8-point to 10-point type in the "text of the instrument" presented for recording. The bill leaves intact page-size and print-quality requirements as well as exemptions for out-of-state notarial acts and certified copies of public records.

Pat Ihnat

HB 2033 – Documentation of Tax Exemptions

HB 2033 clarifies that if a deed is recorded conveying real property to a tax-exempt government entity, and this deed lacks the required certificate from the county assessor representing that taxes are fully paid, the tax obligation is a personal liability of the deed-grantor, and not a lien against the real property conveyed in the deed. The bill amends ORS 311.411 by changing section (2) to (2)(a) and adding section (2)(b). Section (2)(a) – formerly section (2) – prohibits the county clerk from recording a deed that conveys to a tax-exempt government entity if the deed is not also accompanied by a certificate from the assessor representing that taxes are paid in full as of the date of recording. Section (2)(b) provides that if a deed is recorded without a certificate as required by (2)(a), then unpaid taxes are collected in the manner provided under subsection (6). Subsection (6) provides that any unpaid taxes are not a lien against the real property conveyed to the government entity, but a personal obligation of the grantor.

Justin Carter

Chapter 13B

2023 Regular Session/Land Use Bill Summaries

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The information contained in these materials should not be relied upon as comprehensive. These materials are not intended as legal advice and are presented for discussion and illustrative purposes.

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2023 Regular Session / Land Use Bill Summaries

HB 2001, Oregon Laws 2023, Chapter 13
Oregon Housing Needs Analysis

Housing Needs Analysis: Establishes the Oregon Housing Needs Analysis program within the Housing and Community Services Department (OHCS) and directs DLCD and OHCS to assist the Department of Administrative Services (DAS) in carrying out the requirements of the Act. Funds were appropriated to these departments in order to develop a strategy and implement programs to increase access to housing production and choice at all levels of affordability.

Housing Production Targets: The Act directs DAS to establish six-year housing production targets for cities greater than 10,000 and unincorporated urbanized areas inside of metro and eight-year production targets for cities greater than 10,000 and unincorporated urbanized areas outside of metro. Targets must be separated between (1) total production targets; and (2) targets for publicly supported affordable housing for income levels less than 80 percent of the area median income.

Housing Production Dashboard and Equity Indicators: Mandates that OHCS develop and annually update a housing production dashboard for cities greater than 10,000 that includes: (1) progress towards the housing production targets; (2) total housing targets; and (3) a regional comparative analysis of progress towards production. OHCS must also provide annual updates regarding measurable impacts to racial and economic equity, including environmental justice outcomes.

Urbanization Generally: Directs LCDC and DLCD to adhere to principles of equity, accessibility, and affordability when engaging in rulemaking related to housing or urbanization and directs that housing production be their focus when working with local jurisdictions. Public bodies, as defined in ORS 174.109, are directed to remove barriers to and to identify and implement strategies for the development of needed housing and to work with local governments to support housing production. LCDC is permitted to approve a range of policy options or assumptions that a local government may use in determining needed housing, housing production strategies, buildable lands inventories, and changes to UGBs and urban reserves. LCDC is directed to adopt rules related to housing production that prioritize housing production, affordability, and choice. Provides funding for implementation and provides additional parameters for buildable lands inventories.

Housing Production Accountability: Amends ORS 197.293 to restate the principles established under the Act and establishes the ability of DLCD to refer cities that are not proportionately adding housing to its housing acceleration program. The housing acceleration program will require cities to complete an audit of housing barriers and, within 6 months, enter into a housing acceleration

agreement with DLCD, subject to the mandatory provisions in the Act. Amendments or adoptions of code provisions made by the city pursuant to the housing acceleration program are not land use decisions and are not subject to appeal or review. Provides metrics for when cities with populations above 10,000 are failing to make progress towards production accountability. Amends 197.319 to allow DLCD to request an enforcement order without approval from LCDC. Amends ORS 197.320 to specify when LCDC must issue an enforcement order against a city with a population of more than 10,000. Amends ORS 197.335 to provide LCDC with enforcement mechanisms for failing to comply with ORS 197.320. These provisions become effective on January 1, 2025, but DLCD can take steps to build operational capacity prior to the effective date.

Urbanization outside of Metro: Amends ORS 197.286 to 197.314, directs cities with populations greater than 10,000 to perform housing needs analysis and clarifying considerations when performing analysis. Defines "needed housing" as housing by affordability level, type, characteristics, and location that is necessary to accommodate a city's needs over a 20-year planning period. Directs cities to amend UGBs when housing needs exceed capacity and provides parameters for expansion. Allows cities with populations exceeding 10,000 to adopt rural reserves.

Urbanization within Metro: Amends ORS 197.296, ORS 197.297, and ORS 197.303, directing Metro to perform a housing needs analysis for the cities within Metro.

Housing Strategies: Amends ORS 197.290 to clarify the requirements of cities to provide data on housing production strategies, adding a directive to target the furtherance of fair housing, which is defined therein. Directs metro and regional governments outside of metro to adopt housing coordination strategies for the development of needed housing and a schedule and plan for the implementation of those regional policies. Authorizes LCDC to adopt rules for compliance with statewide planning goals when a comprehensive plan amendment or adoption of land use regulation is not otherwise subject to review.

Urban and Rural Reserves: Amends ORS 195.141 to clarify local jurisdictions' role in designating rural reserves. States that the designation and protection of rural or urban reserves are not a basis for a claim for compensation under ORS 195.305 unless it results in additional use restrictions on properties.

Local Housing Reports: Amends ORS 456.586 for conformity with Act and amends ORS 197.286 to 197.314. Directs cities with populations exceeding 10,000 to submit annual housing reports listing types and amounts of different housing types and outlining progress on housing production strategies.

Population Forecasts: Amends ORS 197.033 to allow population data to be segmented by race, ethnicity, and disability status as well as populations on tribal lands to allow measures of compliance with equity standards.

Youth Homelessness: Directs OHCS to expand its policies and services to school aged children and their families and provide evidence-based services for youth experiencing homelessness.

Modular Housing Funding: Amends ORS chapter 458 to instruct OHCS to provide grants or loans to expand production capacity of modular homes. Establishes advisory committee under ORS 285A.060 to advise on implementation of grants and loans. Appropriates funds and prioritizes entities receiving grants and loans based on the populations they serve.

Moderate Income Housing Predevelopment Loans: Amends ORS chapter 289, directing the Oregon Facilities Authority (OFA) to provide financing to local governments and developers for predevelopment, infrastructure, and consultant costs for eligible projects with no less than 25-year affordability restrictions. Appropriates funds to OFA and contains a sunset clause of January 2, 2026.

Termination of Residential Tenancy for Non-Payment: Amends ORS chapter 90 to place additional restrictions on evictions of tenants for defaults due to nonpayment of rent. Requires notice of rental assistance programs with eviction or termination notice in the form set out in ORS 105.135. Allows tenant to cure non-payment default at any point during the eviction proceedings.

Eviction Process: Amends ORS 105.115 to expand the criteria an eviction must meet in order for a judge to issue a default judgment. Changes the timing for the scheduling of a trial for non-payment defaults.

Sealing Evictions: Adds language to ORS 105.105, establishing a process for sealing eviction records entered after January 1, 2014.

Agricultural Workforce Housing: Appropriates funds and directs the Department of Agriculture to provide grants for health and safety improvements to agriculture workforce housing by July 1, 2026. Establishes criteria for the implementation of program and awarding of funds. Directs the Occupational Safety and Health Division of the Department of Consumer and Business Services to assist in determining grant eligibility.

Additional conforming amendments were made for language consistency and to correct references in a variety of places including in ORS chapters 197, 197A, 215, 270, and 466.

HB 2079, Oregon Laws 2023, Chapter ___
Study of Potential Historic Property Preservation Incentives

Oregon currently has a statewide special assessment property tax incentive program that provides reduction in property taxes for owners of certain historic properties. Following the 2021 legislative session, a working group was created to explore the potential of extending, expanding, and creating additional economic incentives to increase the preservation of historic property in Oregon. HB 2079 directs the Legislative Revenue Officer to study the possible creation of an income tax credit and/or grant program to provide additional financial tools to incentivize the reuse and preservation of historic resources.

HB 2127, Oregon Laws 2023, Chapter ___
Affordable Housing Pilot Project

HB 4079 (2016) required LCDC to establish and adopt rules to implement an affordable housing pilot program, under which LCDC could select two cities for UGB expansions to promote affordable housing. One of those cities had to have a population of more than 25,000, and the other had to have a population of 25,000 or less. For the larger city, LCDC selected the City of Bend. HB 2336 (2019) allowed LCDC to select two larger cities if it received no qualifying nominations from smaller cities by January 1, 2020. Because it received no qualifying nominations from smaller cities, LCDC selected the City of Redmond as the second larger city. HB 2160 (2021) allowed LCDC to select a third city, specifically the City of Pendleton, if a nomination were submitted and approved by June 30, 2023. HB 2127 eliminates the deadline for the City of Pendleton to submit its nomination.

HB 2468, Oregon Laws 2023, Chapter ___
Family Child Care Homes in Rental Dwelling Units

HB 2468 directs the Early Learning Council (ELC) to adopt rules to establish reasonable requirements for landlords of tenants who operate a family child care home. However, when establishing rules regarding capacity and adult-to-child ratio requirements, the ELC may not take into consideration the provider's children if the child is between the ages of 10 and 12 and the child is not special needs or has disabilities that requires a high level of care for the child's age. HB 2468 appropriates funds to the Oregon Health Authority and the Department of Human Services for the purposes of implementing this measure.

HB 2889, Oregon Laws 2023, Chapter ___
Oregon Housing Needs Analysis Amendment

Generally, HB 2889 amends HB 2001. Most of those amendments are housekeeping amendments. However, HB 2889 amends HB 2001 in three more substantial ways. First, HB 2889 amends ORS 197.286 to include the definition for "development-ready lands" to mean a type of buildable land that is likely to support the production of housing during the period of the city's housing production target. Second, HB 2889 explicitly clarifies that affordable housing is to be produced by for-profit, nonprofit, and public builders. Third, HB 2889 amends ORS 197.293 in order to clarify that cities which adequately perform in producing housing based on their population will not be referred to the housing acceleration program, even when the city is the lowest performing in its region.

HB 3197, Oregon Laws 2023, Chapter ___
Standards Applicable to Development of Housing

HB 3197 first limits the requirement that development regulations be clear and objective to the development of housing within a UGB. Next, beginning on July 1, 2025, the bill broadens the requirement that development regulations be clear and objective to the development of housing within: (1) unincorporated communities designated in a county's acknowledged comprehensive plan after December 5, 1994; (2) nonresource lands; and (3) areas zoned for rural residential use. Additionally, effective July 1, 2025, county land use regulations may not establish standards for accessory farmworker housing unless the standards are clear and objective.

HB 3362, Oregon Laws 2023, Chapter ___
Validation of Unit of Land Acquired by Innocent Purchaser

HB 3362 allows counties to approve an application to validate a unit of land if the applicant acquired the land as an "innocent purchaser," a phrase which the bill defines, prior to January 1, 2023. Additionally, the county must have: (1) approved an application for the recognition of the unit of land as a lawfully established unit of land before the innocent purchaser acquired the land; (2) approved an application for a property line adjustment to adjust the boundary of the unit of land before the innocent purchaser acquired the land; and, (3) after acquisition by the innocent purchaser, revoked the approvals under (1) and (2). Until April 1, 2024, the bill allows appeals to LUBA challenging certain template dwelling land use approvals based on forgery for non-innocent purchasers. The bill sunsets on January 2, 2025.

HB 3395, Oregon Laws 2023, Chapter ___
Miscellaneous Housing Provisions

HB 3395 requires urban local governments to allow affordable housing on commercially zoned lands that are comparable in density to the allowed commercial uses, with certain exceptions. The legislation allows local governments to (1) extend the 120-day deadline to take final action on an application by 7 days for decisions approving urban housing and (2) withdraw decisions relating to housing for reconsideration until the respondent's brief is due, as opposed to when the record is due. The legislation repeals a sunset clause in prior legislation governing the development of emergency shelters, exempts emergency shelter applications from hearing requirements, requires circuit courts to award attorney fees to emergency shelter applicants who prevail in writ of review proceedings, and provides that special provisions governing the approval of emergency shelters are not applicable when the homeless population drops below a certain level. The legislation requires DCBS to update the state building code to allow a residential occupancy to be served by a single exit. The legislation exempts from the definition of "planned community" at ORS 94.550 developments in which each unit is either subject to an affordability restriction or owned by certain nonprofit organizations. The legislation limits the ways in which local governments can regulate condominiums. The legislation allows award letters from reliable funding sources made to affordable housing developers to satisfy certain subdivision assurance requirements.

The legislation requires urban local governments to allow single room occupancies on lots zoned for single-family dwellings and lots zoned for multi-family dwellings with five or more units. The legislation adds single room occupancies to the definition of "needed housing" at ORS 197.303. The legislation requires all cities with populations of 2,500 or greater to allow duplexes on lots and parcels zoned for detached single-family dwellings. The legislation clarifies that local governments, in amending their comprehensive plans or land use regulations to allow middle housing, are not required to consider whether the amendments significantly affect existing or planned transportation facilities. The legislation appropriates monies to DLCD to provide grants to local governments to assist them in amending their comprehensive plans.

The legislation allows homeowner and condominium associations to amend their declarations and bylaws to conform to ORS 93.270(2) without complying with certain procedures, provides the form that such amendments must take, and provides the form that a certification that an association's declaration and bylaws already conform to ORS 93.270(2) must take. The legislation allows public utilities to convey real property to be used for affordable housing.

The legislation appropriates monies to DHS to provide financial support to nonprofit organizations providing affordable housing support to low-income college students. The legislation appropriates monies to OHCS to provide grants to housing sponsors to develop community housing supporting agricultural workers. The legislation appropriates monies to DAS to provide grants to councils of

governments and economic development districts to support housing. The legislation appropriates monies to OHCS to make a grant to the Network of Oregon Affordable Housing to establish a revolving loan fund for first-time home buyers and requires OHCS to submit a report on the use of those funds. The legislation appropriates monies to OHCS to provide grants to nonprofit corporations to develop funds for the repayment of loans to finance the construction of affordable housing. The legislation requires OHCS, in administering the Emergency Housing Account under ORS 458.650, to provide support for individuals with companion animals.

HB 3458, Oregon Laws 2023, Chapter ___
Issues and Disposition at LUBA

HB 3458 makes the law of the case doctrine applicable to appeals of legislative land use decisions, and it allows LUBA to affirm comprehensive plan and zoning ordinance amendments in part if the decision includes a severability clause and the part to be affirmed is "reasonably severable," a phrase which the legislation defines.

SB 4, Oregon Laws 2023, Chapter 25
Limited Gubernatorial Authority for Semiconductor UGB Expansion

SB 4 provides a narrow path for Governor-approved UGB expansions that facilitate semiconductor and advanced manufacturing siting. To be eligible for inclusion, tracts must generally be contiguous to an existing UGB and not within an urban or rural reserve under ORS 195.144, with an exception for a reserve area north of Hillsboro that is eligible for inclusion under the Act. To expand the UGB under SB 4, the Governor must conduct a public hearing in coordination with the implicated County and nearest city to the site and make a determination that existing lands within a UGB in the state would not meet the needs of the specific project.

SB 4 authorizes the Governor to designate up to two such sites greater than 500 acres and up to six such sites of 500 acres or less for inclusion in a UGB. It allows expedited appeals to the Oregon Supreme Court for challenges to a Governor's decision to expand a UGB under SB 4. The limited gubernatorial authority to expand a UGB under SB 4 expires on December 31, 2024.

SB 644, Oregon Laws 2023, Chapter 76
Rural Residential Accessory Dwelling Units

Prior to passage of SB 644, accessory dwelling units (ADUs) were effectively prohibited on lands zoned for rural residential use by the fact that a statewide map of wildfire risk had not been adopted. Under SB 644, until a statewide map of wildfire risk is adopted, a county can approve ADUs on lands zoned for rural residential use if the ADU complies with the construction provisions of Oregon Residential Specialty Code section R327 in addition to the other requirements set forth in ORS 215.495(2). Following the adoption of a statewide map of wildfire risk, the heightened construction standard would apply only to ADUs on lots or parcels in areas identified as extreme or high wildfire risk on the statewide map of wildfire risk.

SB 835, Oregon Laws 2023, Chapter ___
Subsurface Sewage Disposal Connections for Accessory Dwelling Units

SB 835 directs the Environmental Quality Commission (EQC) to adopt rules that establish the conditions for approving a proposal to permanently connect an ADU to a subsurface sewage disposal system or alternative sewage disposal system that is connected to single-family dwelling on the same lot or parcel as the ADU.

SB 931, Oregon Laws 2023, Chapter ___
Sewage Disposal System Construction Permit Requirements

ORS 454.655 precludes the Department of Environmental Quality (DEQ) from issuing a permit for the construction or installation of a subsurface sewage disposal system or alternative sewage disposal system if a community or area-wide sewerage system is available which will accommodate the proposed discharge. SB 931 authorizes the EQC to adopt rules to determine whether a community or area-wide sewerage system is available. The rules must require the consideration of several factors, including legal availability, the scope of repairs, the cost of repairs, statewide planning goals, and environmental and public health concerns. The bill further provides that, to be available, the community or area-wide sewerage system must be within 200 feet of the property to be served. The bill's amendment to ORS 465.655 become operative on January 1, 2024, but DEQ and EQC may take action before the operative date to enable the EQC to adopt rules on or after the operative date.

HB 3414 (Did Not Pass)
Adjustments and UGB Expansions

HB 3414 failed to pass the Senate before the close of the legislative session. However, given how close the bill was and the likelihood that a similar bill will return in future years, we are providing a summary of it. There were two primary aspects to this bill. First, it required governments to approve adjustments to land use regulations for housing development within the UGB. Second, it would have allowed cities to amend their UGBs to include sites for residential development.

The bill would have required local governments to approve deviations from existing land use regulations when an application proposes net new housing units and is in a UGB that is zoned residential or mixed-use residential uses. The deviations subject to this provision were certain development standards (*e.g.*, setbacks, landscaping, and parking minimums) or design standards (*e.g.*, façade materials, roof forms, and building orientation requirements).

HB 3414 would have allowed cities to unilaterally expand their UGBs when adjacent lots are designated as urban reserve or nonresource land or are subject to acknowledged exception to a statewide planning farmland or forest land planning goal to build more housing. These conversions were limited to 150 net residential acres for cities with a population of 25,000 or greater or 75 net residential acres for a city with a population of fewer than 25,000.

Chapter 14

Nuts and Bolts of Foreclosure

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Introduction: the Parties, Documents, Terminology, and Objectives

For the purposes of this CLE, the terms Mortgage and Deed of Trust will generally be used interchangeably, except where the distinction matters. Generally, a Mortgage is a two-party transaction, where the Owner of a Property conveys an interest in the Property (or the Property itself in certain jurisdictions) to a Lender as security for a Loan.

A Deed of Trust is a three-party transaction, where the Owner conveys a Promissory Note to the Lender, and an interest in the Property (along with an irrevocable Power of Sale) to a Trustee, who can exercise the Power of Sale without the supervision of a court, and at the request of the Lender (Beneficiary), upon default. Mortgages generally do not contain a Power of Sale, and thus require judicial foreclosure.

Deeds of Trust act like Mortgages when foreclosed judicially, so the law concerning judicial foreclosure of either type of security instrument is generally the same within a jurisdiction. In Oregon, the statutes specific to trust deeds are found under ORS Chapter 86 (the Oregon Trust Deed Act, or OTDA), the general laws on judicial foreclosure of Mortgages and other liens (including deeds of trust) are found under ORS Chapter 88, and the laws on foreclosure of statutory liens (e.g., mechanics liens, chattel liens, agricultural liens, etc.) are found under ORS 87. Because the goal of a judicial foreclosure is an execution (sheriff's) sale, the provisions for execution under ORS Chapter 18 also apply.

A) The Parties to a Loan:
   a) Borrower: the individual(s) originally owing the debt under the Mortgage loan, or their assignee who has assumed the borrower's obligations (which usually requires the consent of the Lender); when referring to the signers or other obligors of the promissory Note, they may be known as the "Maker" (UCC § 3-103; (1)(d))
   b) Mortgagor/Grantor: the individual granting a security interest in a parcel of real Property; the term is often used interchangeably with "Borrower" but the concepts are distinct. A non-borrower mortgagor is commonly found where a Property is jointly owned but one borrower has significantly better credit than the other; the Lender may lend money to the credit-worthy Borrower, but, because most Mortgages must be secured by an undivided interest in fee simple, the Lender will require the non-borrowing joint tenant/tenant in common to convey their interests as additional security. A non-borrower also will sometimes grant a Deed of Trust (usually in a commercial context) as an "accommodation party" to provide additional security/collateral for a loan.
   c) Mortgagee/Grantee: the party holding the security interest in the subject Property conveyed by the Mortgagor directly or through assignment by instrument or by operation of law from a prior Mortgagee; usually, the Lender; also known as the "Beneficiary" of a Trust Deed.
   d) Beneficiary: the secured party; a ""Beneficiary" for purposes of the OTDA is the person to whom the obligation that the trust deed secures is owed. At the time of origination, that person is the Lender."[1]
   e) Owner: the holder of the beneficial interest in the fee (or lesser interest) in the Property; usually, but not always, the Borrower and the Mortgagor/Grantor, and commonly, the

[1] Brandrup v. ReconTrust Co., 353 Or. 668, 674, 303 P.3d 301, 304 (2013)

Homeowner; however, avoid the use of the term Owner when discussing the Lender, the Mortgagee, the Beneficiary, or the Holder of the Note, as "Ownership" does not have legal significance in regards to a Note or a Mortgage for the purposes of foreclosure

f) Lender: the party loaning the money to the Borrower, or their assignee; most loans documents will discuss the "Lender, their successors and assigns" to establish that the rights of the Lender may be (and usually are) assigned one or more times during the life of the loan; at origination, the Lender is almost always the original Mortgagee or Grantee
g) Holder: the Holder is a concept from the UCC, which is often confused with the "Owner" of a promissory Note; however, a party may be the Holder, and may otherwise be the Person Entitled to Enforce ("PETE") the Note without owning title to the promissory Note
h) Loan Servicer or Servicer: the party who receives and applies loan payments, and handles customer service contacts with the borrower in exchange for a fee equal to about 0.25-0.5% of the principal balance of loans in a "Loan Servicing Pool"; they may be the Lender or the servicing rights may be outsourced; Borrowers often believe that the Servicer is their Lender, because the Servicer's name is on the Mortgage statements and that is the party the borrower makes payment to or who they call for customer service help; before commencing a foreclosure, counsel must identify who the Lender is and who the Servicer is, and in whose name the action may be brought. Under Oregon law, the Servicer can act in its own name, or with authority, may act in the Lender's name under a power of attorney. [2]

There are three basic types of Loan Servicers:

i) Master Servicer - usually has general agency authority but limited power to modify the terms of the loan; collects payments and distributes income from loans that are in ordinary/compliant repayment status (not in default)
ii) Sub-servicer/Outsource Vendor - an agent of the Master Servicer who performs discrete services for the Master Servicer (e.g., performs administrative tasks such as receiving payments by check and posting payment information to a loan database, no decision-making power)
iii) Special Servicer - servicer of Mortgage loans in default; they are generally vested with authority, if consistent with guidelines, to modify the terms of the loan, and to engage in forbearance, modification, or other accommodation of a borrower in default, with the intent to maximize the return to the Lender ("Loss Mitigation"); their

[2] ORS 86A.175(3)(e) "Service or collect any mortgage banking loan or mortgage loan" includes but is not limited to: (A) Holding documents or written instruments and receiving and disbursing payments according to the instructions of the parties to the documents or written instruments; (B) Collecting or remitting, or having the right or obligation to collect or remit, for a lender, note owner, note holder or other holder of an interest in a note or for a mortgage banker's or mortgage broker's own account, payments, interest, principal and trust items, including but not limited to hazard insurance and taxes, on a mortgage banking loan or mortgage loan in accordance with the terms of the loan, and includes loan payment follow-up, delinquency loan follow-up, loan analysis and notifications to the borrower that are necessary to enable the borrower to keep the loan current and in good standing; and (C) Bringing and maintaining a suit or action to collect amounts owed on a mortgage banking loan or mortgage loan, including but not limited to exercising contractual, statutory or common law remedies such as injunction, specific performance, judicial or nonjudicial foreclosure or receivership.

selection and powers are usually designated in the Pooling and Servicing Agreement ("PSA") applicable to loans held in pools/trusts

i) Servicing Rights: the right to administer loans as a Loan Servicer, which are often transferred independently from the Mortgage loan[3]; when GMAC Mortgage collapsed, the Servicing Rights were their most valuable asset[4]

j) MERS: the "Mortgage Electronic Registration System," which was modeled after the Depository Trust Company ("DTC") to reduce transaction costs in the secondary market for Mortgages, just as DTC has done for book-entry transfers of stocks and other securities.[5] However, unlike DTC, MERS did not obtain prior statutory approval and, therefore, there was (and continues to be) significant litigation concerning the role and powers of MERS under state agency and real Property law.
   i) In certain jurisdictions, MERS may act as the Beneficiary even though it is only the nominee, as long as it is designated as the Beneficiary in the trust deed[6]; in others, MERS is not a Beneficiary under statutes or case law, so, if it is able to act on behalf of the Beneficiary at all, it does so under agency law.
   ii) In some states, like California, the agency can be presumed based on the designation in the trust deed;[7] in other jurisdictions, like Oregon,[8] Arkansas,[9] Washington,[10] etc., the agency cannot be presumed.

k) Nominee: On MERS loans, "MERS is a nominee for the Lender and subsequent buyers ("beneficial Owners") of a Mortgage loan and serves as a common agent for the Mortgage industry";[11] a "nominee" is "[a] party who holds bare legal title for the benefit of others."[12]

l) Government-Sponsored Enterprises (GSEs): (ostensibly private) corporations chartered by the federal government to provide stability and liquidity in the housing finance market to promote home Ownership; more often than not, they will be the "Owner" or insurer of a Mortgage loan in default, even if their name does not appear on the documents; in the post-recession era, the majority of loan originations were backed by GSEs

m) Federal Housing Authority ("FHA"): Originally a New Deal program, the FHA moved to the Department of Housing and Urban Development's ("HUD") Office of Housing in

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[3] https://www.thestreet.com/story/13971025/1/citi-s-focus-on-new-mortgages-spurs-982m-sale-of-servicing-rights.html

[4] http://www.housingwire.com/articles/ocwen-walter-investment-win-bidding-war-rescap-mortgage-servicing

[5] "MERS is a creature of the real estate finance industry. In the mid–1990's, large players in the industry, including the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), decided to create a database that would electronically track ownership in secured real estate loans as they were bought and sold in a secondary market, generally in packages now known as mortgage-backed securities. … They created MERSCorp Holdings, a 'member-based organization made up of thousands of lenders, servicers, sub-servicers, investors and government institutions.' See MERSCORP Holdings, Inc., http:// www.mersinc. org/about-us/faq (accessed May 22, 2013). The primary product of MERSCorp Holdings was and is the "MERS System," a "national electronic database that tracks changes in mortgage servicing and beneficial ownership interests in loans secured by residential real estate." Brandrup v. ReconTrust Co., 353 Or., at 679–80.

[6] "[H]aving MERS the named beneficiary as nominee for the lender conforms to the requirements of a deed of trust under Idaho law." Edwards v. Mortgage Electronic Registration Systems, Inc., 300 P.3d 43, 49 (Idaho 2013) .

[7] *See*, *e.g.* Fontenot v. Wells Fargo Bank, N.A., 129 Cal. Rptr. 3d 467, 481 (Cal. Ct. App. 2011)

[8] Brandrup v. ReconTrust Co., 353 Or 668, 705 (Oregon 2013)

[9] MERS, v. Southwest Homes of Arkansas, 301 SW3d 1, 8 (Arkansas 2009)

[10] Bain v. Metropolitan Mortg. Group, Inc., 1285 P.3d 34, 45-46 (Washington 2012)

[11] https://www.mersinc.org/about/faq

[12] Black's Law Dictionary 1149 (9th ed.2009)

1965. Today, in the context of a Mortgage secured by a 1-4 family home, FHA's primary role is to provide Mortgage default insurance for Mortgages issued through approved Lenders for those unable to achieve an 80% loan-to-value ratio at the time of purchase, to offset the increased risk of loss to a Lender without a sufficient "equity cushion" that would otherwise be at risk of being under-secured after a default.

n) "Occupants of the Premises": the occupants, sometimes styled as "all persons known or unknown claiming any right, title, or interest in and to the lands hereinafter described" are a necessary party to a foreclosure proceeding, as a John Doe party entitled to notice of the proceedings; however, the foreclosure may terminate a junior lease, but otherwise has no direct legal impact on the occupants, as foreclosure conveys title, not the right to possession

B) The Documents & Terminology:

a) Allonge: an additional "paper affixed to the" promissory Note that contains additional indorsements; intended to be used when there is no blank space used on the face (or back of) an instrument for the purposes of indorsement; while there is no reported Oregon case establishing what it means to be "affixed" under UCC 3-0204 (codified as ORS 73.0204), there have been cases (with differing results in various jurisdictions) establishing whether a document in the loan file referencing the specific Note with language evidencing an intent to be affixed is sufficient[13] or whether a more permanent connection (like being physically stapled or glued to the Note) is required. [14]

b) Lost Note Affidavit: possession of a promissory Note holds significant legal importance; however, with frequent loan transfers of thousands of loans, the original documents are occasionally lost or destroyed; the UCC (ORS 73.0309) permits a party to enforce the obligations of a promissory Note by means of a Lost Note Affidavit; because the LNA may be a bearer instrument, may be indorsed and transferred, and is enforceable in place of the promissory Note as long as there are sufficiency protections for the borrower, references herein to the Promissory Note will include an LNA that has been lawfully executed and is held by the PETE.

c) Lis Pendens/Notice of Pendency of Action: a notice recorded in the chain of title that puts parties on notice of pending litigation affecting the Property; provides notice to third parties that the Property is subject to pending litigation; avoids risk of a transfer of the Property or a judgment lien attaching that could survive the sale, since anyone obtaining an interest after recording the lis pendens cannot be a bona fide purchaser without notice (because they have constructive or inquiry notice of the proceedings)

d) Origination File: the file from origination of the loan, which would include the loan application, the settlement statement showing the receipt and distribution of funds under the Mortgage closing, and the origination title policy

e) Loan File or Servicing File: the Lender/servicer's file from the disbursement of the loan forward; this will contain the payment history, the loan documents, a history of transfers of the loan, correspondence with the borrower, internal Notes concerning contacts and communications with the borrower (call logs, etc.).

[13] Purificato v. Nationstar Mortg., LLC, 182 So.3d 821 (Fla. Dist. Ct. App. 2016)
[14] In re Celestine McFadden, 471 B.R. 136 (Bankr. D. S.C. 2012)

f) SCRA: The Servicemembers Civil Relief Act (SCRA) (50 USC App. § 3901 et seq., as amended), formerly known as the Soldiers' and Sailors' Civil Relief Act of 1940, provides important safeguards to members on active-duty status. Search the database on important milestones in the case. The SCRA can limit the right to take a default order or judgment, conduct a nonjudicial foreclosure, eviction (even of non-military dependents), and take other enforcement actions, and may limit interest rates, fees and costs that may be incurred based on a military person being sent on orders. The goal is simple: "to provide for, strengthen, and expedite the national defense through protection extended by this chapter to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation; and … to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service." 50 USC Appx. §3902.[15]

g) Credit Bid: The Lender can credit bid at the foreclosure sale.[16] A credit bid is the use of the Mortgage debt as currency, so a secured party foreclosing a Mortgage with a total balance of $250,000 can bid up to that number without advancing cash; if the Lender bids $260,000, it would usually have to pay $10,000 cash in addition to its credit bid, and that amount would be distributed to the junior lienholders or back to the homeowner by order of priority[17]

i) In a judicial foreclosure case, the plaintiff should request permission to credit bid as one of the claims for relief.

C) Objectives of Foreclosure Action for the Lender: cure the loan default by legal progress by:

a) compelling full payoff (generally through sale or refinance);
b) reinstatement of the loan by payment in full of the amount in default to bring the loan current, with future payments to continue according to the amortization schedule;
c) engaging in consensual modification to capitalize the arrears (add them to the principal balance, or "tack them on the end of the loan") to cure the default;
d) pre-foreclosure short sale (deliver the Lender an acceptable amount to release the borrower, which is generally based on the expected recovery on a foreclosure sale after legal, marketing, and carrying costs, and the inherent risks of litigating or holding Property, along with the time value of money);
e) successful foreclosure going to third-party bidder (i.e., the Lender receives the full balance, or at least more than their maximum bid, without incurring carrying costs or marketing costs and while avoiding further risk of challenge to title; because most foreclosure sales are "as-is" sales without warranty of title, the risk of defects in foreclosure process are shifted to buyer; and
f) Successful foreclosure resulting in real estate owned (REO) Property with clean, marketable title ("fee simple without restriction").

[15] For more information (a primer directed to judges, providing thorough discussion and a compliance checklist), see https://www.americanbar.org/groups/legal_services/milvets/aba_home_front/information_center/servicemembers_civil_relief_act/
[16] ORS 18.936
[17] Priv. Cap. Grp., LLC v. Harris, 273 Or. App. 529, 363 P.3d 502 (2015).

I. Title Policies and Title Claims

A) Title Policies

Since the goal of foreclosure is to deliver clear and marketable title at the end of the foreclosure process, the first step should always be to order a title policy, usually known as a Foreclosure Guaranty, a Trustee's Sale Guaranty, or, in jurisdictions like Oregon permitting both judicial and nonjudicial foreclosures, a Combination Guaranty (collectively, the "Foreclosure Guaranty"). The same companies that provide title insurance and escrow services for real estate closings will sell these policies, which will be issued by national title insurance companies and will be sold through a local title office. If available, order a Combination Guaranty.

The Foreclosure Guaranty serves two vital functions: it provides the necessary information for the foreclosure that might be found on a lien abstract or title report (vesting information, tax information, the legal description of the Property, any easements, covenants, conditions and restrictions ("CC&Rs") junior or senior interests, and any exceptions like known encroachments) and, perhaps more importantly, it contains an insurance component, usually for the value of the principal balance owing on the Mortgage. The insurance component will generally guarantee that the title company will insure the status of title after the foreclosure against title exceptions and other items in the public record at the time the policy or endorsement was issued (the "Plant Date") that were not disclosed on the Foreclosure Guaranty. After completing a foreclosure and addressing all exceptions, if the Lender (specifically, the insured party on the Foreclosure Guaranty) attempts to resell the Property through their REO (Real Estate Owned) Department and the purchaser's title company finds an omitted lien, the issuer of the Foreclosure Guaranty will have to cover the loss (i.e. pay off the lien, settle the claim, or litigate the case to strictly foreclose the omitted lien). Note, the policy does not ordinarily inure to the benefit of a third-party purchaser at foreclosure, as a foreclosure sale is without warranty and bidders are charged with conducting their own due diligence.

B) Title Claims: Tendering a title claim is a straight-forward process; once you have determined that the issue is a covered issue (or potentially-covered issue), then draft a letter to the insurer asserting the claim and requesting a coverage position. Cite the policy information, including the specific interest that was insured, and why it should be a covered claim (i.e. the Origination Policy did not disclose that there was litigation pending when the loan was originated concerning lot line encroachment). Provide the basic evidence you have (i.e. a docket report showing the lot line dispute was a matter of public record at the time the loan was originated). Most importantly: tender the claim immediately, and get a coverage position before commencing the foreclosure or trying to do any corrections.

II. Applying the Foreclosure Process: "A foreclosure is the process by which an Owner's right to a Property is terminated, the foreclosing party's interest is liquidated, and junior creditor interests on the Property are extinguished."[18]

A) Document Gathering: Obtain the Loan File and necessary supporting documents. At the outset, it is not necessary to get the Origination File, as the details of origination don't generally matter unless there is something in the Loan File or on the Litigation Guaranty that

[18] https://www.irs.gov/irm/part5/irm_05-012-004.html

suggests additional facts are needed. While the fact investigation begins with the Foreclosure Guaranty, the loan servicing file is the other vital component. With electronic record keeping, the loan file will usually be conveyed electronically. Often, it is possible to complete a foreclosure with minimal need for paper records from the Lender. However, the vital documents to begin the foreclosure process are:

a) Promissory Note:
   i) the promissory Note must be in the possession of the Lender or their document custodian; get a certification from the Lender that this is true if the original Note is not transferred to counsel at the time of referral for foreclosure
      (1) in a judicial foreclosure, the original Note should be transferred to the custody of counsel, in order to be presented to the court at the time of judgment in a judicial foreclosure proceeding if required by the Court[19]
      (2) check the indorsements on the Note and Allonge; counsel must ensure that there is an uninterrupted chain of indorsements from the originating Lender or their successor by merger to the final, either through special indorsements to each successive assignee, or in blank,

b) Trust Deed/Mortgage, and any recorded assignments of the Mortgage:
   i) the Loan File will usually have the original recorded Mortgage/DOT that was returned to them after recording;
   ii) a copy is ordinarily sufficient as the original document doesn't hold much legal significance (i.e., it is not be a bearer instrument); if there is need to prove the document and the original is missing, obtain a certified copy from the county recorder, which is ordinarily admissible and self-authenticating.

c) Pay History:
   i) a pay history for the life of the loan, or at least showing the period since the loan was past due, along with the assessment of any fees and costs, escrows for taxes and insurance, etc.
   ii) get a breakdown of the "fees and costs"; many Lenders will present charges and advances in lump sums some of which may or may not be "recoverable" against the borrower under the loan documents; an improper assertion of the amount legally due can lead to Fair Debt Collection Practices Act ("FDCPA") liability for both the Lender whose name is on the pleading and the attorney (and potentially their partners) who served the pleading[20]

d) Demand Letter:
   i) provides evidence of acceleration and notice of the threat of foreclosure;
   ii) useful for analysis of statute of limitations issues;
   iii) check the principal balance due at on the demand, and the amount due at the time of foreclosure; if principal has gone down, additional payments have been applied since the demand; the attorney should inquire further as to whether there was a potential waiver of the "time is of the essence" clause, or

[19] Oregon UTCR § 2.060(1).
[20] Under 15 USC §1692f, it is an unfair practice under the FDCPA to collect "any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law."

if the Lender had been careful and issued a notice that the payment was being applied without waiver

iv) There are often equitable arguments that acceptance of late payments or partial cures act as modifications of the loan agreement and a waiver of the "time is of the essence" clause by implied forbearance or modification; therefore, whenever accepting payments that do not comply with the original loan or any modified terms, any agreement should include a clause providing that acceptance of partial payments shall not operate as a waiver of acceleration; if payments were applied in the absence of a reservation of rights letter, it is a best practice to "re-demand" and wait 30 days before proceeding, since a new cause of action will accrue when the next payment is missed

B) Oregon Foreclosure Avoidance ("OFA") Program: Since 2013, Oregon has required that any non-exempt Beneficiary foreclosing a residential trust deed participate in a resolution conference (pre-foreclosure mediation). ORS 86.726.

a) Exemption: ORS 86.726 does not apply to a Beneficiary who submits to the Attorney General a sworn affidavit that states that during the preceding calendar year the Beneficiary did not commence more than **30 actions** to foreclose a residential trust deed by advertisement and sale under ORS 86.735 or by suit under ORS 88.010.

b) Resolution Conference: "A trained and neutral mediator conducts a face-to-face meeting (referred to as a dispute resolution conference) between a homeowner and their Lender with the goal of avoiding home foreclosure. *See* ORS 86.732 for general requirements.

c) Certificate of Compliance: If the parties comply with the requirements for of the OFA program, the facilitator issues a certificate of compliance that must be attached to the judicial foreclosure complaint or recorded with the notice of default and election to sell.

C) Pre-foreclosure Checks: The following are issues counsel must be aware of in every residential foreclosure matter, and the failure to address or consider them can lead to substantial liability for both counsel and their clients.

a) FDCPA: See Section III, infra, for further discussion. However, for the foreclosing attorney, think of FDCPA and the related CFPB regulations the minute the file is referred, because in most circumstances your first communication with the borrower will trigger FDCPA compliance obligations on the attorney as a debt collector in addition to any potential liability for the client.

i) It is a best practice to send an FDCPA- and CFPB-compliant notice prior to commencing a foreclosure, providing the debt validation language required by 15 USC §1692g at least 40 days before serving a summons and complaint or notice of default (i.e., to ensure compliance with the minimum 30 days + 5 days after mailing)

ii) Note, the Supreme Court held that a business (including a law firm) engaged in no more than a non-judicial foreclosure is not a debt collector under the FDCPA. Instead, the Court held that those pursuing non-judicial foreclosures are subject to the more limited FDCPA restrictions contained in section 15 USC 1692f(6).[21] However, other communications sent in the foreclosure

[21] Obduskey v. McCarthy & Holthus LLP, 139 S. Ct. 1029 (2019).

process might not be subject to this limited exception, so best practice remains to send an debt validation, with FDCPA "safe harbor" language

b) Statute of Limitations:

i) Consider what limitation rule applies:

(1) Suit on Note: Claims on the promissory Note will usually follow the general statute for contract claims – 6 years (ORS 12.080)

(2) Deed of Trust: Unless exceptions under ORS 88.120 apply, "no Mortgage upon real Property shall be a lien upon such Property after the expiration of 10 years from the later of:

(a) the date of maturity of the Mortgage debt,

(b) the expiration of the term of the Mortgage debt or

(c) the date to which the payment thereof has been extended by agreement of record." ORS 88.110.

c) SCRA: Run a search for military status on the Department of Defense's SCRA website to determine whether each party defendant is in the active military, or has been within 367 days prior to the search date at https://scra.dmdc.osd.mil/

d) Bankruptcy: you **must** run bankruptcy searches at every critical stage in the foreclosure; even an innocent violation can result in sanctions, and "Acts in violation of the automatic stay are void. Soares v. Brockton Credit Union (In re Soares), 107 F.3d 969, 976 (1997) (highlighting a circuit split on the subject and siding with the majority view that considers stay violations void rather than voidable)"

e) Demand: How old is the demand letter (or is there even a copy of one); is there evidence it was sent (and, if required, received); is the principal balance the same as on the current payoff (if it is higher, was the loan modified? If it is lower, did the bank accept additional payments? If so, was there a reservation of rights letter? If not, does your state's law require a new demand to re-assert the "time is of the essence" clause? If you represent the borrower, do you have an additional defense? In the very least, can you create a fact question to get you past summary judgment, and if you are in a pro-borrower jurisdiction, do you have a legal claim that might get you before a jury? For Lender's counsel, if you are going to send an FDCPA debt validation notice anyway, should you include an additional demand and acceleration notice as a precaution?

f) Eligibility for Deficiency: Analyze whether state law, the loan documents, and the nature of the Property (rental or second home vs. primary residence) permit a deficiency action if the Property sells for less than the amount due (as they almost always do; if there is any equity, the borrower should probably sell the Property pre-foreclosure to preserve their equity, since the costs of enforcement are generally going to be added to the loan balance, and can be substantial)

g) Environmental Review: While environmental checks are often conducted only on commercial properties, if the Lender has reason to believe there may be environmental risks to owning the Property, they may wish to conduct a "Phase I" environmental survey; if the Phase I turns up matters of concern, an invasive Phase II (site inspection with core/soil samples) should be conducted.

D) Judicial or Nonjudicial: In Oregon, and approximately 28 other states (and Guam), a party may choose whether to foreclose judicially or nonjudicially, though the choice may be somewhat limited by applicable One Action, Security-First, or similar election of remedy statutes. In the remaining states (along with the U.S. Virgin Islands and Puerto Rico), the Lender

must proceed judicially, with some exceptions (e.g., New York is considered a judicial foreclosure state, but has a nonjudicial process available only for co-op apartments; they are personal Property not realty under New York law and so are foreclosed under Article 9 of the UCC). In general, the judicial-only states are clustered on the east coast and in certain Midwestern/Plains states.

In those states where the Lender has the option on which way to proceed, some factors to consider are:

a) Cost: nonjudicial foreclosure is generally less expensive[22]

b) Speed: judicial foreclosure often takes twice as long as nonjudicial[23]

c) Title Issues: if there are title issues (e.g. scrivener's error in legal description or there is a mobile home that has not been de-titled) and the Lender would need a court order to reform the Deed of Trust or otherwise modify the rights of interested parties, it is generally more efficient to bring additional counts for declaratory relief in a judicial foreclosure action

d) Redemption: In Oregon, there is a 180-day right of redemption after the foreclosure sale, placing a cloud on title and preventing most uses or renovations of the Property, because the borrower can recover the Property from the winning bidder at auction by paying:

i) The amount bid, plus 9% interest from the date of sale;

ii) Taxes and HOA assessments, plus 9% interest from the date of payment;

iii) Any amounts necessarily expended by the purchaser to prevent waste, and

iv) Any amounts paid by the purchaser on senior liens.

e) Deficiency Claims: a party foreclosing nonjudicially cannot pursue a deficiency after the Trustee's sale;[24] therefore, if the Property is underwater but the borrower has other unencumbered assets (and there is no applicable anti-deficiency law or loan provision), it would make sense to proceed judicially and to plead for a deficiency to survive the sheriff's sale to permit garnishment or execution on other assets after recovering on the sale of the Property; often comes up in the "strategic default" scenario.

f) MERS: While no longer prevalent, for a time, many Lenders elected to proceed judicially on deeds of trust where MERS was named as a Beneficiary in the chain of title, particularly when they were nominee for a failed bank or Lender, to avoid risk that a foreclosure would be invalidated based on issues regarding the chain of assignment or agency issues

g) "Comfort Order": if there is any doubt about the validity or enforceability of any document, or the right of the foreclosing Lender to bring the action, judicial foreclosure is recommended to obtain a comfort order; the alternative is to assume the risk that a court may undue the sale under a collateral attack, which is extraordinarily rare after a judicial foreclosure, as the bar to setting aside a valid judgment is usually quite high

E) Nonjudicial Foreclosure Process:

[22] https://www.fanniemae.com/content/guide_exhibit/allowable-attorney-trustee-foreclosure-fees.pdf

[23] https://www.fanniemae.com/content/guide_exhibit/foreclosure-timeframes-compensatory-fees-allowable-delays.pdf

[24] ORS 86.797(2).

a) Promissory Note: Ensure that the Promissory Note is in the possession of counsel or in possession of the Lender requesting the foreclosure (confirm what your state law requires) and again ensure that there is an uninterrupted chain of indorsements or an ultimate indorsement in blank

b) Appointment of Successor Trustee: The OTDA specifically authorizes an attorney for the creditor to act as the foreclosing Trustee;[25] before commencing a foreclosure, the Beneficiary will usually need to appoint a foreclosure counsel, law firm, or a non-attorney title or Trustee company, as successor Trustee under the Deed of Trust; the "AST" must be recorded.

c) Notice of Default/Notice of Default and Election to Sell ("NOD"): the NOD is similar to the summons and complaint in a judicial foreclosure action; it provides legal notice to the parties that the Trustee has commenced the nonjudicial foreclosure process against the Property.[26]

i) The NOD must be served on the parties, generally in the same manner as a summons, or by first class and certified mail, return receipt requested.

ii) Publication: the NOD must be published once a week for four consecutive weeks, with final publication at least 20 days before sale[27]

iii) The NOD is also recorded in the chain of title for the Property, to provide notice of record to any interested party of the pending foreclosure.

iv) Service of the NOD must be completed in the manner required by statute on the Grantor to commence the statutory notice period, so it is recommended to set the sale date sufficiently beyond the minimum statutory period to ensure time to serve all parties and let the statute run before the sale date (i.e., the statute requires 120-day notice, set the sale approximate 150 days from the date of the notice, to provide 30 days to complete service)

v) Record proofs of service for all methods of service (mailing, post, publication) prior to sale

d) Special Notice to IRS:

i) notice must be given at least 25 days prior to the nonjudicial foreclosure sale, regardless of when the lien arose. 26 U.S.C. §7425(c)(1); use IRS Form 14497[28] to provide notice to the IRS so that they may review the terms of sale and whether they believe any equity secures their claim

ii) if a lien is identified on the final pre-sale check, you will likely need to postpone the sale to provide formal notice, unless you can get the IRS to consent. 26 U.S.C. §7425(c)(3); use IRS Form 14498[29]

iii) Consent requires an affirmative response and cannot be granted retroactively, so if the Lender has sufficient time, it is generally easiest to postpone the sale and issue Form 14497 than to keep the sale date and hope for no delays in processing the consent request under Form 14498.

e) Presale Checklist: Always check with your Lender about their internal requirements for presale compliance (if any). Most Lenders will have a policy dictating the timeframe for the pre-sale checks (i.e. within 24 hours of sale or on the morning of sale)

[25] ORS 86.713(2)
[26] ORS 86.764
[27] ORS 86.774
[28] https://www.irs.gov/pub/irs-pdf/f14497.pdf
[29] https://www.irs.gov/pub/irs-pdf/f14498.pdf

i) Bankruptcy Check: remember, in most jurisdictions, acts in violation of the stay are void ab initio, and many borrowers will file minutes before a sale, and if they are pro se, may not know how to immediately contact you.
   (1) If you represent the borrower, make sure you contact the foreclosure Trustee in advance to ask how to give them emergency notice of bankruptcy filing, up to and including sending an agent to the place of sale to announce the bankruptcy filing when the auction is called.

ii) SCRA Checks: Run SCRA checks on all parties before going to sale; if additional individuals (like specifically identified tenants/occupants of the premises) run searches on their names as well.

iii) Bidding Strategy: the Lender will often provide written instructions to the Trustee to open the bid at a particular amount; familiarize yourself with the process (i.e., can the Trustee only bid for the Lender at the opening or can it competitively bid); Lenders generally wish to bid slightly less that their opinion of what the Property will resell for, as the marketing costs, carrying costs, transfer taxes, and Ownership risks are often offset against achieving the highest price; the Trustee or counsel must make sure that the bid does not exceed the total amount due (unless the foreclosure is strategic and the foreclosing party wants to obtain the Property even at a higher cost; if the party over-bids

iv) Bidding Agent: Consider whether a bidding agent is needed to incrementally (competitively) bid; if a third party is used, they must have errors and omissions insurance, as they will not be covered by the attorney's malpractice policy and an error in overbidding or underbidding could have dire consequences and significant costs.

v) Postponement of Sale.[30]
   (1) The Trustee may postpone the sale for one or more periods that total not more than 180 days from the original sale date, giving notice of each postponement by public proclamation made at the time and place set for sale. A written notice must be issued and served on all parties entitled to notice under ORS 86.764 and 86.771.
   (2) The one exception is a postponement of not more than two days, which may be made by oral proclamation only.

vi) Restart After Stay of Sale:[31]
   (1) A pending sale that has been stayed "by proceedings in bankruptcy or for any other lawful reason" (and except when the Beneficiary participated in obtaining the stay), may be restarted if a notice of amended sale is issued within 30 days of the lifting of the stay.
   (2) The amended notice must be given >15 days before the new sale date.
   (3) If publication for four weeks was not completed before the stay, the amended notice must be published for the remaining number of times required, and must be last published at least 20 days before the new sale date.

[30] ORS 86.782(2)
[31] ORS 86.782(12)

vii) Disposition of Proceeds. The proceeds of the foreclosure sale are distributed by the Trustee to pay the costs of sale, then to the obligations secured by the Deed of Trust, then to the junior lienholders, then to the grantor of the Deed of Trust (i.e., the former Owner, or their successor). [32] If the Trustee has any concerns over dual liability or conflicting claims, they should interplead the funds in court to be absolved of liability for improper disbursal.[33]

F) Challenging a Nonjudicial Foreclosure Post-Sale: "The [OTDA] represents a well-coordinated statutory scheme to protect grantors from the unauthorized foreclosure and wrongful sale of Property, while at the same time providing creditors with a quick and efficient remedy against a defaulting grantor... However, the Trustee's Power of Sale is subject to strict statutory rules designed to protect the grantor, including provisions relating to notice and reinstatement."[34]

a) Borrower may challenge "fundamentally flawed" (i.e., void) sale, such as if the sale was held by a party where the Trustee was not properly appointed, or where the default was cured.[35]

b) A sale will be immune from challenge even if there are technical flaws, so long as the party received actual notice in compliance with the OTDA, and the sale is not fundamentally flawed.[36] Challenges brought after a Trustee's sale has been conducted based on scrivener's errors or technical defects do not serve either of the competing interests under the OTDA; they would not "serve the interest of providing a quick, efficient, and final remedy against a defaulting grantor, while [also] not serving the interest of protecting grantors against unauthorized foreclosures and wrongful sales of Property." [37]

G) Judicial Foreclosure: an equitable, in rem action (distinguished from a suit on the Note, which is an action at law on a contract)

a) Follows general procedures for any civil action
b) Case will generally commence with a summons and a complaint
   i) Remember, immediately record a lis pendens/notice of pendency of the action with the foreclosure case details, parties, and the legal description of the Property in the chain of title, to provide notice to third parties and to avoid the risk of additional liens attaching to the Property during foreclosure
   ii) Consider whether you should include a FDCPA warning with the summons and complaint.
      (1) In *Thomas v. Law Firm of Simpson & Cybak*, 392 F.3d 914 (7th Cir. 2004), the 7th Circuit court established that "the FDCPA's broad definition of a "communication" encompasses the service of a summons and complaint. When Simpson served the summons and complaint, it conveyed information regarding Thomas's debt."
      (2) Congress subsequently amended the FDCPA to exclude a civil complaint from the definition of communication ("a formal pleading in

[32] ORS 86.794
[33] ORCP 31
[34] Staffordshire Invs., Inc. v. Cal-W. Reconveyance Corp., 209 Or. App. 528, 542, 149 P.3d 150, 157 (2006)
[35] Wolf v. GMAC Mortg., LLC, 276 Or. App. 541, 370 P.3d 1254 (2016).
[36] "If the trustee has complied with the statutory notice requirements and the default is not cured, the trustee may sell the property at a public auction to the highest bidder without judicial oversight." Brandrup v. ReconTrust Co., 353 Or. 668, 678, 303 P.3d 301, 306 (2013)
[37] DiGregorio v. Bayview Loan Servicing, LLC, 281 Or. App. 484, 492–93, 381 P.3d 961, 966 (2016).

a civil action shall not be treated as an initial communication." 15 USC 1692g(d)).

(3) However, query whether a summons is not a pleading under your state law; it could still be a "communication" under state law even if a complaint is not.

c) Common allegations in a Judicial Foreclosure Complaint:

i) Jurisdiction and venue: generally in the county where the Property is located; if the Property is in more than one county, evaluate whether you must bring parallel actions or if you can bring the action in one county and domesticate the judgment in the other county after the proceedings

ii) Note: allege the date and amount of the promissory Note, and that the plaintiff is the Person Entitled to Enforce (UCC 3-301) or otherwise is entitled to enforce the Note (is the real party in interest); if they are not the original holder, allege facts of the indorsement (UCC 3-204) and transfer

(1) Check the indorsement on the Note;

(a) is it an indorsement in blank:

("pay to the Order of _____, /s/ Original Lender")

(UCC 3-205(b))

(b) or is it specially indorsement:

("pay to the Order of XYZ Bank, /s/ Original Lender")

(UCC 3-205(a))

(c) if there are multiple indorsements, are they each indorsed in blank;

(i) if not, is there a logical chain of special indorsements that lead to a blank indorsement or an indorsement to your foreclosing party?

(ii) if not, do you need a corrective indorsement, an additional indorsement or an allonge?

(iii) if it is impossible to get corrective indorsements (prior special indorsee cannot be found or has no legal successor) is there extrinsic evidence in the loan file to prove PETE status of your foreclosing party to defend a motion to dismiss or to prove PETE status if the borrower can survive summary judgment by disputing PETE status?

(iv) *Cf.* if the endorsements are in blank and therefore the Note is a bearer instrument, the foreclosing party should not need to prove "Ownership" or the chain in transfers; remember,

even a party wrongfully in possession (e.g., a thief of the Note) may be a PETE under UCC 3-301

iii) Deed of Trust: allege the date and amount of the Deed of Trust, the date and instrument number from recording the Deed of Trust, and the date(s) and recording information for any assignments of the Deed of Trust. If your theory is no written assignment was needed but that the Deed of Trust was assigned by operation of law by the transfer of the Note (remember, the security follows the Note), you may wish to allege that fact to establish the foreclosing party's standing to bring the action.

iv) Default: Generally, default for non-payment is the primary default under a foreclosure action. However, because it is an equitable action, it is best to allege any act of default, to establish that the borrower has acted inequitably in addition to their failure to pay. Review the Deed of Trust sections providing "events of default" to analyze if there are additional claims.

v) Amount Due: Obtain a payoff from the foreclosing party (often the Special Servicer) to show the amounts due. You will often need to request a breakdown to show specific fees and costs; you will want to separately set out the fees, as courts are resistant to award what is often tens of thousands in miscellaneous fees and costs without a basis in the Note and Deed of Trust for recovery of those amounts. Exercise extreme care before alleging an amount due that is not specifically provided for in the Note or Deed of Trust; including amounts the Lender is not specifically entitled to may give rise to an FDCPA claim.

vi) Prayer for Relief: Check your state statutes and case law, as well as the borrower's bankruptcy history. Carefully craft your prayer for relief to either establish the amount due and to have the Property sold to satisfy that amount, or to ask the court to enter a money award that is docketed as a judgment lien and attaches to other Property pursuant to state law. Do not request a judgment that suggests the borrower is liable for the amount, or claiming any deficiency, if the Borrower has received a bankruptcy discharge at any time between the date of the Note and the date of the foreclosure.

vii) Money Judgment or Declaration of Amount Due; Deficiencies: Since 2015, Oregon has permitted a creditor to enter a "declaration of amount due" in a foreclosure rather than a money award; it can *only* request a declaration of amount due with respect to a "residential Deed of Trust"[38]

(1) Oregon is an "anti-deficiency" state; a deficiency judgment (ability to collect on a remaining loan balance after partial satisfaction in foreclosure) is only available if allowed by statute, and if specifically plead; the claim is waived if not preserved in the foreclosure case

[38] "Residential trust deed" means a trust deed on property upon which are situated four or fewer residential units, one of which the grantor, the grantor's spouse or the grantor's minor or dependent child occupies as a principal residence at the time the trust deed is recorded or, in the case of a purchase money loan, one of which is intended to be the principal residence of the grantor, the grantor's spouse or the grantor's minor or dependent child after the trust deed is recorded. ORS 86.705(6).

(2) Because foreclosure is an equitable process to satisfy a lien, the general result should be a " a declaration of the amount of the debt that the lien secures"[39] along with an order to the sheriff to levy on the Property to deliver that sum, or so much of it as the sale of the Property can provide;

(3) As to foreclosure of trust deeds or Mortgages where a money judgment and claim for deficiency is allowed (i.e., for a commercial Deed of Trust, a DOT secured by a second home, or for a home equity/second Mortgage that was not originated at the same time and by the same Lender as the senior Deed of Trust), the complaint must seek and the judgment must specifically provide for a money award and deficiency judgment.[40]

d) Affidavit of Indebtedness: In most jurisdictions, the foreclosure matter will be resolved by default and the Lender will prove their prima facie case through an affidavit of indebtedness, which will lay out the elements of the debt and their entitlement to recover;

i) Hearsay Exception/Business Records: the affidavit is signed with personal knowledge under the business records exception to the rule against hearsay, so must lay a foundation for the record-keeping procedures and the exhibits to avoid hearsay challenges; the common exhibits to the affidavit are loan documents and a pay history or printout of the amounts due.

ii) Question re Third Party Business Records/"Adoptive Business Records": Since most loans are transferred at least once, consider what business records are being relied on, and is there a foundation for the present Beneficiary/ servicer to introduce records (such as a pay history or demand letters) from a prior Beneficiary/servicer; Eligibility for the business records exception under OEC 803(6) depends upon: (A) the record itself having the characteristics required by OEC 803(6) and (B) "evidence of the record-making practices of the business that created the record." *Allan v. Oceanside Lumber Co*., 214 Or 27, 328 P2d 327 (1958). The *Arrowood* Court, after examining the text and context of OEC 803(6), found a declaration with third party records that had been "adopted" by the present Beneficiary could not introduce that hearsay, as they failed to "present evidence regarding the record-making practices ***of the business that created the hearsay***."[41]

e) Judgment: the judgment should track the allegations in the prayer for relief, and should include the amounts due under the Mortgage as established by the Affidavit of Indebtedness, along with a direction to the sheriff to sell the Property to satisfy that amount; check on your local practice on additional steps that may be needed to have the sheriff levy on the Property and sell it at auction, and what role counsel has in the notice provisions before the sheriff's sale

f) Affirmative Defenses: Real Deal and Red Herrings

i) Standard civil litigation defenses: forum, venue, improper service, lack of subject matter or personal jurisdiction

[39] ORS 88.010(1)(a).
[40] ORS 86.797(3)(b).
[41] Arrowood Indemnity Co. v. Fasching, 369 Or 214, 251, 503 P3d 1233 (2022).

ii) One action rule: was there a prior proceeding on the Mortgage or an action on the debt?

iii) Produce the Note: not a likely winner, but may hold up the Lender until they can produce an original Note or a lost Note affidavit; the inability to produce the Note may give rise to a real party in interest defense

iv) The Pooling and Servicing Agreement (PSA): One of the most common defenses raised when the loan is held in a trust is that the Note was not deposited into the trust prior to the date required under the PSA, or the loan was not serviced according to its terms; the borrower will often attempt to challenge whether the foreclosing party is the real party in interest based on a technical violation of the PSA; borrowers were particularly emboldened by the decision in *Glaski v. Bank of America* (2013) 218 Cal. App. 4th 1079 ("Glaski") which suggested that acts in violation of the PSA were void (and not simply voidable). Even though the vast majority of these cases in the state and federal courts throughout the county have gone in favor of denying standing to borrowers and affirming that the acts are voidable only at the request of the parties with interests in the trust, the allegation of PSA violations are routinely made and occasionally gain traction. However, it now appears settled that, at least for New York trusts, there is no standing for third party challenges.[42]

v) Accounting: the borrower should demand an accounting to assure that there were no servicing errors regarding misapplied or overlooked payments

vi) Real Party in Interest: a borrower should always raise this defense, and borrower's counsel should always investigate the issue. In order to bring the foreclosure claim, the Lender must be the "Person Entitled to Enforce" the promissory Note under UCC 3-301. A simple way to test this is to demand to see the original Note (or a color copy). A color copy showing a blue ink signature is a good proxy for seeing the original (particularly if counsel for the Lender is out of state or in a distant office; bank records are almost always scanned in black and white, so a color scan with metadata showing it was recently created is a strong indicator that the document is in counsel's possession). By raising this claim, the borrower is assured that the Lender will be compelled to provide prima facie evidence of standing to enforce the obligation and will do so under oath (usually by affidavit or sworn declaration).

vii) MERS: however, even those courts that have found that MERS is ineligible to be a "Beneficiary" under a trust deed because they do not hold the beneficial interests have rejected the argument that that somehow invalidates

[42] "New York's highest court found that a mortgagor like Ms. Lopez lacks standing to challenge a violation of a pooling and servicing agreement: *In any event, Erobobo, as a mortgagor whose loan is owned by a trust, does not have standing to challenge the plaintiff's possession or status as assignee of the note and mortgage based on purported noncompliance with certain provisions of the [pooling and servicing agreement]. Id. at 1178.* Since the intermediate appellate court was wrong in Erobobo, then Glaski, having relied on the intermediate appellate court's decision, was wrong as well." Lopez v. JPMorgan Chase & Co., 198 Wash. App. 1048 (2017).

the trust deed.[43] MERS' role as nominee for the Beneficiary does not mean that the Note and the Trust Deed have been "irreparably split." [44]

viii) Failure of Condition Precedent: This is a boilerplate affirmative defense, but can be effective if the Note or Mortgage/Deed of Trust has a pre-lawsuit notice provision. For most loans, the default notice is the only notice required, but certain loan documents have a separate notice provision before either party may commence litigation. If the Lender only sent a form-letter demand, it may not be sufficient notice, particularly where the foreclosing party did not write the loan but took an assignment or inherited the loan through acquiring a failed bank.

ix) Predatory Lending: Frequently claimed, though it rarely if ever successful for individual litigants ("successful" claims usually end in undisclosed settlements that might cover attorneys' fees and any nuisance value); just as with housing discrimination cased, discrete cases are hard to prove, but where trends are observed, particularly where Lenders have targeted discrete communities, regulators will often step in to bring these claims on behalf of the general public.[45] However, even then, most of the successful predatory lending actions are brought against student Lenders, payday Lenders, and other non-Mortgage Lenders.[46]

g) Counterclaims and Collateral Litigation: Filing an answer in a judicial foreclosure also provides a vehicle to litigate related claims concerning the servicing of the loan, the collection efforts related to the loan, and (perhaps, given the age of the loan) even matters related to the origination of the loan. During a nonjudicial foreclosure, there is not a convenient forum, but counsel advising the borrower should consider whether to bring court proceedings to raise any claims or collateral matters related to the loan or the foreclosure. Some claims may be lost if a nonjudicial foreclosure is completed, so counsel should issue-spot for potential claims to avoid risk of inadvertent waiver due to delay. Under either circumstance, exercise great caution and analyze the risks of doing raising collateral claims, including the risk of liability with recourse if the Borrower or other loan party loses on those claims and the statute provides for attorney fees for the prevailing party. Some unfair trade statutes have attorneys' fees provisions to discourage frivolous litigation (though, notably, the FDCPA does not). Because the recovery would be based on a statutory provision and not pursuant to the loan documents, the anti-deficiency/anti-recourse protections under many state's Mortgage laws would likely not apply to fees and costs for asserting a losing (and especially a frivolous) counterclaim.

i) FDCPA Claims (and OUDCPA – Oregon analogue to federal FDCPA): *See* Section III (G).

ii) Unfair Trade Practices claims: state and federal law may regulate the actions of Lenders, servicers, attorneys, and their affiliates, and there may be a private right of action under these statutes.

iii) Truth in Lending Act disclosure violations and rescission

[43] *See, e.g.* Walker v. Quality Loan Serv. Corp., 176 Wn. App. 294, 322-23, 308 P.3d 716 (2013); Brandrup v. ReconTrust Co., 353 Or 668, 303 P3d 301 (Oregon 2013); Niday v. GMAC Mortgage, LLC, 353 Or 648, 302 P3d 444 (Oregon 2013)

[44] *See, e.g.*, Edelstein v. Bank of New York Mellon, 286 P.3d 249 (Nevada 2012)

[45] *See, e.g.,* https://www.iowaattorneygeneral.gov/newsroom/states-settle-with-household-finance-up-to-484-million-for-consumers

[46] *See, e.g.,* http://files.consumerfinance.gov/f/201407_cfpb_factsheet_supervision-and-enforcement.pdf

iv) RESPA claims
v) Elderly Persons and Disabled Persons Abuse Prevention Act (if applicable)
vi) Errors related to Oregon Foreclosure Moratoria (2020 First Special Session HB 4204 and 2021 Regular Session HB 2009): While most provisions of these bills, including private rights of action, have now sunsetted, the bills had provisions related to mandatory notices, and rights to defer certain payments until loan maturity, that may have prospective effect – check the servicing file and pay history to ensure any benefits were properly implemented, and check credit report to ensure deferrals were properly reported

h) Third Party Claims from Junior Lienholders:
   i) If you represent a junior lienholder who receives a summons and complaint in foreclosure, the junior lienholder should file an appearance and cross-claim/third-party claim to foreclose the junior Deed of Trust.
   ii) While there is a common practice (or at least there was during the time when there was little equity in properties and little chance of a surplus after payment of the first Deed of Trust) to permit defaults because the Lender did not wish to spend the money to appear and make a claim for surplus funds, and such foreclosed junior Lenders would often appear after judgment and sale had occurred if there was a surplus to claim, this strategy is risky, because Oregon courts increasingly find that the language of ORS 88.050 regarding "foreclosure of more than one lien on the same Property" requires an appearance and cross-claim/third-party claim to assert the amount and priority of the junior lien to be satisfied out of the proceeds, or the claim may be forever barred, as it is not "adjudged" in the case if the party waits for a surplus funds motion post-judgment.[47]
i) "Defenses to the Defenses"
   i) Ability to Cure: even when a borrower raises a myriad of affirmative defenses and counterclaims, the Lender should further plead to demand that the borrower tender a cure of the payment default; even if the borrower can establish various counterclaims, the inability to cure a default should be fatal in any action brought by the real party in interest entitled to payment
   ii) Statute of Frauds: during the early days of loss mitigation (particularly pre-CFPB) there were many arguments about verbal promises of loan modifications from bank employees; if the borrower alleges any oral agreement, raise a statute of frauds defense; there is precedent supporting the requirement that an agreement modifying a prior agreement that was required to comply with the statute of frauds must also comply (i.e., since the Mortgage had to be in writing signed by the party to be charged with its breach, a modification of the Mortgage must also have been made in a writing signed by the party agreeing to modify)
j) Non-standard Loan Issues:

[47] *See*, e.g. Chico Holdings, LLC vs Fishbow, LLC, Harbor Construction, LTD, Michael A Welt, Martin S Hall, Blackburne & Brown Mortgage Company, et al, Curry County Case No. 19CV10642, Letter Ruling dated December 23, 2022.

i) Reverse Mortgages/Home Equity Conversion Mortgage ("HECM"): a Mortgage that does not require payments; the Mortgage is secured by the equity in the home, which the borrower can access as cash during their lifetime (with the intent that the loan will be repaid through sale, refinance, or foreclosure at the time of death or when the home is no longer the primary residence of the borrower). While there are notable differences, a reverse Mortgage can be analyzed similar to a sale with a retention of a life estate for the borrower and their spouse. These loans are HUD-insured and have additional regulatory requirements during the loan and upon maturity.
   (1) There will always be a second Mortgage, held by the HUD Secretary, in case the advances outstrip the original loan balance, and protecting HUD from being boxed in by junior encumbrances.
   (2) The heirs will usually have the right to pay off the HECM for 95% of the value at the time of death, regardless of the balance due; there are prompt notice provisions and certain restrictions so engage the Lender promptly if you represent an heir who wishes to retain the Property.
   (3) Surviving-Spouse Litigation: Earlier in this decade, there was litigation concerning the rights of a non-borrower surviving spouse and whether they too were entitled to a defeasible life estate; the amount available under a reverse Mortgage is tied to the value of the Property and the age of the borrower (between two borrowers over the age of 62 living in properties of equal value, the older borrower would be entitled to borrow more, as less interest would accumulate during their expected lifetime under the actuarial tables; a younger person had to leave an additional equity cushion to ensure the interest did not exceed the value of the Property secured by the Mortgage during the borrower's expected lifetime)[48]
   (4) HUD Mortgagee Letter 2015-15: HUD periodically issues "Mortgagee Letters" stating policy under HUD rulemaking provisions; Mortgagee Letter 2015-15 made most surviving spouse litigation moot, as it provided protection for spouses who met the qualifications (generally requiring that the marriage predates the Mortgage and the spouse lived in the Property, to avoid risk of sham marriages to provide life estates to much younger spouses)[49]

ii) "Section 184" Loans: Private loans secured by the leasehold interests of tribe members in "Indian Country" (a term defined by statute)[50] often against a 50-year ground lease with a manufactured or mobile home located on the premises. The Bureau of Indian Affairs ("BIA") must give consent for a Section 184 Loan, and must again consent to permit the foreclosure of that loan. The tribe holds a right of first refusal to purchase the loan when in default, and if the tribe does not exercise the right, the Property may only be sold to an eligible member of the tribe. The title records are held in the BIA

[48] *See, e.g.* Bennett v Donovan, 703 F.3d 582 (DC Circ. 2013)
[49] https://portal.hud.gov/hudportal/documents/huddoc?id=15-15ml.pdf
[50] 18 U.S. Code § 1151

records, not the county recorder's office, and for that reason, most title insurance companies will not provide a Foreclosure Guaranty for these loans.[51]

III. CFPB and FDCPA Compliance in Foreclosure

A) CFPB Compliance:

a) Initial Outreach: Upon default, the servicer must attempt contact within 36 days of initial missed payment, and must reach out every time a payment is missed[52]

b) "Facially-complete package: "If a borrower submits all the missing documents and information as stated in the notice required pursuant to § 1026.41(b)(2)(i)(B), or no additional information is requested in such notice, the application shall be considered facially complete. If the servicer later discovers additional information or corrections to a previously submitted document are required to complete the application, the servicer must promptly request the missing information or corrected documents and treat the application as complete for the purposes" of CFPB compliance, and the application is considered complete for any CFPB-imposed time period as of that date[53]

c) No Referral for Foreclosure:

i) "A servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process [commonly known as the First Legal Action, or "First Legal"] unless:

(1) A borrower's Mortgage loan obligation is more than 120 days delinquent;

(2) The foreclosure is based on a borrower's violation of a due-on-sale clause; or

(3) The servicer is joining the foreclosure action of a subordinate lienholder."[54]

d) 37-Day Rule (Before Pending Sale): Section 1024.41(g) generally provides that, if a borrower submits a complete loss mitigation application after a servicer has made the first foreclosure filing but more than 37 days before a scheduled or anticipated foreclosure sale, a servicer may not move for foreclosure judgment or order of sale, or conduct a foreclosure sale until a borrower is notified of the borrower's ineligibility for a loss mitigation options, the borrower rejects a loss mitigation offer, or the borrower fails to perform as agreed under an option.

e) Notice to borrower when package is complete: Within 5 days of receipt of the loan modification package, the servicer must notify the borrower in writing whether the application is complete or incomplete; if the package is incomplete, the notice must provide a list of additional documents needed and a due date for the additional documents to be submitted.[55]

B) Notice of Debt under FDCPA: The FDCPA requires that a debt collector include the following in the initial communication to a debtor or to send a notice within five days of the

[51] https://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/ih/homeownership/184/faq
[52] CFPB "Foreclosure Avoidance," http://files.consumerfinance.gov/f/201312_cfpb_foreclosure-avoidance-procedures.pdf
[53] 12 CFR Part §1024.41(c)(2)(iv)
[54] 12 CFR Part §1024.41(f)(1)
[55] 12 CFR Part §1024.41(b)(2)(i)(B)

initial communication. This means the firm (if it qualifies as a debt collector) must send a timely notice containing:

a) the amount of the debt;

b) the name of the creditor to whom the debt is owed;

c) a statement that unless the consumer, within 30 days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

d) a statement that if the consumer notifies the debt collector in writing within the 30-day period that the debt, or any portion of the debt, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and will provide a copy of such verification or judgment to the consumer; and

e) a statement that, upon the consumer's written request within the 30-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

f) What this means for homeowners facing foreclosure is that you have the right to dispute the debt and ask for a verification of the existence and amount of the outstanding indebtedness. Just be sure to do so within 30 days after receiving the notice. If there are any amounts not permitted under the Mortgage contract or applicable law included in the outstanding indebtedness, that's a violation of the FDCPA. (If they never send you the notice, that's a violation too.)

g) Also, if you dispute the debt, the debt collector must cease its attempts to collect the debt, or the disputed portion of the debt, until it mails verification of the debt to you. Strategic borrowers will often use this right as a way to delay the proceedings by 30 days. Conversely, the foreclosing party must ensure that the collection efforts (including any filing of First Legal) must not occur until the debt has been properly verified to stay in compliance with their FDCPA obligations.

C) Attorneys as Debt Collectors under FDCPA: Attorneys who "regularly" engage in debt collection are "debt collectors" under the FDCPA.[56] After the *Heintz* decision was issued, Congress amended portions of the FDCPA to provide that "shall not apply to a formal **pleading** made in connection with a legal action."[57] However, remember that in Oregon, a "pleading" is only "the written statements by the parties of the facts constituting their respective claims and defenses…[i.e., the] complaint and an answer." ORCP 13. A motion, summons, or "other paper" served in litigation is *not a pleading*, so careful counsel will abide by the FDCPA notice provisions even when serving a summons and complaint to initiate a judicial foreclosure.

a) The Second Circuit suggested the following test for "regularly" in another matter:

> "(1) the absolute number of debt collection communications issued, and/or collection-related litigation matters pursued, over the relevant period(s), (2) the frequency of such communications and/or litigation activity, including whether any patterns of such activity are discernable, (3) whether the entity has personnel specifically assigned to work on debt collection activity, (4) whether the entity has systems

[56] See, e.g., Heintz v. Jenkins, 514 U.S. 291 (1995).
[57] 15 U.S.C.A. § 1692e(11).

> or contractors in place to facilitate such activity, and (5) whether the activity is undertaken in connection with ongoing client relationships with entities that have retained the lawyer or firm to assist in the collection of outstanding consumer debt obligations."[58]

D) Bona Fide Error: To invoke the bona fide error defense to liability under the FDCPA, defendants must show that the violation: (1) was unintentional; (2) resulted from a bona fide error; and (3) occurred despite the defendant's maintenance of procedures reasonably adapted to avoid such error. Consumer Credit Protection Act § 813(c), 15 U.S.C.A. § 1692k(c).

E) Elements of an FDCPA Claim:

a) The claimant is a "consumer";[59]
b) The debt is a "consumer debt";[60]
c) The respondent is a "debt collector";[61] and
d) The respondent has acted (or failed to act) in violation of an enumerated provision; the most common improper communications[62] in connection with the debt include:

i) Communication at "any unusual time or place"; calls before 8 a.m. and after 9 p.m. are presumptively at unusual times;
ii) Contacting a debtor directly who is known to be represented by an attorney with respect to the debt;
iii) Contacting the debtor at their place of employment;
iv) Communicating with third parties concerning the collection of a debt (calling relatives or neighbors, except in limited circumstances to obtain "location information" without advising the third party of the nature of the inquiry[63]);
v) Engaging in harassment or abuse (threats of violence, obscene language);[64]
vi) Falsely threatening to take legal action;
vii) Suggesting that the collector is a government agency, or that they may seek criminal charges through a government agency, for if the debtor fails to pay; and
viii) Using a name or other symbol on an envelope that identifies the contents as from a debt collector (if the business name suggests debt collection, then the collector may only include their address without a name on the envelope).

RESOURCES: the links below were to currently-published versions as of April 3, 2023; be sure to go to each resource's webpage to obtain the most current information.

- Multnomah County Court – Foreclosure Panel – Consensus Statement
  - https://www.courts.oregon.gov/courts/multnomah/go/judge%20documents/consensusofjudgesonmultnomahcircuitcourtforeclosurepanel.pdf
- Oregon Professional Liability Fund – Foreclosure Checklist:

[58] Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56, 62–63 (2nd Cir. 2004).
[59] §1692a(3) or §1692c(d)
[60] 15 U.S.C. §1692a(5)
[61] 15 U.S.C. § 1692a(6)
[62] 15 U.S.C. § 1692c
[63] 15 U.S.C. § 1692b
[64] 15 U.S.C. § 1692d

    - See https://osbplf.org/services/resources/#forms for latest version
- BarBooks – Real Estate Desk Book
    - Nonjudicial Foreclosure of Trust Deeds, Oregon Real Estate Deskbook, Vol. 2 -- Financing Transactions (2015 ed.), Chapter 23: https://barbooks.osbar.org/w/osb/RED2-2015#Chapter_23_NONJUDICIAL_FORECLOSURE_OF_TRUST_DEEDS
    - Judicial Foreclosures; Oregon Real Estate Deskbook, Vol. 2 -- Financing Transactions (2015 ed.), Chapter 24: https://barbooks.osbar.org/w/osb/RED2-2015#Chapter_24_MORTGAGE_FORECLOSURE

Chapter 15

Presentation Slides: Land Use and Renewable Energy

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Land Use & Renewable Energy

RELU Conference 2023

August 12, 2023

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Overview

- Statewide Renewable Energy Policy
  - Department of Energy
  - Statewide Planning Goal 13 - Energy Conservation
- What renewables are being built and where?
- What are the land use rules for renewables?
- How does the land use system address advancing energy policy?

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Statewide Energy Policy

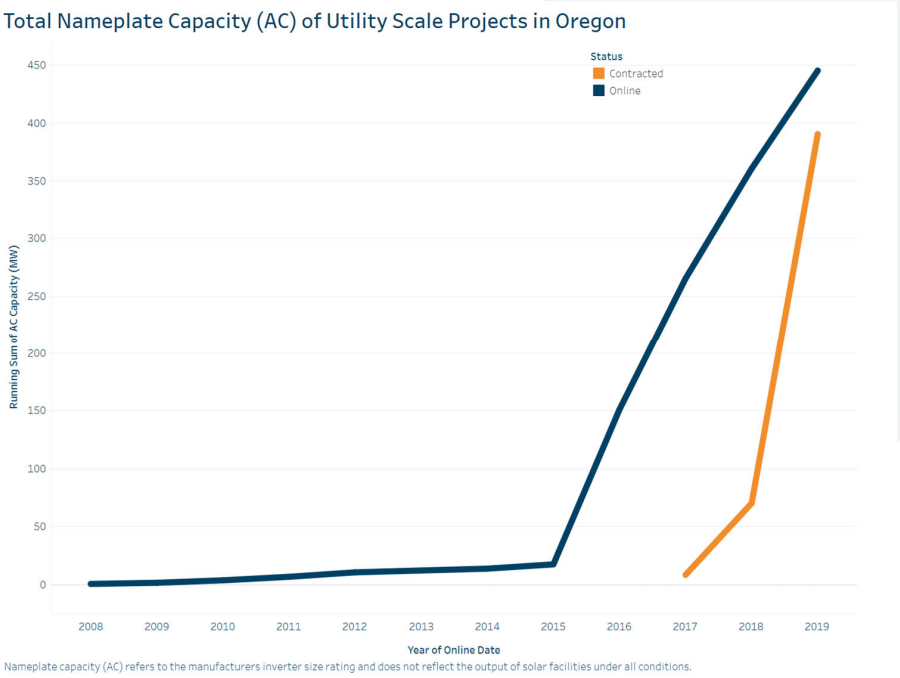
- Department of Energy
  - Public Utility Commission
  - Energy Facility Siting Council
- Goal 13 – Energy Conservation
  - Has no meaning for renewables – *1000 Friends v. Jackson County*, 292 OrApp 173 (2018)
    - "The text of the goal and its guidelines do not directly or indirectly require the development of energy facilities."
- Goal 5 – Natural Resources

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What renewables are being built and where?

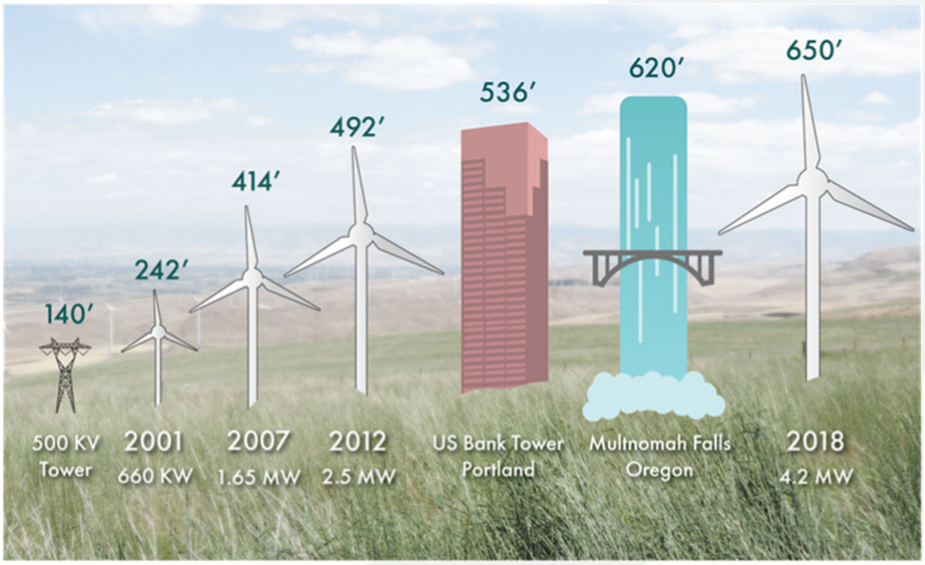
- Solar
- Wind
- Other
  - Hydro
  - Biomass
  - Thermal

Solar Demand



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Wind Technology



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Land Use Rules for Renewables

- Urban Areas
  - Go for it
- Rural areas
  - Conditional Use
  - Goal Exception
  - EFSC

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Rural Conditional Use

- Forest Lands - OAR 660 Division 6
  - Commercial Utility Facilities for the purpose of generating power
  - 10 acres
- Farm Lands - OAR 660 Division 33
  - Wind Power Generation Facilities
  - Photovoltaic Solar Power Generation Facilities
- Columbia Valley AVA – ORS 215.447

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Rural Goal Exceptions

- Acreage
- Choosing a reason
- Alternatives analysis

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Rural Goal Exceptions

- Reasons Exception – OAR 660 Division 4
- Choosing a reason
- Alternatives analysis

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Rural Goal Exceptions

- HB 3409 (2023)
- "On or before November 3, 2023, the Land Conservation and Development Commission shall adopt rules to allow a local government to consider a photovoltaic solar power generation facility a rural industrial use for purposes of justifying a reason for an exception…"

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EFSC Jurisdiction

- ORS 469.300 and ORS 215.446
- Based on project size with different measures for different technologies
- Wind = by average electric generating capacity (≥50MW)
- Solar = by acreage and soil type

EFSC Solar Thresholds

Current

Land Type	County Review		EFSC Review
	Small	Mid-Tier	Large
High-Value Farmland	≤100 acres	100 to 160 acres	>160 acres
Arable Land	≤100 acres	100 to 1,280 acres	>1,280 acres
Any Other Land	≤320 acres	320 to 1,920 acres	>1,920 acres

HB 31790 – Effective January 1, 2024

Land Type	County Review		EFSC Review
	Small	Mid-Tier	Large
High-Value Farmland	≤100 acres	100 to 240 acres	>240 acres
Arable Land	≤100 acres	100 to 2,560 acres	>2,560 acres
Any Other Land	≤320 acres	320 to 3,480 acres	>3,480 acres

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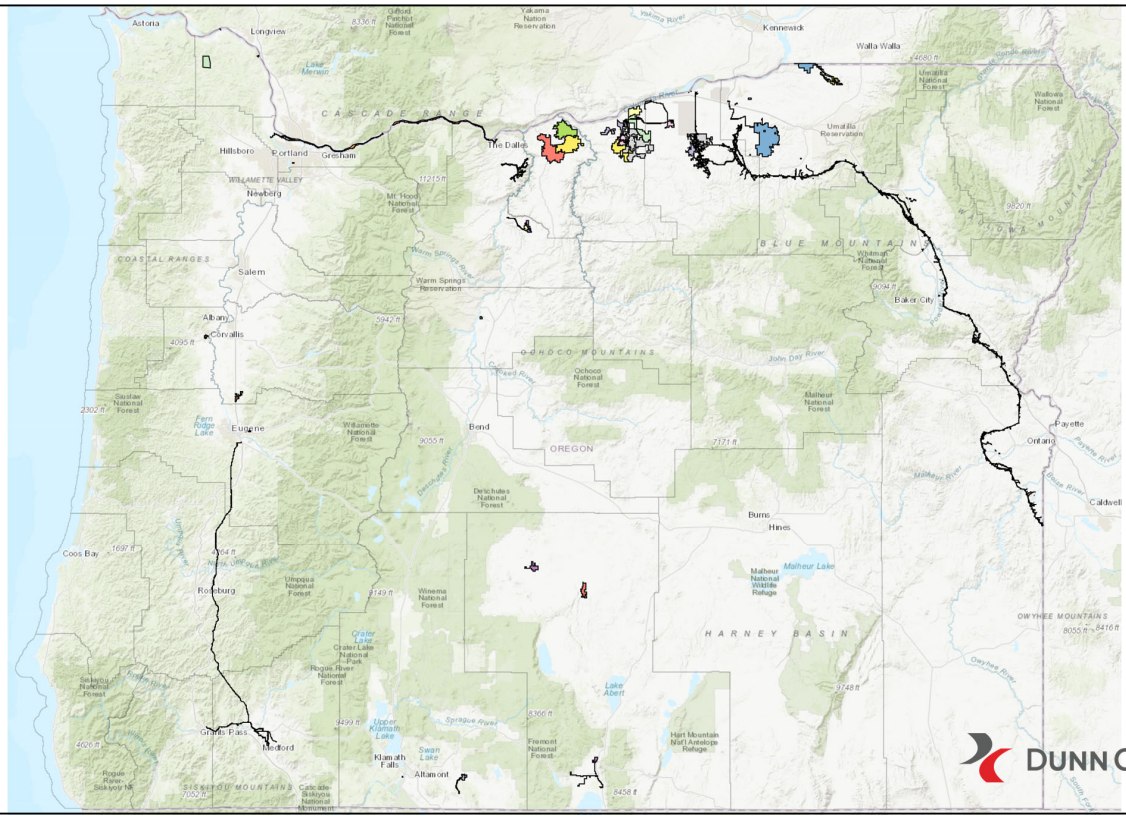
Approaches to Renewable Energy Policy and Technology?

- Regulatory whack-a-mole
- Ad hoc legislation and Rulemaking
- Comprehensive planning

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Rulemaking Bonanza!

- DLCD Solar Siting per HB 3409 – 2023 RAC
- EFSC Process Review – Phase 1 of 3
- EFSC Contested Case Review – 2023 RAC
- EFSC Site Certificate Amendment Review – 2023 RAC
- ODOE Energy Strategy per HB 3630 – Due November 2023
- ODOE Hydrogen rule making - ongoing
- Oregon Territorial Sea Plan – Part 5
- Oregon Hydrogen Study
- DEQ – Renewable Fuels





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Chapter 16

The Intersection of Real Estate and Insolvency

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"Receiverships: Oregon," *Practical Law,* Thomson Reuters (2022) (reprinted with permission of authors) 16–33

11 U.S.C. § 362

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a)—

(A) of the commencement or continuation of a civil action or proceeding—

(i) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;
(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;
(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or
(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;
(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;
[(5) Repealed. Pub. L. 105–277, div. I, title VI, § 603(1), Oct. 21, 1998, 112 Stat. 2681–866;]
(6) under subsection (a) of this section, of the exercise by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency of any contractual right (as defined in section 555 or 556) under any security agreement or arrangement or other credit enhancement forming a part of or related to any commodity contract, forward contract or securities contract, or of any contractual right (as defined in section 555 or 556) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such contracts, including any master agreement for such contracts;
(7) under subsection (a) of this section, of the exercise by a repo participant or financial participant of any contractual right (as defined in section 559) under any security agreement or arrangement or other credit enhancement forming a part of or related to any repurchase agreement, or of any contractual right (as defined in section 559) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;
(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;
(9) under subsection (a), of—
(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;
(C) a demand for tax returns; or
(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;
(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;
(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under chapter 537 of title 46 or section 109(h) of title 49, or under applicable State law;
(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under chapter 537 of title 46;
(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;
(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;
(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;
(17) under subsection (a) of this section, of the exercise by a swap participant or financial participant of any contractual right (as defined in section 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any swap agreement, or of any contractual right (as defined in section 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if such tax or assessment comes due after the date of the filing of the petition;

(19) under subsection (a), of withholding of income from a debtor's wages and collection of amounts withheld, under the debtor's agreement authorizing that withholding and collection for the benefit of a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, that is sponsored by the employer of the debtor, or an affiliate, successor, or predecessor of such employer—

(A) to the extent that the amounts withheld and collected are used solely for payments relating to a loan from a plan under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 or is subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title;

(20) under subsection (a), of any act to enforce any lien against or security interest in real property following entry of the order under subsection (d)(4) as to such real property in any prior case under this title, for a period of 2 years after the date of the entry of such an order, except that the debtor, in a subsequent case under this title, may move for relief from such order based upon changed circumstances or for other good cause shown, after notice and a hearing;

(21)under subsection (a), of any act to enforce any lien against or security interest in real property—

(A) if the debtor is ineligible under section 109(g) to be a debtor in a case under this title; or

(B) if the case under this title was filed in violation of a bankruptcy court order in a prior case under this title prohibiting the debtor from being a debtor in another case under this title;

(22) subject to subsection (l), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor;

(23) subject to subsection (m), under subsection (a)(3), of an eviction action that seeks possession of the residential property in which the debtor resides as a tenant under a lease or rental agreement based on endangerment of such property or the illegal use of controlled substances on such property, but only if the lessor files with the court, and serves upon the debtor, a certification under penalty of perjury that such an eviction action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property;

(24) under subsection (a), of any transfer that is not avoidable under section 544 and that is not avoidable under section 549;

(25) under subsection (a), of—

(A) the commencement or continuation of an investigation or action by a securities self regulatory organization to enforce such organization's regulatory power;

(B) the enforcement of an order or decision, other than for monetary sanctions, obtained in an action by such securities self regulatory organization to enforce such organization's regulatory power; or

(C) any act taken by such securities self regulatory organization to delist, delete, or refuse to permit quotation of any stock that does not meet applicable regulatory requirements;

(26) under subsection (a), of the setoff under applicable nonbankruptcy law of an income tax refund, by a governmental unit, with respect to a taxable period that ended before the date of the order for relief against an income tax liability for a taxable period that also ended before the date of the order for relief, except that in any case in which the setoff of an income tax refund is not permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of a tax liability, the governmental unit may hold the refund pending the resolution of the action, unless the court, on the motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection (within the meaning of section 361) for the secured claim of such authority in the setoff under section 506(a);

(27) under subsection (a) of this section, of the exercise by a master netting agreement participant of any contractual right (as defined in section 555, 556, 559, or 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any master netting agreement, or of any contractual right (as defined in section 555, 556, 559, or 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such master netting agreements to the extent that such participant is eligible to exercise such rights under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue;

(28) under subsection (a), of the exclusion by the Secretary of Health and Human Services of the debtor from participation in the medicare program or any other Federal health care program (as defined in section 1128B(f) of the Social Security Act pursuant to title XI or XVIII of such Act); and

(29) under subsection (a)(1) of this section, of any action by—

(A) an amateur sports organization, as defined in section 220501(b) of title 36, to replace a national governing body, as defined in that section, under section 220528 of that title; or

(B) the corporation, as defined in section 220501(b) of title 36, to revoke the certification of a national governing body, as defined in that section, under section 220521 of that title.

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), (f), and (h) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;
(2) the stay of any other act under subsection (a) of this section continues until the earliest of—
(A) the time the case is closed;
(B) the time the case is dismissed; or
(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied;
(3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)—
(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;
(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and
(C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—
(i) as to all creditors, if—
(I) more than 1 previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was pending within the preceding 1-year period;
(II) a previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to—
(aa) file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);
(bb) provide adequate protection as ordered by the court; or
(cc) perform the terms of a plan confirmed by the court; or
(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 or any other reason to conclude that the later case will be concluded—
(aa) if a case under chapter 7, with a discharge; or
(bb) if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; and
(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such

case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor; and

(4)

(A)

(i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case; and

(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;

(B) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; and

(D) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors if—

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; or

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, such action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to such action of such creditor.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later—

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that—

(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either—

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property.

If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

(e)

(1) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such

stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(2) Notwithstanding paragraph (1), in a case under chapter 7, 11, or 13 in which the debtor is an individual, the stay under subsection (a) shall terminate on the date that is 60 days after a request is made by a party in interest under subsection (d), unless—

(A) a final decision is rendered by the court during the 60-day period beginning on the date of the request; or

(B) such 60-day period is extended—

(i) by agreement of all parties in interest; or

(ii) by the court for such specific period of time as the court finds is required for good cause, as described in findings made by the court.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h)

(1) In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2)—

(A) to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722, enter into an agreement of the kind specified in section 524(c) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p) if the trustee does not do so, as applicable; and

(B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

(2) Paragraph (1) does not apply if the court determines, on the motion of the trustee filed before the expiration of the applicable time set by section 521(a)(2), after notice and a hearing, that such personal property is of consequential value or benefit to the estate, and orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee. If the court does not so

determine, the stay provided by subsection (a) shall terminate upon the conclusion of the hearing on the motion.

(i) If a case commenced under chapter 7, 11, or 13 is dismissed due to the creation of a debt repayment plan, for purposes of subsection (c)(3), any subsequent case commenced by the debtor under any such chapter shall not be presumed to be filed not in good faith.

(j) On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated.

(k)

(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

(l)

(1) Except as otherwise provided in this subsection, subsection (b)(22) shall apply on the date that is 30 days after the date on which the bankruptcy petition is filed, if the debtor files with the petition and serves upon the lessor a certification under penalty of perjury that—

(A) under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment for possession was entered; and

(B) the debtor (or an adult dependent of the debtor) has deposited with the clerk of the court, any rent that would become due during the 30-day period after the filing of the bankruptcy petition.

(2) If, within the 30-day period after the filing of the bankruptcy petition, the debtor (or an adult dependent of the debtor) complies with paragraph (1) and files with the court and serves upon the lessor a further certification under penalty of perjury that the debtor (or an adult dependent of the debtor) has cured, under nonbankruptcy law applicable in the jurisdiction, the entire monetary default that gave rise to the judgment under which possession is sought by the lessor, subsection (b)(22) shall not apply, unless ordered to apply by the court under paragraph (3).

(3)

(A) If the lessor files an objection to any certification filed by the debtor under paragraph (1) or (2), and serves such objection upon the debtor, the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the certification filed by the debtor under paragraph (1) or (2) is true.

(B) If the court upholds the objection of the lessor filed under subparagraph (A)—

(i) subsection (b)(22) shall apply immediately and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's objection.

(4) If a debtor, in accordance with paragraph (5), indicates on the petition that there was a judgment for possession of the residential rental property in which the debtor resides and does not file a certification under paragraph (1) or (2)—

(A) subsection (b)(22) shall apply immediately upon failure to file such certification, and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating the absence of a filed certification and the applicability of the exception to the stay under subsection (b)(22).

(5)

(A) Where a judgment for possession of residential property in which the debtor resides as a tenant under a lease or rental agreement has been obtained by the lessor, the debtor shall so indicate on the bankruptcy petition and shall provide the name and address of the lessor that obtained that pre-petition judgment on the petition and on any certification filed under this subsection.

(B) The form of certification filed with the petition, as specified in this subsection, shall provide for the debtor to certify, and the debtor shall certify—

(i) whether a judgment for possession of residential rental housing in which the debtor resides has been obtained against the debtor before the date of the filing of the petition; and

(ii) whether the debtor is claiming under paragraph (1) that under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment of possession was entered, and has made the appropriate deposit with the court.

(C) The standard forms (electronic and otherwise) used in a bankruptcy proceeding shall be amended to reflect the requirements of this subsection.

(D) The clerk of the court shall arrange for the prompt transmittal of the rent deposited in accordance with paragraph (1)(B) to the lessor.

(m)

(1) Except as otherwise provided in this subsection, subsection (b)(23) shall apply on the date that is 15 days after the date on which the lessor files and serves a certification described in subsection (b)(23).

(2)

(A) If the debtor files with the court an objection to the truth or legal sufficiency of the certification described in subsection (b)(23) and serves such objection upon the lessor, subsection (b)(23) shall not apply, unless ordered to apply by the court under this subsection.

(B) If the debtor files and serves the objection under subparagraph (A), the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the situation giving rise to the lessor's certification under paragraph (1) existed or has been remedied.

(C) If the debtor can demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been

remedied, the stay provided under subsection (a)(3) shall remain in effect until the termination of the stay under this section.

(D) If the debtor cannot demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied—

(i) relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to proceed with the eviction; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's certification.

(3) If the debtor fails to file, within 15 days, an objection under paragraph (2)(A)—

(A) subsection (b)(23) shall apply immediately upon such failure and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating such failure.

(n)

(1) Except as provided in paragraph (2), subsection (a) does not apply in a case in which the debtor—

(A) is a debtor in a small business case pending at the time the petition is filed;

(B) was a debtor in a small business case that was dismissed for any reason by an order that became final in the 2-year period ending on the date of the order for relief entered with respect to the petition;

(C) was a debtor in a small business case in which a plan was confirmed in the 2-year period ending on the date of the order for relief entered with respect to the petition; or

(D) is an entity that has acquired substantially all of the assets or business of a small business debtor described in subparagraph (A), (B), or (C), unless such entity establishes by a preponderance of the evidence that such entity acquired substantially all of the assets or business of such small business debtor in good faith and not for the purpose of evading this paragraph.

(2) Paragraph (1) does not apply—

(A) to an involuntary case involving no collusion by the debtor with creditors; or

(B) to the filing of a petition if—

(i) the debtor proves by a preponderance of the evidence that the filing of the petition resulted from circumstances beyond the control of the debtor not foreseeable at the time the case then pending was filed; and

(ii) it is more likely than not that the court will confirm a feasible plan, but not a liquidating plan, within a reasonable period of time.

(o) The exercise of rights not subject to the stay arising under subsection (a) pursuant to paragraph (6), (7), (17), or (27) of subsection (b) shall not be stayed by any order of a court or administrative agency in any proceeding under this title.

11 U.S.C. § 365

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)

(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title;

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or

(D) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other

lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(1)

(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

(d)

(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4)

(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of—

(i) the **date** that is 120 days after the date of the order for relief; or

(ii) the date of the entry of an order confirming a plan.

(B)

(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.

(ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

(5) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(e)

(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(A)

(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f)

(1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title—

(A) if before **such** rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title—

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)

(1)

(A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and—

(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or

(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and

timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.

(D) In this paragraph, "lessee" includes any successor, assign, or mortgagee permitted under the terms of such lease.

(2)

(A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and—

(i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or

(ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare interest to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such timeshare interest, and the term of any renewal or extension of such timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(i)

(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession—

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(l) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n)

(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract—

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive—

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract or any agreement supplementary to such contract—

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(o) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

(p)

(1) If a lease of personal property is rejected or not timely assumed by the trustee under subsection (d), the leased property is no longer property of the estate and the stay under section 362(a) is automatically terminated.

(2)

(A) If the debtor in a case under chapter 7 is an individual, the debtor may notify the creditor in writing that the debtor desires to assume the lease. Upon being so notified, the creditor may, at its option, notify the debtor that it is willing to have the lease assumed by the debtor and may condition such assumption on cure of any outstanding default on terms set by the contract.

(B) If, not later than 30 days after notice is provided under subparagraph (A), the debtor notifies the lessor in writing that the lease is assumed, the liability under the lease will be assumed by the debtor and not by the estate.

(C) The stay under section 362 and the injunction under section 524(a)(2) shall not be violated by notification of the debtor and negotiation of cure under this subsection.

(3) In a case under chapter 11 in which the debtor is an individual and in a case under chapter 13, if the debtor is the lessee with respect to personal property and the lease is not assumed in the plan confirmed by the court, the lease is deemed rejected as of the conclusion of the hearing on confirmation. If the lease is rejected, the stay under section 362 and any stay under section 1301 is automatically terminated with respect to the property subject to the lease.

11 U.S.C. § 502

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

(3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;

(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds—

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of—

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds—

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of—

(i) the date of the filing of the petition; or

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates;

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor; or

(9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) or under the Federal Rules of Bankruptcy Procedure, except that—

(A) a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide; and

(B) in a case under chapter 13, a claim of a governmental unit for a tax with respect to a return filed under section 1308 shall be timely if the claim is filed on or before the date that is 60 days after the date on which such return was filed as required.

(c) There shall be estimated for purpose of allowance under this section—

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(2) any right to payment arising from a right to an equitable remedy for breach of performance.

(d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

(e)

(1) Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that—

(A) such creditor's claim against the estate is disallowed;

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or

(C) such entity asserts a right of subrogation to the rights of such creditor under section 509 of this title.

(2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim had become fixed before the date of the filing of the petition.

(f) In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(g)

(1) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(2) A claim for damages calculated in accordance with section 562 shall be allowed under subsection (a), (b), or (c), or disallowed under subsection (d) or (e), as if such claim had arisen before the date of the filing of the petition.

(h) A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(i) A claim that does not arise until after the commencement of the case for a tax entitled to priority under section 507(a)(8) of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

(k)

(1) The court, on the motion of the debtor and after a hearing, may reduce a claim filed under this section based in whole on an unsecured consumer debt by not more than 20 percent of the claim, if—

(A) the claim was filed by a creditor who unreasonably refused to negotiate a reasonable alternative repayment schedule proposed on behalf of the debtor by an approved nonprofit budget and credit counseling agency described in section 111;

(B) the offer of the debtor under subparagraph (A)—

(i) was made at least 60 days before the date of the filing of the petition; and

(ii) provided for payment of at least 60 percent of the amount of the debt over a period not to exceed the repayment period of the loan, or a reasonable extension thereof; and

(C) no part of the debt under the alternative repayment schedule is nondischargeable.

(2) The debtor shall have the burden of proving, by clear and convincing evidence, that—

(A) the creditor unreasonably refused to consider the debtor's proposal; and

(B) the proposed alternative repayment schedule was made prior to expiration of the 60-day period specified in paragraph (1)(B)(i).

11 U.S.C. § 503

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.
(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—

(1)

(A) the actual, necessary costs and expenses of preserving the estate including—

(i) wages, salaries, and commissions for services rendered after the commencement of the case; and

(ii) wages and benefits awarded pursuant to a judicial proceeding or a proceeding of the National Labor Relations Board as back pay attributable to any period of time occurring after commencement of the case under this title, as a result of a violation of Federal or State law by the debtor, without regard to the time of the occurrence of unlawful conduct on which such award is based or to whether any services were rendered, if the court determines that payment of wages and benefits by reason of the operation of this clause will not substantially increase the probability of layoff or termination of current employees, or of nonpayment of domestic support obligations, during the case under this title;

(B) any tax—

(i) incurred by the estate, whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both, except a tax of a kind specified in section 507(a)(8) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case;

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph; and

(D) notwithstanding the requirements of subsection (a), a governmental unit shall not be required to file a request for the payment of an expense described in subparagraph (B) or (C), as a condition of its being an allowed administrative expense;

(2) compensation and reimbursement awarded under section 330(a) of this title;

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by—

(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;

(E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian; or

(F) a member of a committee appointed under section 1102 of this title, if such expenses are incurred in the performance of the duties of such committee;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title;

(6) the fees and mileage payable under chapter 119 of title 28;

(7) with respect to a nonresidential real property lease previously assumed under section 365, and subsequently rejected, a sum equal to all monetary obligations due, excluding those arising from or relating to a failure to operate or a penalty provision, for the period of 2 years following the later of the rejection date or the date of actual turnover of the premises, without reduction or setoff for any reason whatsoever except for sums actually received or to be received from an entity other than the debtor, and the claim for remaining sums due for the balance of the term of the lease shall be a claim under section 502(b)(6);

(8) the actual, necessary costs and expenses of closing a health care business incurred by a trustee or by a Federal agency (as defined in section 551(1) of title 5) or a department or agency of a State or political subdivision thereof, including any cost or expense incurred—

(A) in disposing of patient records in accordance with section 351; or

(B) in connection with transferring patients from the health care business that is in the process of being closed to another health care business; and

(9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

(c) Notwithstanding subsection (b), there shall neither be allowed, nor paid—

(1) a transfer made to, or an obligation incurred for the benefit of, an insider of the debtor for the purpose of inducing such person to remain with the debtor's business, absent a finding by the court based on evidence in the record that—

(A) the transfer or obligation is essential to retention of the person because the individual has a bona fide job offer from another business at the same or greater rate of compensation;

(B) the services provided by the person are essential to the survival of the business; and

(C) either—

(i) the amount of the transfer made to, or obligation incurred for the benefit of, the person is not greater than an amount equal to 10 times the amount of the mean transfer or obligation of a similar kind given to nonmanagement employees for any purpose during the calendar year in which the transfer is made or the obligation is incurred; or

(ii) if no such similar transfers were made to, or obligations were incurred for the benefit of, such nonmanagement employees during such calendar year, the amount of the transfer or obligation is not greater than an amount equal to 25 percent of the amount of any similar transfer or obligation made to or incurred for the benefit of such insider for any purpose during the calendar year before the year in which such transfer is made or obligation is incurred;

(2) a severance payment to an insider of the debtor, unless—

(A) the payment is part of a program that is generally applicable to all full-time employees; and

(B) the amount of the payment is not greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made; or

(3) other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case, including transfers made to, or obligations incurred for the benefit of, officers, managers, or consultants hired after the date of the filing of the petition.

11 U.S.C. § 547

(a) In this section—

(1) "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation;

(3) "receivable" means right to payment, whether or not such right has been earned by performance; and

(4) a debt for a tax is incurred on the day when such tax is last payable without penalty, including any extension.

(b) Except as provided in subsections (c) and (i) of this section, the trustee may, based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses under subsection (c), avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The trustee may not avoid under this section a transfer—

(1) to the extent that such transfer was—

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was—

(A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or

(B) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor—

(A) to the extent such security interest secures new value that was—

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;
(ii) given by or on behalf of the secured party under such agreement;
(iii) given to enable the debtor to acquire such property; and
(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 30 days after the debtor receives possession of such property;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and
(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of—

(A)
(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or
(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title;
(7) to the extent such transfer was a bona fide payment of a debt for a domestic support obligation;
(8) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600; or
(9) if, in a case filed by a debtor whose debts are not primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $5,000.[1]

(d) The trustee may avoid a transfer of an interest in property of the debtor transferred to or for the benefit of a surety to secure reimbursement of such a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the trustee under subsection (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the trustee or the amount paid to the trustee.

(e)

(1) For the purposes of this section—

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made—

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time, except as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, if such transfer is perfected after such 30 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of—

(i) the commencement of the case; or

(ii) 30 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

(g) For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section.

(h) The trustee may not avoid a transfer if such transfer was made as a part of an alternative repayment schedule between the debtor and any creditor of the debtor created by an approved nonprofit budget and credit counseling agency.

(i) If the trustee avoids under subsection (b) a transfer made between 90 days and 1 year before the date of the filing of the petition, by the debtor to an entity that is not an insider for the benefit of a creditor that is an insider, such transfer shall be considered to be avoided under this section only with respect to the creditor that is an insider.

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Receiverships: Oregon

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A Q&A guide to receiverships in Oregon. This Q&A addresses the process by which receiverships are generally administered in Oregon, including the commencement and administration of the receiverships, the duties and actions of receivers, creditor claims, and the jurisdiction of the court. Answers to questions can be compared across many jurisdictions (see Receiverships: State Q&A Tool).

Commencing a Receivership

1. What are the applicable statutes for receiverships in your jurisdiction?

Before 2017, Oregon did not have comprehensive statutes that governed receiverships. The law of receiverships was derived primarily from case law, the Oregon Rules of Civil Procedure 80 to 82, and ad hoc references in various specialized chapters of Oregon Revised Statutes. In June 2017, Oregon enacted the Oregon Receivership Code (ORC), which is codified in Oregon Revised Statutes Chapter 37, and the ORC became effective in 2018.

The ORC applies to all receiverships initiated in Oregon state courts, except for:

- Receiverships commenced by a state agency under statutory authority.
- Federal receiverships authorized by or initiated under federal law.

(O.R.S. § 37.040(1).)

However, a state agency may elect for the receivership to be governed by the ORC (O.R.S. § 37.040(2)).

Except where specified, the provisions of the ORC control over conflicting provisions of state law, including Rule 80 of the Oregon Rules of Civil Procedure (O.R.S. § 37.040(3)). Oregon statutes that reference receiverships outside the ORC, include:

- O.R.S. § 60.667 (in a judicial proceeding brought to dissolve a corporation, when applicable, the ORC controls over conflicting provisions of this section).
- O.R.S. § 62.702 (in a judicial proceeding brought to dissolve a cooperative, when applicable, the ORC controls over conflicting provisions of this section).
- O.R.S. § 65.667 (in a judicial proceeding brought to dissolve a benefit corporation, when applicable, the ORC controls over conflicting provisions of this section).
- O.R.S § 105.452 (the ORC applies to housing receiverships under Chapter 105, except that the provisions of Chapter 105 control over conflicting provisions of the ORC).
- O.R.S. § 415.253 (the ORC does not apply to coordinated care organization delinquency proceedings under ORS 415.203 to 415.430).
- O.R.S. § 652.515 (the ORC controls over conflicting provisions of O.R.S. 652.510 to 652.570 relating to payment of wage claims by receivers).
- O.R.S. § 734.113 (the ORC does not apply to delinquency proceedings relating to rehabilitation, liquidation, and conservations of insurers under Chapter 734).
- O.R.S. § 97.942 (authorizing the appointment of a receiver "necessary or advisable" for certain funeral related prearrangement providers and omitting any express reference to the ORC).
- O.R.S. § 586.529 (authorizing the appointment of an employee of the State Department of Agriculture as receiver relating to certain probable grain shortages in relation to certain warehouse receipts and omitting any express reference to the ORC).
- O.R.S. § 97.852 (authorizing the appointment of a receiver for an endowment care cemetery when "necessary or advisable" and omitting any express reference to the ORC).

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- O.R.S. § 124.120 (authorizing the appointment of a receiver to protect against the abuse of vulnerable persons under Chapter 124 and omitting any express reference to the ORC).
- O.R.S. § 450.295 (authorizing the appointment of a receiver to operate certain district sewage systems as necessary to protect the interests of the state and of the district, but omitting any express reference to the ORC),
- O.R.S. § 93.915 (subject to the procedural requirements of Or. R. Civ. P. and the ORC, as applicable, an action may be instituted to appoint a receiver or to obtain a temporary restraining order during forfeiture under certain land sale contracts).
- O.R.S. § 86.752 (subject to the procedural requirements of Or. R. Civ. P. 79 and 80 and the ORC, as applicable, an action may be commenced to appoint a receiver or to obtain a temporary restraining order during foreclosure of a trust deed by advertisement and sale of certain non-residential trust deeds even after action on the note).

2. Please identify and describe the different types of receiverships available in your jurisdiction (for example, general receiver, special receiver, regulatory receiver, etc.) and their specific purposes. List any common law receiverships available in your jurisdiction.

The Oregon Receivership Code (ORC) does not make a formal distinction between the types of receivers, such as special, specific, general, custodial, and pendente lite receivers. The ORC provides that a court may appoint a receiver over:

- All a person's property wherever located.
- Less than all the person's property, but the order must reasonably describe the property over which the receiver is to control.

(O.R.S. § 37.060(5).)

An order that appoints a receiver over a person and does not describe the property over which the receiver controls is construed to appoint the receiver over all the person's property.

The ORC does not purport to displace existing Oregon receivership case law, provided case law does not conflict with the ORC (O.R.S. § 37.010; see also *Oregon Civil Pleading and Litigation* (2020 ed.) Chapter 21, Receivers, § 21.2-1 ("the work group [involved in drafting the ORC] saw its mission as bringing clarity to existing law, rather than attempting to make wholesale substantive changes to the law ... most of the prior case law in Oregon remains valid, except when it directly conflicts with provisions of [the ORC]"); Oregon Receivership Code Report of the Receivership Work Group on Senate Bill 899A (2017), pg. 1 (suggesting intent to "amplify upon the existing Oregon receivership provisions"); see Question 1).

3. Generally, in which court must a receivership be commenced? Please explain for each type of receiver.

The Oregon Receivership Code (ORC) does not limit the court in which a receivership must be filed. It provides instead that that the ORC applies to all receiverships initiated "in a court of this state" (O.R.S. § 37.040). Therefore, based on the language in the statute a receivership may be commenced in any Oregon trial court except those with limited jurisdiction, such as the justice court or small claims court (O.R.S. § 46.405 (small claims court jurisdiction); O.R.S § 51.080 (civil jurisdiction of justice court)).

In receiverships concerning real property, the action to appoint a receiver should be brought in the county where the real property is located (O.R.S. § 14.040).

4. Please identify who has the authority to seek appointment of a receiver in your jurisdiction.

The Oregon Receivership Code (ORC) provides that any person or the court on its own motion, may seek the appointment of a receiver (O.R.S. § 37.060). The ORC defines "person" to mean individual, corporation, limited liability company, general partnership, limited partnership, limited liability partnership, cooperative, business trust, governmental entity, or other entity, of any kind or nature (O.R.S. § 37.060(13)).

A receivership is typically not available to creditors in consumer cases. A court cannot appoint a receiver over personal property held for consumer use, over exempt property, or over property that is held in trust, except in certain domestic relations cases (O.R.S. § 37.050(1)-(2)). Therefore, in practice, a receivership is not an appropriate substitute for creditors seeking sale of a residential property because of the limited marketability of the non-exempt portion of residential property.

Under the ORC, nearly any commercial litigant is empowered to seek appointment of a receiver. However,

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Receiverships: Oregon

litigants are prudent to consider whether a remedy of receivership is warranted because the court may assess the receiver's fees and costs, as well as sanctions if it finds the appointment of the receiver was wrongful or procured in bad faith (O.R.S. § 37.410(6)). The debtor, as owner of the property subject to the receivership, may also have an action for trespass (see *Clausen v. Carstens*, 83 Or. App. 112, 115 (1986)).

In addition to the Section 37 provisions of the ORC regarding the authority to appoint a receiver, other statutes also authorize persons or entities to seek the appointment of a receiver. For example:

- The Director of the Department of Consumer and Business Services may seek appointment of a receiver when related to certain violations of the Oregon Securities Law (O.R.S. § 59.255).
- The court may appoint a receiver in actions to dissolve an Oregon corporation, cooperative, or benefit corporation (O.R.S. §§ 60.667, 62.702, and 65.667).
- A creditor with rights under Oregon law governing fraudulent transfers may seek appointment of a receiver to take charge of a transferred asset or of other property of a transferee (O.R.S. § 95.260(1)(c)(B)).

5. What circumstances must exist for a receiver to be appointed in your jurisdiction? Please address whether the company must be insolvent and what insolvency means in your jurisdiction.

In Oregon, receivers may be appointed at any time to protect and preserve property or the rights of parties in the property, however, appointment of a receiver is discretionary (O.R.S. § 37.060(1); Or. R. Civ. P. 80(B); see also *McMunn v. ML & H Lumber, Inc.*, 247 Or. 319, 323 (1967)). If a contract provides for the appointment of a receiver, a court may consider the contract provision but is not bound to uphold it (O.R.S. § 37.060(2)).

Oregon case law suggests that a receivership is a harsh remedy to be invoked as a last resort (see *Rugger v. Mt. Hood Elec. Co.*, 143 Or. 193, 223 (1933); *McKinney v. Nayberger*, 138 Or. 203, 217 (1931) (a receiver should not be appointed if a less drastic remedy is available)).

Under both the Oregon Receivership Code (ORC) and Or. R. Civ. P. 80, when a receivership is reasonably necessary to protect the entity's property or the interests of the debtor's owners or creditors, then courts look to the insolvency of an entity, or the imminent danger of insolvency (O.R.S. § 37.060(1)(g); Or. R. Civ. P. 80(B)(8)). Insolvency exists when:

- The entity is generally not paying debts as they become due.
- The sum of the entity's debts or other obligations is greater than the fair value of its property, other than property:
  - transferred with intent to defraud creditors; or
  - that is otherwise exempt from execution.

(O.R.S. § 37.030(8).)

Insolvency is not defined by Or. R. Civ. P. 80.

The ORC and Or. R. Civ. P. 80 provide similar additional grounds for appointment of a receiver. Specifically, receivers may be appointed:

- Before judgment, if the property that is the subject of the action or rents or profits deriving from the property are in danger of being lost or materially injured or impaired.
- After judgment:
  - if reasonably necessary to carry the judgment into effect;
  - to dispose of property according to the judgment;
  - to preserve the property during the pendency of an appeal;
  - when an execution has been returned unsatisfied and the debtor refuses to apply the property in satisfaction of the judgment; or
  - either before or after the issuance of an execution, to preserve, protect, or prevent the transfer of property subject to the execution and sale.
- In a statutory fraudulent conveyance action.
- When property is attached by a creditor, if:
  - the property is perishable or is otherwise in danger of waste, impairment, or destruction; or
  - the debtor has abandoned the property and receivership is reasonably necessary to conserve, protect, or dispose of the property (O.R.S. § 37.060; Or. R. Civ. P. 80).
- In any situation where:
  - the appointment of a receiver is expressly required or permitted by statute; or
  - in the discretion of the court, appointment of a receiver is reasonably necessary to secure justice to the parties.

(O.R.S. § 37.030(1).)

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Receiverships: Oregon

For statutes permitting appointment of receivers outside the ORC, see Question 1.

Common law in Oregon suggests that courts also have inherent power to appoint a receiver, even in the absence of a statute or rule authorizing the receiver's appointment (see *Wm. H. Taylor Fin. Corp. v. Oregon Logging & Timber Co.*, 116 Or. 440, 447 (1925)). Before enactment of the ORC, caselaw provided that the moving party seeking a receiver to protect property must demonstrate that the property subject to the action is in possession of the defendant and that the moving party has probable rights in the property (*Grayson v. Grayson*, 222 Or. 507, 510-11 (1960)). However, the requirements for appointment of a receivership in *Grayson* are likely abrogated by the more specific standard for appointment set out by the ORC in O.R.S. § 37.060. Although a receiver may be appointed on many grounds, Oregon courts have historically held that a receivership is an ancillary procedural remedy and may not be the sole object of a suit (see *French v. C.F. & T. Co.*, 124 Or. 686, 690 (1928); but see *Jackson v. Nicolai-Neppach Co.*, 219 Or. 560, 573-74 (1959) (suggesting statutory basis may abrogate common law rule)).

6. What is required to file a receivership in your jurisdiction. Please include information on:

- Documents, including any official forms and a description of the operative document.
- Filing requirements (including what needs to be filed and where, timing, electronic versus paper, and any fees that must be filed).

Documents

In Oregon, there are no official forms specific to appointing a receiver. The Oregon Receivership Code (ORC) provides that the court may appoint a receiver on motion (O.R.S. § 37.060(1)). The motion should include:

- The grounds for the appointment of a receiver.
- A declaration or affidavit as necessary to adduce the supporting facts (O.R.S. § 37.060(1); see also *Grayson v. Grayson*, 222 Or. 507, 516 (1960) (referencing required showing)).
- A statement under oath from the proposed receiver of any necessary receiver disclosures required under O.R.S. § 37.080.
- A proposed order appointing receiver. The order appointing the receiver dictates the scope of receiver's powers and duties and, therefore, at a minimum:
  - reasonably identify the property subject to the receivership;
  - describe the receiver's powers; and
  - describe the receiver's obligations for filing reports.

  (Or. R. Civ. P. 80(D); O.R.S. § 37.060(5); O.R.S. § 37.110.)

The person drafting the order may wish to include the following additional information:

- The identity of the receiver.
- The factual basis for the appointment.
- The terms of compensation for the receiver.
- Whether security is required and, if so, the amount provided.
- If appointed related to any real property, a legal description of the real property.

In receiverships under Or. R. Civ. P. 80, the order appointing the receiver must contain the deadline for submitting claims in liquidations (Or. R. Civ. P. 80(D)). The ORC, however, permits the receiver to give notice of the claims bar date in asset cases after providing initial notice of the receivership to interested persons, which occurs within 30 days after appointment (O.R.S. § 37.210 (claims-bar deadline); O.R.S. § 37.330 (initial notice to creditors)).

Corporate actions or approval are not required for seeking appointment of a receiver.

There is no special fee for seeking a receivership beyond the ordinary fees required under O.R.S. Chapter 21. However, when appointing a receiver under Or. R. Civ. P. 80, the court must require security in an amount covering the payment of any costs, damages, and attorney fees that may sustained or suffered by any party due to the wrongful act of the receiver. Giving a security is discretionary under the ORC (O.R.S. § 37.060(6)).

Notice

Notice of the receiver's appointment must be made on the adverse party at least five days before the time specified for the hearing unless the court orders a different notice period (Or. R. Civ. P. 80(C)). Any notices required under Or. R. Civ. P. 80, including notice of the hearing of the receiver's appointment must be served according to Or. R. Civ. P. 9 (Or. R. Civ. P. 80(F)(3)). The ORC does not expressly provide that notice must be given before a receiver's appointment, but Oregon case law indicates that notice must be given even in the absence of an express statutory requirement (see *Anderson v. Robinson*, 63 Or. 228, 233 (1912)).

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A court may not appoint a receiver on an ex parte basis unless there is an emergency situation that gives rise to the right for a temporary restraining order under Or. R. Civ. P. 79, such as the threat of irreparable injury (see *Anderson*, 63 Or. at 233 (ex parte appointment of receiver is generally void); see also Council on Court Procedures, Staff Comment to Rule 80 (1979-81 biennium) ("There is no provision for an ex parte receivership order. In an emergency situation, a temporary restraining order would be available under Rule 79 to protect a party until a receivership could be established")).

The ORC and Or. R. Civ. P. do not expressly provide for appointment of a receiver in a motion for an order to show cause why a receivership should not be approved. Orders appointing a receiver are expressly excluded from the definition of **provisional process** in Or. R. Civ. P. 81(A)(9). However, while the party seeking the appointment of a receiver under Or. R. Civ. P. 80 is not directed to use the procedure for provisional process set out in Or. R. Civ. P. 83, it is common practice for creditors to seek appointment of a receiver in a motion for an order to show cause. The choice of motion for an order to show cause is likely motivated by:

- Timing considerations because show cause hearings are generally heard on an expedited basis.
- Whether the moving party seeks additional provisional relief, such as a temporary restraining order prohibiting dissipation of assets.

Creditors using the show cause process under Or. R. Civ. P. 83 to obtain an order appointing a receiver should be mindful of the rule's emphasis on the necessity of showing that the subject property is in danger of destruction, serious harm, concealment, removal from this state, or transfer to an innocent purchaser (Or. R. Civ. P. 83(D)).

Selecting a Receiver

7. Please explain how a receiver is selected in your jurisdiction and whether there are any statutory requirements or qualifications to be appointed as receiver.

In Oregon, **any person** (as defined in O.R.S. § 37.030(13)), regardless of whether they are a resident of Oregon, may serve as receiver. Receivers are typically professionals, for example, attorneys, accountants, liquidation specialists, or property managers. The requesting party typically nominates a receiver, which may be an individual or an entity. However, if a court appoints an entity as a receiver, the court may require a specific individual to appear in the receivership on behalf of the entity (O.R.S. § 37.070).

The receiver may not be:

- An entity that is not authorized to conduct business in Oregon.
- A person that has been convicted of a crime involving moral turpitude or is controlled by a person that has been convicted of a crime involving moral turpitude.
- The sheriff of any county, unless expressly permitted by statute.

(O.R.S. § 37.070.)

The person selecting the proposed receiver should consider:

- The scope of the duties necessary to administer the receivership together with the receiver's qualifications.
- Whether the receiver:
  - should have specialized knowledge regarding the property or business; and
  - requires control.

The court is not required to appoint the person proposed as receiver, but practical considerations make it unlikely that the court substitutes the selection (O.R.S. § 37.060(1) (suggesting court's ability to select receiver on its own motion)).

Under the ORC, the court may not appoint a person as receiver unless that person discloses if:

- It is an affiliate of a party.
- Holds an interest materially adverse to an interest of a party.
- Has a material financial interest in the outcome of the action.
- Has a debtor-creditor relationship with a party.
- Holds an equity interest in a party.

The proposed receiver must sign a declaration that its disclosures are true and correct (O.R.S. § 37.080; see Question 8).

8. Please explain what is required to obtain court approval of a selected receiver in your jurisdiction.

In Oregon, the requesting party typically nominates a proposed receiver.

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- The sheriff of any county, unless expressly permitted by statute.

(O.R.S. § 37.070.)

The court is not required to appoint the person proposed as receiver, but practical considerations make it unlikely that the court substitutes the selection (O.R.S. § 37.060(1) (suggesting court's ability to select receiver on its own motion)).

The person selected to be receiver must disclose under oath whether the person:

- Is an affiliate of a party to the receivership.
- Has an interest materially adverse to an interest of a party to the receivership.
- Has a material financial interest in the outcome of the action, other than compensation approved by the court.
- Has a debtor-creditor relationship with the debtor.
- Holds an equity interest in a party to the receivership, other than a non-controlling interest in a publicly traded company.

(O.R.S. § 37.080.)

The proposed receiver must sign a declaration that its disclosures are true and correct.

A party to the case should typically not be appointed receiver unless other parties in interest consent or special circumstances exist making appointment of a receiver in the best interest of all concerned (see *N. Brewery Co. v. Princess Hotel*, 78 Or. 453, 46 (1915)).

Duties and Actions of the Receiver

9. Please identify and describe the main statutory duties and responsibilities for each type of receiver, as applicable, in your jurisdiction (for example, providing notice to creditors, holding meetings of creditors, etc.)

In Oregon, the receiver's responsibilities are typically contained in the order appointing the receiver and are not limited based on historical distinctions or the scope of the receivership property. The Oregon Receivership Code provides a non-exhaustive list of responsibilities the court may confer on the receiver, whether appointed over all or some of the debtor's property (O.R.S § 37.110).

The statutes contain a broad range of powers, including authorizing the receiver to:

- Collect, control, manage, conserve, and protect estate property.
- Operate a business constituting estate property, including preservation, use, sale, lease, license, exchange, collection, or disposition of property in the ordinary course of business.
- In the ordinary course of business, incur unsecured debt and pay expenses incidental to the receiver's preservation, use, sale, lease, license, exchange, collection, or disposition of estate property.
- Assert a right, claim, cause of action, or defense of the debtor that relates to estate property.
- Assert, in its name, any claim for statutory fraudulent conveyance that may be asserted by any of the debtor's creditors.
- On subpoena, compel a person to:
  - submit to examination under oath in the manner of a civil deposition;
  - produce and permit inspection and copying of designated records or tangible things, regarding estate property or any other matter that may affect administration of the receivership.
- Engage and pay compensation to professionals as permitted in O.R.S. § 37.310.
- Incur debt for the use or benefit of estate property other than in the ordinary course of business as permitted by O.R.S. § 37.260.
- Make improvements to estate property.
- Use or transfer estate property, other than in the ordinary course of business, as permitted by O.R.S. § 37.250.
- Assume the debtor' s executory contracts as permitted by O.R.S. § 37.240.
- Determine whether to establish a claims procedure under O.R.S. § 37.340.
- Allow or disallow creditors' claims as permitted by O.R.S. § 37.360.
- Distribute estate property under O.R.S. § 37.370.

(O.R.S §§ 37.110(1)(a) to 37.110(1)(r).)

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Receiverships: Oregon

The party seeking appointment of the receiver may request that the court confer additional powers on the receiver that are reasonably necessary to avoid injustice, beyond those expressly listed (O.R.S § 37.110(1)(s)). The court may also limit, expand, or modify the powers conferred on the receiver at any time (O.R.S § 37.110(3)).

An appointed receiver has various duties, including the duty to:

- Notify all federal and state taxing agencies of the receiver's appointment in compliance with any applicable laws (O.R.S. § 37.120(1)).
- At all times comply with applicable law (O.R.S. § 37.120(2)).
- If appointed over real property, file a certified copy of the order of appointment, together with a legal description of the real property (if one is not included in the order), with the county recorder where the real property is located (O.R.S. § 37.120(4)(3)).
- Follow any additional duties imposed by the court at any time. The court may also limit, expand, or modify duties imposed by the court on a receiver at any time (O.R.S. § 37.120(4)).
- Within 30 days of appointment, provide notice of the receivership to all the debtor's known creditors and any other known person having a claim or interest in estate property (O.R.S. §37.030(1)). The notice must include
  - the date of appointment of the receiver;
  - the name of the court and the case number of the receivership;
  - the deadline for the submission of claims by creditors, if known;
  - the name and address of the owner;
  - the name and address of the receiver and receiver's attorney, if any;
  - a procedure for notifying the receiver if the recipient is represented by an attorney;
  - a procedure for being placed on the special notice list; and
  - a statement that the person may not receive notice of all further proceedings in the receivership unless the person requests to be placed on the special notice list.

  The notice must also be published at least once per week for two consecutive weeks in a newspaper of general circulation in all counties where the estate property is known to be located (O.R.S. §37.030(3)).
- Within 60 days of appointment (unless the court sets a different time), a receiver must file with the court a schedule of:
  - all the debtor's known creditors;
  - the creditors' last known mailing addresses; and
  - the amount and nature of the creditors' claims and whether their claims are disputed.

  (O.R.S. §37.190.)

  The receiver is not required to file this schedule if can show that the estate is unlikely have sufficient assets to make distributions to unsecured creditors.
- Within 60 days of appointment, file an inventory of all the property that is part of the receivership estate and receiver's control, except that the inventory does not need to include legal claims that are estate property (O.R.S. §37.190).
- File monthly reports detailing the receiver's operations and financial affairs. The monthly report must include.
  - a concise narrative summary of the receiver's activities during the period and a description of any major upcoming events;
  - beginning and ending cash balances;
  - a statement of cash receipts and disbursements;
  - a statement of noncash receipts and payments;
  - a statement of receipts and dispositions of estate property outside the ordinary course of business, including a description of the property, the value of the property, and the amounts received from any disposition of the property;
  - a statement of accounts receivable;
  - a statement of the receiver's fees and expenses;
  - a tax disclosure statement listing taxes owed or required tax deposits, the name of the taxing agency, the date due, and an explanation for any failure to make payments or deposits; and
  - any other information required by the court.

  (O.R.S. §37.200.)
- In liquidation cases with sufficient assets, set a bar date for claims submissions (O.R.S. §37.210; see Question 15).

10. In addition to statutory duties, please summarize any common law duties imposed on a receiver in your jurisdiction.

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Receiverships: Oregon

In Oregon, the receiver, as an officer of the court, has a further duty to exercise independent judgment to impartially administer the property under the receiver's control for the benefit of all concerned (see *N. Brewery Co. v. Princess Hotel*, 78 Or. 453, 461 (1915)).

The court may limit, expand, or modify the statutory powers and duties of a receiver (O.R.S. § 37.120(4)).

11. Please explain if the receiver must post a bond in your jurisdiction and take any actions before beginning its duties.

In Oregon, when appointing a receiver under Or. R. Civ. P. 80, the court must require a bond or security in an amount that covers payment of any costs, damages, and attorney fees that may be sustained or suffered by any party due to the wrongful act of the receiver.

Under the Oregon Receivership Code, it is discretionary for the receiver to give a bond or security (O.R.S. § 37.060(6)). Unless otherwise provided by applicable law, the court may require the receiver to post a bond that:

- Is conditioned on the faithful discharge of the receiver's duties.
- Is in an amount determined by the court to be adequate to secure payment of any costs, damages, and attorney fees that may be sustained or suffered by any person due to a wrongful act of the receiver.
- Has one or more sureties that meet the qualifications set out in Or. R. Civ. P. 82(D), or that are approved by the court.

(O.R.S. § 37.090(1).)

Except as otherwise provided by applicable law, the court may require a receiver to post an alternative security in place of a bond, such as a letter of credit or a deposit of funds, with the clerk of the court. This alternative security is held to secure the receiver's faithful performance of the receiver's duties until the court authorizes the release or return of the alternative security. Interest accruing on any deposit of funds is remitted to the receiver on its discharge (O.R.S. § 37.090(2)).

The court may also require the receiver to carry an insurance policy with coverage and limits determined by the court instead of a bond, which may be charged against the estate (O.R.S. §§ 37.090(3) and (4)).

The court may authorize a receiver to act before the receiver posts bond, alternative security, or acquires an insurance policy (O.R.S. § 37.090(5)).

12. Under what circumstances can a receiver be removed in your jurisdiction?

In Oregon, a receiver may be removed by a motion made by the debtor, the receiver, any creditor, or the court's own motion if the receiver resigns, refuses, or fails to serve for any reason or for other good cause (O.R.S. § 37.400(1)).

When a receiver is removed, the court must appoint a successor receiver if the court determines that the estate requires further administration (O.R.S. § 37.400(1)). Any litigation involving the receiver continues by or against the successor receiver (O.R.S. § 37.290(6)).

13. Please explain the process for terminating or removing a receiver, including all relevant notice requirements.

In Oregon, the court may remove a receiver if the receiver resigns, refuses, or fails to serve for any reason or for any other good cause. Removal may be made by motion of the debtor, the receiver, any creditor, or on the court's own motion (O.R.S. § 37.400(1)).

If a receiver is replaced, litigation involving the receiver continues by or against the successor receiver (O.R.S. § 37.290(6)). Only a successor receiver appointed by the court has a cause of action against a former receiver to recover on behalf of the estate (O.R.S. § 37.290(9)).

If a receiver is removed but the receivership continues, the former receiver must:

- Fully account for and turn over to the successor receiver all the property of the estate.
- File a report of all receipts and disbursements during its tenure as receiver.
- Give notice to all persons on the special notice list.

(O.R.S. § 37.400(3).)

The court must then hold a hearing and enter an order discharging the former receiver from all further duties and responsibilities as receiver

The receiver's discharge releases:

- The receiver from any further duties and responsibilities under the Oregon Receivership Code.
- The receiver and any persons acting on behalf of the receiver from all further liability regarding the administration of estate property or the receivership.

(O.R.S. § 37.410(4).)

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Receiverships: Oregon

For receiverships proceeding according to Rule 80 of the Oregon Rules of Civil Procedure, the rules do not provide for a specific process for removal other than termination of the receivership (Or. R. Civ. P. 80(G)). Because the Or. R. Civ. P. 80 does not explicitly provide for a process for removal, in practice, the provisions of the Oregon Receivership Code generally control when removing a receiver.

At common law, the removal of a receiver may be made by motion (see *Giroux v. Bockler*, 98 Or. 398, 417 (1921)).

Administration of the Receivership

14. What are the key processes during the receivership in your jurisdiction? Please describe:

- Financing, including the ability of the receiver to obtain financing.
- Assets sales, including whether sales are held at private or public auction and the circumstances for each, as well as notice requirements.
- Avoidance powers, including the specific avoidance powers given to a receiver in your jurisdiction and the relevant time period for recovering preferences.
- Assumption or rejection of executory contracts, including what actions a receiver must take to assume or reject a contract in your jurisdiction.

Financing

In Oregon, a receiver authorized to operate a business may**:**

- Obtain credit and incur debt in the ordinary course of business **(**O.R.S. §37.110(1)(c); O.R.S. §37.260(1)). The receiver's expenses related to this credit and debt are allowable as an administrative expense (O.R.S. §37.260(1)).
- With court approval, obtain credit or incur debt outside the ordinary course of business. The receiver may mortgage, pledge, hypothecate, or encumber estate property as security for repayment of any deb. A creditor's security interest may be in the form of a receiver's certificate (O.R.S. §37.260(2)).

Use, Sale, or Transfer of Property

Under the Oregon Receivership Code (ORC), a receiver may:

- Have the general power to sell property in the ordinary course of business, if provided in the order appointing the receiver (O.R.S. § 37.110(1)(b)). However, the receiver may not sell or dispose of real property without a court order (O.R.S. § 37.180).
- With court approval, use or transfer receivership property other than in the ordinary course of business (O.R.S. § 37.250). Unless a transfer agreement provides otherwise, this type of transfer is free and clear of any lien held by the person that obtained appointment of the receiver, any subordinate liens, and any right of redemption, but is subject to any senior liens (O.R.S. § 37.250(2)).

Estate property does not need to be sold at a public auction. In practice, the receiver may sell property as if it were the owner by permitting time for due diligence, allow regular commercial brokers to show the property, entering negotiated purchase and sale agreements that allow for financing and inspections, and permitting closing to occur in a commercially reasonable fashion (O.R.S. § 37.250(2)).

If a transfer extinguishes a lien on estate property, the lien attaches to the proceeds of the transfer with the same validity, perfection, and priority that the extinguished lien had on the transferred property before the transfer, regardless of whether the proceeds are sufficient to satisfy all obligations secured by the lien (O.R.S. § 37.250(3)).

A creditor that holds a valid lien on receivership property that is subject to a sale may credit bid the amount of its allowed secured claim to purchase the property and offset the price. However, the creditor must pay sufficient funds to satisfy the reasonable transfer expenses and any obligation secured by any senior lien extinguished by the transfer (O.R.S. § 37.250(4)).

If estate property includes an interest as a co-owner of property, the receiver has all rights and powers of a co-owner afforded by applicable law, including any rights of partition (O.R.S. § 37.250(6)). If the debtor holds an undivided interest in property as a tenant in common, joint tenant, or tenant by the entirety, the receiver may obtain court approval to sell both the interest that is estate property and the interest of any co-owner if the court determines that:

- Partition of the property is impracticable.
- Sale of the estate's undivided interest in the property realizes significantly less for the estate than a sale of the property free and clear of the interests of the co-owner.
- The benefit to the estate of the sale outweighs the detriment, if any, to the co-owner.

(O.R.S. § 37.250(7).)

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Receiverships: Oregon

A receiver may not sell, transfer, or dispose of residential property or an undivided interest in residential property without specific judicial approval, which a court may grant only in case of:

- Waste, destruction, or obstruction of marketing of the property.
- Enforcement of an order in a domestic relations suit.
- Other good cause shown.

(O.R.S. § 37.250(8).)

A receiver, after giving 14-days' notice, may abandon estate property that is burdensome to the receiver or of inconsequential value or benefit. Abandoned property no longer constitutes estate property. A receiver may not abandon property in violation of a state statute or rule that is designed to protect the public health or safety from identified hazards (O.R.S. § 37.280).

For receiverships proceeding under Or. R. Civ. P. 80, a receiver's express authority to sell property is limited to:

- Disposing the property according to judgment.
- The circumstance when an execution has been returned unsatisfied and the debtor refuses to apply the property in satisfaction of the judgment.

(Or. R. Civ. P. 80(B)(3).)

Avoidance Actions

The order appointing the receiver may confer the power on the receiver to:

- Assert a right, claim, cause of action, or defense of the debtor that relates to estate property.
- Assert any claim under Oregon's fraudulent conveyance statutes that may be asserted by any of the debtor's creditor (O.R.S. § 37.110(d) and (e)).

There are no statutory provisions granting a general receiver additional time to file a fraudulent conveyance. Therefore, any avoidance actions must be brought within four years after the transfer was made or the obligation was incurred or within one year after the transfer or obligation may reasonably have been discovered (O.R.S. § 95.280).

There are no statutory provisions for recovery of preferences by a receiver.

Assumption or Rejection of Executory Contracts and Unexpired Leases

A debtor is typically party to executory contracts and unexpired leases as part of its ongoing business. A receiver should assess the value of the contracts and leases and determine those that are beneficial and those that carry greater liabilities to the estate. The Oregon Receivership Code (ORC) expressly addresses assumption, rejection, and assignment of executory contracts.

The ORC defines **executory contract** to mean:

- A contract, including an unexpired lease, where the obligations of both parties remain unperformed so that failure to complete performance constitutes a material breach excusing the performance of the other.
- A contract, including an unexpired lease, where a party has an unexercised option to require its counterparty to perform.

(O.R.S. § 37.030(6).)

With court approval, a receiver may:

- Assume any of the debtor's executory contract.
- Reject any of the debtor's executory contract on 14-days' notice.

(O.R.S. § 37.240(1).)

Performance of an executory contract does not constitute an assumption of the contract or an agreement by the receiver to assume it, nor does it preclude the receiver from rejecting it (O.R.S. § 37.240(1)).

The court may condition assumption or rejection of any executory contract on terms and conditions that the court deems just and proper, however:

- If a receiver assumes an executory contract, the receiver must assume the contract in its entirety (O.R.S. § 37.240(2)).
- A rejection of an executory contract is treated as a breach of the contract occurring immediately before the receiver's appointment and the receiver's right to possess or use property under the executory contract terminates on rejection of the contract (O.R.S. § 37.240(3)). The other party to a rejected executory contract may take any necessary steps to terminate or cancel the contract.

Any claims resulting from a receiver's rejection of an executory contract must be submitted to the receiver within 30 days after the rejection (O.R.S. § 37.240(3)).

If the receiver rejects an executory contract for the sale of real property where the owner is the seller and the purchaser is in possession, the sale of a real property timeshare interest where the owner is the seller, the license of intellectual property rights where the owner is the licensor, or the lease of real property where the owner is the lessor, then the counterparty to the agreement may:

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- Treat the rejection as a termination of the contract, license, agreement, or lease.
- Elect to treat rejection of an executory contract as a termination and hold a lien against the real property for the portion of the purchase price that the purchaser paid.
- Remain in possession and continue to perform all obligations arising under the contract but offset any damages from rejection against any payments. However, the counterparty has no claim or rights against the receiver for any damages arising from the receiver's rejection

(O.R.S. § 37.240(7).)

A receiver may assume an executory contract even if the contract provides that appointment of a receiver is a breach of the contract (O.R.S. § 37.240(4)). However, a receiver may not assume a debtor's executory contract without the consent of the other party to the contract if:

- Applicable law excuses the other party from accepting performance from or rendering performance to anyone other than the debtor even in the absence of any provisions in the contract expressly restricting or prohibiting an assignment of rights or duties.
- The contract:
  - makes a loan or extends credit or financial accommodations to or for the debtor's benefit; or
  - issues a security of the debtor.
- The contract expires by its own terms or under applicable law before the receiver's assumption.

(O.R.S. § 37.240(5).)

A receiver may not assign an executory lease without assuming it unless the receiver obtains consent from all other parties to the lease (O.R.S. § 37.240(6)).

If a receiver does not seek authorization from the court to assume an executory contract within 180 days after the receiver's appointment, the receiver is deemed to have rejected the contract (O.R.S. § 37.240(8)).

Creditor Claims

15. What is the procedure for notifying creditors of their rights to file claims in your jurisdiction? Please explain all notice requirements, including proof of claim requirements and deadlines. List all applicable statutes.

Notice

The Oregon Receivership Code (ORC) permits the receiver to give notice of a claim bar date in asset cases after having provided the initial notice of the receivership to interested persons, which occurs within 30 days after appointment (O.R.S. § 37.210).

In a liquidation under the ORC, the receiver is not required to provide notice and a claims process when there are insufficient funds to provide a distribution to creditors. In this case, the receiver may choose to notify creditors that there is no claims process (O.R.S. § 37.340(2)).

If the receiver determines that the estate has sufficient funds to provide distributions to creditors, the receiver must establish a claims process by sending a written document describing a claims process, including relevant dates and deadlines, to all known creditors (O.R.S. § 37.340(1)).

In a liquidating receivership under Or. R. Civ. P. 80, the order appointing the receiver must include a claims-bar deadline (Or. R. Civ. P. 80(D)(3)).

Claims Process

Under the ORC, the receiver has flexibility to set the form and procedure of the claims process (O.R.S. § 37.340(1)). If the receiver does not prescribe a form or specify the required contents of a claim, claims must be in written form and:

- Include the name and address of the claimant.
- Describe the nature and amount of the claim.
- Be signed by the claimant or the claimant's agent.
- Include any other information required by the receiver.

(O.R.S. § 37.350(4).)

Claims may only be submitted after a claims process is established and claims must be delivered to the receiver and not filed with the court (O.R.S. §§ 37.350(1) and (5)). Claimants must submit their claims according to the following deadlines:

- Within 30 days after the claims process is established.
- Within 30 days from rejection of an executory contract for claims arising from the rejection of an executory contract.
- Within 180 days after the claims process is established for claims by state agencies.

The court may shorten or extend any of the deadlines (O.R.S. § 37.350(3)).

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Receiverships: Oregon

All unsecured claims that arose before the receiver was appointed must be submitted to participate in any distribution, regardless of whether the claim is contingent, liquidated, unliquidated, or disputed (O.R.S. § 37.350(2)).

A claim executed and submitted that follows the requirements of the ORC or the receiver's notice constitutes prima facie evidence of the validity and amount of the claim (O.R.S. § 37.350(6)).

16. Please explain the process for determining allowance and disallowance of claims in your jurisdiction, including the power and authority of the court regarding the process.

In Oregon, at any time before court approval of the receiver's final report, the receiver may disallow a claim on 21-days' notice and a court order. The receiver's notice must contain the grounds for disallowance. (O.R.S. § 37.360(1)(a)).

At any time before the court approved the receiver's final report, any interested person may also object to a claim. The objector must mail a copy of the objection, together with a notice of hearing, to the receiver and claimant at least 21 days before the hearing. The court must then hear the objection and enter an order allowing or disallowing the claim (O.R.S. § 37.360(1)(b)).

On a receiver's or creditor's request or on order of the court, an objection is subject to mediation before adjudication of the objection. However, claims by the state are not subject to mediation unless the state consents to mediation (O.R.S. § 37.360(2)).

For claims allowance purposes, on a receiver's motion or a motion of any interested person, the receiver may estimate any:

- Contingent or unliquidated claim, which when fixed or liquidated unduly delays the administration of the receivership.
- Right to payment arising from a right to an equitable remedy.

(O.R.S. § 37.360(3).)

The court determines the process for objecting to and allowing claims in cases that are not subject to the Oregon Receivership Code (Or. R. Civ. P. 80).

17. Please explain the priority scheme for the payment of creditors' claims in your jurisdiction and the applicable statutes.

In Oregon, allowed claims in a receivership must receive distribution according to the order of priority under the Oregon Receivership Code (ORC). The Priority of claims is as follows:

- First, allowable unpaid costs and expenses incurred in preserving secured property (recoverable from the secured property).
- Second, claims of creditors with liens on estate property that are duly perfected under applicable law. These creditors receive the proceeds from the disposition of their collateral and their claims must be paid from the proceeds according to their respective priorities under applicable law.
- Third, actual, necessary costs, and expenses incurred during the administration of the estate. This includes the allowed fees and reimbursement of the receiver and its professionals. Expenses incurred during the administration of the estate have priority over the secured claim of any creditor obtaining the appointment of the receiver.
- Fourth, certain claims of the federal government.
- Fifth, claims of creditors with liens on estate property that are not required to be perfected under applicable law. These creditors receive the proceeds of the disposition of their collateral.
- Sixth, claims of creditors with liens on estate property that have not been duly perfected under applicable law. These creditors receive the proceeds from the disposition of their collateral to the extent that unsecured claims are made subject to those liens under applicable law.
- Seventh, claims for wages, salaries, or commissions, including vacation, severance, and sick leave pay, or contributions to an employee benefit plan up to the aggregate amount of $12,850 for each claimant, earned by the claimant within 180 days of the earlier of the receiver's appointment and the cessation of the estate's business.
- Eighth, unsecured claims of individuals up to the amount of $2,850 for each claimant, arising from any deposit (before receivership) for the purchase, lease, or rental of property or the purchase of services for personal, family, or household use that were not delivered or provided.
- Ninth, claims for a spousal support debt or child support debt, except if the debt:
  - is assigned to another entity, voluntarily, by operation of law, or otherwise; or
  - includes a liability designated as a support obligation.

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- Tenth, unsecured claims of state governmental units for taxes that accrued before the receiver's appointment.
- Eleventh, other unsecured claims.
- Twelfth, interests of the owner.

(O.R.S. § 37.370(1).)

If the proceeds from the disposition of collateral securing an allowed secured claim are less than the amount of the claim or a creditor's lien is avoided on any basis, the creditor holds an unsecured claim in the amount of the deficiency (O.R.S. § 37.370(1)).

Except for claims of perfected secured creditors and certain claims of the federal government, claimants receive distributions on a pro rata basis (O.R.S. § 37.370(2)).

The ORC permits the receiver to pay claims without a court order setting the priority of claimants (O.R.S. § 37.180(1)). However, in practice, a prudent receiver obtains a court order regardless to avoid a later dispute.

Compensation of Receiver and Professionals

18. Please explain how receivers are compensated in your jurisdiction, including:

- Whether there is a statutory or state law threshold compensation fee for receiver.
- Whether court approval is required for compensation.
- Whether parties must receive notice.

In Oregon, there is no statutory scheme or threshold for compensation of a receiver or its professionals. The case law provides that a receiver's fees must be reasonable (*U.S. Inv. Corp. v. Portland Hosp.*, 40 Or. 523, 525 (1902)).

In the case of a receivership proceeding under Or. R. Civ. P. 80, the court determines and enters order regarding the fees and costs paid to the receiver and its professionals on the termination of the receivership (Or. R. Civ. P. 80(G)).

In the case of a receivership proceeding under the Oregon Commercial Code (ORC), the receiver may compensate itself as the case progresses from available funds without further court approval if the order appointing the receiver permits (O.R.S. § 37.110(1)(n)). However, the receiver must provide a statement of its fees and expenses in the receiver's required monthly reports (O.R.S. § 37.200(2)(g)).

To avoid later dispute, the party seeking appointment of a receiver should outline the method and means of the receiver's compensation in the proposed order appointing the receiver. A receiver's compensation should accord with the realities of the estate. For example, receivers may be compensated on an hourly basis, on a set percentage of the liquidated assets, or a blend of the two.

The ORC permits the receiver to be paid third in priority in any distribution from the estate's assets, except that a receiver may obtain payment of its costs and expenses necessary to preserve or dispose of collateral directly from the proceeds of the collateral. (O.R.S. §§ 37.370 and 37.270).

19. What professionals are receivers permitted to retain in your jurisdiction? Please explain how a receiver's professionals are compensated.

In Oregon, a receiver may engage and pay compensation of professionals if the order appointing the receiver permits (O.R.S. § 37.110(1)(h)). The receiver must provide notice of the intent to hire a professional that includes:

- The professional's identity and qualifications.
- The proposed engagement's nature and scope.
- Any potential conflict of interest.
- The proposed compensation.

(O.R.S. § 37.310(2).)

After providing notice and resolving any objections, the receiver may employ attorneys, accountants, appraisers, brokers, real estate licensees, auctioneers, or any other professional to represent or assist the receiver in carrying out its duties (O.R.S. § 37.310).

Except if authorized by the court, a receiver may not employ a professional that holds or represents an interest adverse to the estate (O.R.S. § 37.310(4)). However, a professional is not disqualified solely because of the professional's employment by, representation of, or other relationship with a creditor or other interested person, provided the relationship is disclosed in the notice of the professional's employment (O.R.S. § 37.310(4)).

After giving notice, the receiver may make payments to professionals for services rendered to the receiver. The notice must include an itemized billing statement indicating:

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- The time spent.
- Billing rates of all persons that performed work to be compensated.
- A detailed list of expenses.

(O.R.S. § 37.310(6).)

The receiver itself may act as attorney or accountant if it is in the best interests of the estate (O.R.S. § 37.310(5)).

Closing the Receivership

20. What is the process for closing a receivership proceeding in your jurisdiction? Where a court order is required, please explain the key provisions of an order closing the case.

In Oregon, to terminate a receivership, the parties or the court must file a motion seeking to end the receivership (Or. R. Civ. P. 80(B); O.R.S. § 37.180(1)(h); O.R.S. § 37.410(1)).

Under the Oregon Receivership Code (ORC), a receivership may be terminated:

- On distribution or disposition of all estate property.
- The completion of the receiver's duties regarding estate property;
- For other good cause.

(O.R.S. §37.410(1).)

If any of the above conditions exist, the receiver must move the court for an order discharging the receiver (O.R.S. §37.410(1)). The motion must include a final report and accounting including:

- A list of estate property received during the receivership.
- A list of disbursements, including payments to the receiver's professionals.
- A list of dispositions of receivership property.
- A list of distributions made or proposed to be made from the estate for creditor claims.
- If not filed separately, a request for approval of the payment of the receiver's fees and expenses
- Any other information required by the court.

(O.R.S. §37.410(2).)

If the court approves the final report and accounting, the court must discharge the receiver (O.R.S. § 37.410(3)). The court may also issue an order exonerating the receiver's bond or alternative security (O.R.S. § 37.410(3)).

The receiver's discharge under the ORC:

- Releases the receiver from any further duties and responsibilities under the ORC
- Releases the receiver and any persons acting on behalf of the receiver from all further liability related to administering the estate property.

(O.R.S. § 37.410(4).)

The party seeking termination must give at least 14-days' notice (O.R.S. § 37.170(2)).

If a party seeking to appoint a receiver invokes Rule 80 of the Oregon Rules of Civil Procedure (ORCP), such as in an order to show cause, a receivership may be terminated only on a motion served with at least ten-days' notice on all parties appearing in the proceeding (Or. R. Civ. P. 80(G)). The court may:

- Require that the receiver file and serve a final account and report.
- Allow written objections to the receiver's account within a specified time.

(Or. R. Civ. P. 80(G).)

At the hearing on the motion to terminate, the court must:

- Hear all objections to the final account.
- Take evidence, as appropriate.
- Make orders concerning the termination of the receivership, including all necessary orders on the fees and costs of the receivership.

(Or. R. Civ. P. 80(G).)

When proceeding to commence and terminate a receivership, counsel should be aware of the differences between the provisions of the ORC and Rule 80 of ORCP to ensure compliance.

21. Is there a process in your jurisdiction for dissolving the receive company after the receivership concludes?

In Oregon, there is no statutory process for dissolving a debtor company after the receivership concludes.

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Parties wishing to dissolve an entity after the conclusion of a receivership should follow the standard statutory processes, as applicable, contained in:

- O.R.S. Chapter 60 (corporations).
- O.R.S. Chapter 63 (limited liability companies).
- O.R.S. Chapter 67 (partnerships).

Jurisdiction and Power of the Court

22. What statutes, if any, confer powers on the court relating to the receivership, receiver, and creditors in your jurisdiction? Please explain those powers.

In Oregon, the court has the power to appoint a receiver and the appointing court has:

- Exclusive authority over the receiver.
- Exclusive jurisdiction to control all real property, tangible, and intangible personal property constituting the estate, wherever located.
- Exclusive jurisdiction to determine all controversies relating to the collection, preservation, application, and distribution of the estate.
- Exclusive jurisdiction to determine all claims against the receiver arising out of the exercise of the receiver's powers or the performance of the receiver's duties.

(O.R.S. §37.100(1).)

However, if any part of the estate is subject to the jurisdiction of another court in a domestic relations matter, the court appointing the receiver may not exercise authority over the property subject to the jurisdiction of the domestic relations court unless expressly permitted by order of that court (O.R.S. §37.100(2)).

23. What responsibilities does the clerk of court in your jurisdiction have in relation to maintaining the records of the receivership?

In Oregon, the Oregon Receivership Code provides that it is generally the responsibility of the receiver to prepare and retain appropriate business records, including records of all cash receipts, disbursements, and dispositions of receivership property (O.R.S. § 37.200 (setting out the requirements for the receiver's monthly reports)).

The clerk of the court must also secure any bond or alternative security until the receiver completes its duties or otherwise authorized by the court (O.R.S. § 37.090(2)).

Bankruptcy Considerations

24. May a receiver commence a bankruptcy proceeding in your jurisdiction?

In Oregon, there is no statutory guidance or caselaw regarding a receiver's authority to file a bankruptcy case under Title 11 of the US Code. The power to initiate a bankruptcy proceeding is not included in the express list of powers in O.R.S. § 37.110 that may be conferred on a receiver in the court order appointing the receiver. However, the list is not exclusive and the power to take any act reasonably necessary to avoid injustice may be conferred on the receiver by the court order (O.R.S. §37.3110(1)(s)). If not included in the order, a receiver seeking to file a bankruptcy case should seek specific court approval.

25. If an involuntary petition is filed during the course of the receivership in your jurisdiction, what action, if any, must the receiver take?

There is no express rule or statutory authority in Oregon regarding the receiver's duties when an involuntary bankruptcy petition is filed during the course of the receivership.

An involuntary bankruptcy case may generally be filed by three creditors holding at least $18,600 in liquidated unsecured claims, not subject to a bona fide dispute if they can show that the debtor is generally not paying its debts (§ 303(b)(1), (2), Bankruptcy Code; see Practice Note, The Involuntary Bankruptcy Process).

An order appointing a receiver does not operate as a stay to the commencement of a bankruptcy case under federal bankruptcy laws.

If creditors file an involuntary petition during the receivership:

- The receiver must preserve and protect the assets of the receivership estate (§ 543(a), Bankruptcy Code).
- Unless otherwise ordered by the bankruptcy court, the receiver must turn over property of the receivership estate to the bankruptcy trustee (§ 543(b), Bankruptcy Code).

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- The bankruptcy court may permit the receiver to continue to administer the debtor's assets if appointed or in possession of the assets more than 120 days before the bankruptcy, unless the assets must be returned to prevent fraud or injustice (§ 543(d), Bankruptcy Code). However, even if the receiver is appointed less than 120 days before bankruptcy, the bankruptcy court may exercise discretion in rare cases and allow the receiver, instead of the bankruptcy trustee, to administer the assets if:
  - it is in the best interest of the creditors; and,
  - the debtor is solvent, it is the best interest of equity holders.

(11 U.S.C. § 543(d).)

26. May a receiver challenge an involuntary bankruptcy proceeding in your jurisdiction? Please explain.

In Oregon, there is no specific statutory authority giving receivers authority to object to an involuntary bankruptcy petition. However, if the receiver has the power under the Oregon Receivership Code to assert any of the debtor's right relating to estate property, it likely has the authority to object to an involuntary bankruptcy petition (O.R.S. § 37.110(1)(e) (power to assert the debtor's right may be conferred on receiver by court order)).

A bankruptcy court may:

- Dismiss an involuntary bankruptcy proceeding on certain circumstances including the consent of the petitioner and the debtor (§ 303(j), Bankruptcy Code).
- Dismiss or abstain from hearing a bankruptcy case if it is in the best interest of creditors depending on the facts and circumstances of the case and the length of time that a receiver has been in place (§ 305(a)(1), Bankruptcy Code).

Other Topics

27. Are there any statutes or case law in your jurisdiction that would prevent a business directly engaged in cannabis business (i.e. cultivators, dispensaries), or a business that provides ancillary services to a cannabis business (i.e. commercial landlords), from being placed into a receivership? If yes, please list and explain the statutes.

Cannabis and marijuana are legal in Oregon for recreational use and Oregon's administrative rules permit a receiver to operate a licensed cannabis business (O.A.R. 845-025-1260). The receiver may obtain temporary authority to operate a licensed cannabis business "for a reasonable period to allow orderly disposition of the business" (O.A.R. 845-025-1260(1)).

The receiver of a licenses cannabis or marijuana business must provide the licensing commission with:

- Proof that the person is the legal receiver for the business.
- A written request for authority to operate receiver, listing the address and telephone number of the receiver.

(O.A.R. 845-025-1260(1)(a).)

The licensing commission may revoke or refuse to issue or extend authority for the receiver to operate the business:

- If the receiver does not propose to operate the business immediately or does not begin to operate the business immediately on receiving the temporary authority.
- For any of the reasons that the commission may ordinarily revoke or refuse to issue or renew a license.
- If the receiver operates the business in violation of any Oregon law or regulation governing legal cannabis.
- If a reasonable time for disposition of the business elapsed.

(O.A.R. 845-025-1260(2).)

The receiver may not operate the business until the licensing commission issues a certificate of authority. A certificate of authority is initially issued for a 60-day period and may be extended as reasonably necessary to allow for the disposition of the business (O.A.R. 845-025-1260(3) and (4)).

28. If the receivership statutes in your jurisdiction are unique in aspects not covered by the questions in this Q&A, please state so here.

The Oregon Receivership Code (ORC) was primarily prepared by a commission of judges, practitioners, and law professors convened to form the Oregon Law Commission Work Group (Work Group) in March 2016 (see Oregon Receivership Code Report of the Receivership Work Group on Senate Bill 899A (2017), pg. 1). The Work Group's mission was to amplify existing receivership

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Receiverships: Oregon

law, study the suitability for Oregon of a substantial set of receivership statutes, and, if suitable, prepare a draft bill for legislative introduction. The Work Group considered adopting the Uniform Commercial Real Estate Receivership Act (UCRERA) or adopting Washington's established receivership statutes, but ultimately set out to tailor an Oregon specific set of statutes.

The Work Group's result produced the ORC, which tracks language from statutes in other jurisdictions but is also unique to Oregon. One provision that initially drew criticism was the apparent breadth of the ORC's stay provision in O.R.S. § 37.220. By its terms, the stay applies to actions the debtor without any apparent limitation on the application of the section to the debtor's receivership estate property (O.R.S. § 37.220). The UCRERA, however, more clearly limits application of its stay provision to receivership property, which is defined as "the property of an owner which is described in the order appointing a receiver or a subsequent order" (UCRERA, § 2(16)). For this reason, the broader language in the ORC may prove problematic when construed to reach the debtor's property that is not part of the estate.

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Chapter 17

Oregon Law of Drainage and Flood Damage

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OREGON LAW OF DRAINAGE & FLOOD DAMAGE

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Oregon drainage law is largely derived from common law. Although statutes that address drainage and flood control issues do exist, *see* ORS Chapter 549, these statutes have historically not played any key role in drainage law cases. The provisions of ORS Chapter 549 have limited applicability, and when they do apply their operation is relatively straightforward. So the operation of that statute is not within the scope of this paper; instead, this paper will focus on the evolution of Oregon drainage law as a common law doctrine largely defined by the courts. Also, the author notes that cities and counties do regulate stormwater facilities, as do drainage districts, but are not addressed herein.

By the author's most recent count, there are roughly 75 Oregon-specific cases that address some aspect of the core common law drainage law concepts. They are listed at Appendix B. It is critical to read most- if not all - of this body of caselaw before analyzing a drainage case.

Unfortunately, Oregon's case law can be somewhat difficult to reconcile. At times, the courts have used language that later courts have questioned but not clarified or resolved. While it can be tempting to simply rely on the first good quote one stumbles upon that, when read in isolation, seems to support your client's position, this generally leads to poor results. Some isolated quotes need to be read with a grain of salt, which is to say that these quotes should not be read too far beyond the case's immediate factual context. Truly understanding these cases requires the practitioner to have a more holistic understanding of the doctrines and keen awareness of the terminology used by the courts. Each case should be carefully considered in its factual context. To accomplish this, the author recommends reviewing the appellate briefs associated with each case. Where possible, use Google Earth, USGS topographical maps, historical aerial photographs, and other resources to pinpoint the terrain and factual circumstances under which these cases arose.

I. Definitions.

While the terms used in drainage law may appear familiar, they can have different meanings in the legal context than one might expect. It is therefore necessary to define these terms before discussing the case law. Drainage law has traditionally evaluated the rights and liabilities of property owners concerning the discharge of water by classifying the water in question as 1) surface water, 2) water flowing within a natural watercourse, or 3) flood water. Consequently, one key to understanding this body of law is to understand how these terms are defined.

A. The Distinction between "Surface Water," "Watercourse" and "Floodwaters."

The first key concept to understanding the legal rights as between so-called "upstream" or "up-gradient" landowners and "downstream" or down-gradient" landowners is the distinction between "surface waters" and "natural watercourses."

There is a tendency to think of the term "surface water" in contrast to "groundwater." However, as used in drainage cases, the term "surface water" is primarily intended to be distinguished from water in a watercourse, and perhaps to a lesser extent, from floodwaters. Oregon courts have adopted the common definition of "surface water," as follows:

> "Surface water, we learn from *Price v. Oregon Railroad Co.*, 1906, 47 Or. 350, 358, 83 P. 843, 846, is that which is diffused over the surface of the ground, derived from falling rains or melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to, and does flow with other waters, whether derived from the surface or springs * * *." When this commingling is accomplished, it ceases to be surface water and becomes the running water of a stream. (Quotations omitted)

Wellman v. Kelley, 197 Or 553, 560, 252 P2d 816 (1953); *Price v. Oregon R. & Nav. Co.,* 47 Or 350, 83 P 843 (1906). *See also Street v. Ringsmyer*, 108 Or. 349, 351-2, 354, 216 P. 1017 (1923) (citing common definition and correctly noting that water caused to be diverted away from natural channels by artificial means such as a ditch is not "surface water."); *Whitney v. Willamette Bridge RY. Co.,* 23 Or 188, 31 P 472 (1892) (artificial gulch is not a watercourse).[1]

In contrast, Oregon case law defines a "natural watercourse" as a current of water in a channel, as a living stream with reasonably defined banks. *See Hanson v. Crouch,* 98 Or 141, 145-6, 193 P 454 (1920*); Fitzstephens v. Watson*, 218 Or. 185, 344 P.2d 221 (1959); *Levene v. City of Salem*, 191 Or. 182, 229 P.2d 255 (1951). A natural watercourse has a definite and at least periodic source of water supply, but there need not necessarily be a flow of water in its channel at all times. *Wellman v. Kelley*, 197 Or 553, 252 P.2d 816 (1953). A watercourse must have a perceptible current during periods when the water is flowing. *Hough v. Porter,* 51 Or 318, 95 P 732 (1908), *supp op,* 51 Or 318, 379-81, 98 P 1083, *rehg denied,* 51 Or 445, 102 P 728; *Simmons v. Winters*, 21 Or 35, 39-41 27 P 7 (1891). Thus, a natural watercourse may be as large as a river, stream, or creek, or as small as a or swale or gully where water has caused erosion that leads to the formation of a bed and bank.

Water that escapes from the confines of the bank of a watercourse during times of heavy rains is generally considered to be "floodwaters," and not surface waters. Once water has found its

[1] *See also Locklin v. City of Lafayette*, 7 Cal. 4th 327, 345, 867 P.2d 724, 736 (1994); *San Gabriel V.C.C. v. Los Angeles County*, 182 Cal. 392, 398, 188 P. 554 (1920)("[Surface waters] in the legal sense are those which fall on the land by precipitation from the skies or arise in springs and spread over the surface of the ground without being collected into a definite body."); *Le Brun v. Richards*, 210 Cal. 308, 315, 291 P. 825, 829 (1930) ("[S]urface waters are those which are produced by rainfall, melting snow, or springs, and which in the case of the two first mentioned sources are precipitated, and in the case of the last-mentioned source, rise upon the land.").

way into a watercourse, it can only become "surface water" again in a somewhat rare circumstance, highlighted below in a quote from *Price v. Oregon R. & Nav. Co.,* 47 Or 350, 83 P 843 (1906):

> As said in *Crawford v. Rambo, supra*: "It is difficult to see upon what principle the flood waters of a river can be likened to surface water. When it is said that a river is out of its banks, no more is implied than that its volume then exceeds what it ordinarily is. Whether high or low the entire volume at any one time constitutes the water of the river at such time; and the land over which its current flows must be regarded as its channel, so that, when swollen by rains and melting snows it extends and flows over the bottoms along its course, that is its flood channel, as when, by droughts, it is reduced to its minimum, it is then in its low-water channel." If in times of flood any part of the waters of a stream become separated or disassociated from the main body and spreads out over the adjoining country without following any definite water course, or channel, it ceases to be a part of the stream and may be regarded as surface water. *N.Y. & St.L.R. Co. v. Speelman*, 12 Ind.App. 372, 40 N.E. 541; *New York, etc., R. Co. v. Hamlet Hay Co*., 149 Ind. 344, 47 N.E. 1060, 49 N.E. 269. But, so long as the waters form one continuous body, flowing in the ordinary course of the stream and returning to the natural channel as they recede, they are, properly speaking, waters of a water course, although not confined to the banks of the stream. This question has been ably and exhaustively considered, in his usual clear and masterful manner, by Mr. Justice Lumpkin, in *O'Connell v. East Tenn. Ry. Co*., 87 Ga. 246, 13 S.E. 489, 13 L.R.A. 394, 27 Am.St.Rep. 246, and his conclusion is that whether the flood waters of a stream are to be deemed as part of the stream or mere surface water depends upon the configuration of the country and the relative position of the water after it has gone beyond the usual channel.
>
> "If the flood water," he says, "becomes severed from the main current, or leaves the stream never to return, and spreads out over the lower ground, it has become surface water. But, if it forms a continuous body with the water flowing in the ordinary channel, or if it departs from such channel animo revertendi, presently to return, as by the recession of the waters, it is to be regarded as still a part of the river. The identity of a river does not depend upon the volume of water which may happen to flow down its course at any particular season. The authorities hold that a stream may be wholly dry at times without losing the character of a water course. So, on the other hand, it may have a 'flood channel' to retain the surplus waters until they can be discharged by the natural flow." And this is the doctrine of the authorities generally. 30 Am. & Eng.Enc.Law (2d Ed.) 324; 3 Farnham, Waters, § 879; *Jones v. Seaboard Air*

> *Line R. Co*., 67 S.C. 181, 45 S.E. 188; *Byrne v. Minn.* & St.L.Ry. Co., 38 Minn. 212, 36 N.W. 339, 8 Am.St.Rep. 668; *Chicago, Burlington & Quincy R. Co. v. Emmert*, 53 Neb. 237, 73 N.W. 540, 68 Am.St.Rep. 602; *New York, etc., R. Co. v. Hamlet Hay Co*., 149 Ind. 344, 47 N.E. 1060, 49 N.E. 269; *New York, etc., R. Co. v. Speelman*, 12 Ind.App. 372, 40 N.E. 541. There is no contention in this case that the waters which caused the injury to the plaintiff were not flowing in one continuous body, following the course of the ordinary channel of Hale creek, and they were therefore to be regarded as a part of the stream, and not as surface waters. (Emphasis added).

Id. at 358–60. *See also Eastern Oregon Land Co. v. Willow River Land & Irr. Co*., 201 F 203 (9th Cir 1912) (floodwaters which eventually return to the ordinary channel are still part of the natural stream).

B. Meaning of the Terms "Divert" and "Diversion."

As will be discussed below, one of the cardinal sins of drainage law is to "divert" water from one drainage "basin" to another. In *Vandehey v. Wheeler*, 13 Or App 25, 499 P2d 1319 (1972), *op. withdrawn by* 13 Or Ap 25, 507 P2d 831 (1973), the Oregon Court of Appeals defined what is meant by the phrase "diverting water":

> Water is 'diverted' when its flow is turned from the course it would otherwise follow. Thus, water can be diverted from one natural watercourse to another natural watercourse, *See, Brattain v. Conn,* 50 Or 156, 91 P 458 (1907), or from one artificial water conduit to another artificial water conduit. The most common use of the term, however, is when water is diverted from a natural watercourse to an artificial conduit. See, *Boyce v. Killip,* 184 Or. 424, 198 P.2d 613 (1948);" *State ex rel. Johnson v. Stewart*, 163 Or. 585, 96 P.2d 220 (1940); *In Re North Powder River*, 75 Or. 83, 144 P. 485, 146 P. 475 (1915).

Id. at 32–33. Thus, a drainage basin is, as a practical matter, defined by gravity. Practitioners should understand that when analyzing cases, the term "basin" does not suggest any particular size. A single urban residential lot may drain into two or more basins. But the term may also be used to describe a drainage area encompassing hundreds or even thousands of acres.

C. Differentiating Between Different Types of Flood Waters.

As mentioned above, diffuse waters occurring on the surface of land are no longer recognized as "surface waters" once they have become part of a stream in a watercourse. *Price v. Oregon R. & Nav. Co.,* 47 Or 350, 358-59, 83 P 843 (1906); *Morton v. Oregon Short Line Ry. Co*., 48 Or 444, 87 P 151 (1906), *on recons.* 87 P. 1046 (1906). Such waters typically do not regain their legal treatment as "surface waters" if they escape the confines of a watercourse. *Price*, 47 Or at 358–59. Rather, when streams or rivers and similar watercourses overflow, the water that escapes the boundaries of the watercourse is known as "flood water," not "surface water" or water

flowing within a "natural watercourse." *Id*. It is critical to understand that key distinction when analyzing a case.

Oregon law recognizes a distinction between "ordinary" floods and "extraordinary" floods. *Allen v. K. P. Timber Co.,*152 Or 176, 53 P.2d 29. *Wellman v. Kelley,* 197 Or 553, 252 P2d 816 (1953). The distinction is required for the application of the "act of God" defense, which is an often-used but rarely successful shield to liabilities.

1. Ordinary Flood Waters

An ordinary flood is one which occurs "annually, or at certain seasons, or at other regular intervals, and which are not of unprecedented magnitude." 78 Am Jur 2d § 224. For example, in *Wimmer v. Compton*, 277 Or 313, 560 P2d 626 (1977), the Court stated:

> "Where, in times of flood, any part of a stream or water course which becomes separated from the main body flows an ordinary and consistent course and returns to the natural channel as it recedes, such flooding must be ordinary as opposed to extraordinary flooding. Ordinary flooding is that which occurs annually or at certain seasons or other regular intervals, which is not of unprecedented magnitude, and which is generally regarded as ordinary. *Wellman et ux. v. Kelley and Harrison,* 197 Or. 553, 252 P.2d 816 (1953); *Schweiger et ux. v. Solbeck et ux.,* 191 Or. 454, 230 P.2d 195, 29 A.L.R.2d 435 (1951); *Price v. Oregon Railroad Co.,* 47 Or. 350, 83 P. 843 (1906)."

Id. at 318. An example of a flood that was not considered to be "extraordinary" is found in *Schweiger v. Solbeck*, 191 Or 454, 230 P2d 195 (1951):

> "Taking into consideration the heavy rainfall which is normal in the area involved in this case, it is impossible to conclude from the evidence that that which immediately preceded the disaster was at all extraordinary. It was a heavy rain, but not of unprecedented proportions. In its occurrence and magnitude, it might have been anticipated by a person of reasonable prudence. * * *"

2. Extraordinary Flood Waters

In both *Schweiger v. Solbeck*, 191 Or 454, 464, 230 P2d 195 (1951) and *Wellman v. Kelley*, 197 Or 553, 252 P2d 816 (1953), the court gave a definition to "extraordinary flood waters," by stating:

> "* * * An extraordinary flood is one 'whose comings are not foreshadowed by the usual course of nature, and whose magnitude and destructiveness could not have been anticipated or provided against by the exercise of ordinary foresight.' 13 Am. & Eng. Enc. Law, 2d ed., p. 687; *Town of Jefferson v. Hicks*, 23 Okl. 684, 102 P.

> 79, 24 L.R.A.N.S., 214, 218. *See also Allen v. K. P. Timber Co.,* 152 Or. 176, 181, 53 P.2d 29."

Wellman, 197 Or at 560. In *Allen v. K. P. Timber Co.,* 152 Or 176, 53 P2d 29 (1935), the court defined what it considered to be a flood which is "extraordinary" in magnitude:

> "Floods such as from climatic and geographical conditions may reasonably be expected, whether of frequent or infrequent occurrence, must be taken into consideration in estimating hazards attending the obstruction of water courses. The term 'act of God,' in its legal sense, applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them. And that rule must be regarded as the proper one. The Illinois court of appeals held that extraordinary floods are those not occurring annually. But the mere fact that a flood does not occur annually will not make it an extraordinary one, if, from the climatic conditions and the character of the country, it is likely to occur, and has been known to occur, with sufficient frequency to warn those living in the vicinity that it is likely to occur at any time. The question whether a flood is ordinary or extraordinary is in most cases for the jury." (Emphasis Added).

Id. at 181–82. The case of *Price v. Oregon R. & Nav. Co.,* 47 Or 350, 83 P 843 (1906) provides a rare example of a case that was submitted to the jury on the act of God defense. Another example where a jury found the floodwaters to be extraordinary in nature is found at *Nolan v. Martin Bros. Cont. & Timber Prod. Corp*, 236 Or 631, 390 P2d 175 (1964).

II. Key Concepts of the Modified Civil Law Rule: Diversion, Collection, Acceleration.

With the definitions set forth above in mind, we can begin the discussion of Oregon law of drainage. Oregon has adopted a modified version of the "civil law rule" of drainage. *Wellman v. Kelley*, 197 Or 553, 563-66, 252 P2d 816 (1953) (citing cases).

1. The Civil Law Rule Explained.

We begin by discussing the "civil law rule" in its pure (i.e. unmodified) form. The pure form of the "civil law rule" is not the law in Oregon, but it is necessary to discuss in in order to gain an understanding of the modification.

This doctrine has its origins in Louisiana law. *See Orleans Navig. Co. v. Mayor of New Orleans,* 2 Mart (o.s.) 214, 1 La. 73 (La Super 1812). In its purest form, the "civil law rule" gave the up-gradient landowner an easement or servitude over lower parcels which allowed him to discharge surface waters, without liability, as they naturally flowed from his higher land onto the lower land of another. *Whitney v. Willamette Bridge RY. Co.,* 23 Or 188, 31 P 472 (1892). *See, e.g., Le Brun v. Richards*, 210 Cal. 308, 291 P. 825 (1930). Under a pure form of the civil law rule, the up-gradient owner, however, was not permitted to gather the surface waters by artificial means and discharge them onto the lower land in greater volume or at a different location or in a different manner than they would have been discharged naturally. *See, e.g., San Gabriel V.C.C. v.*

Los Angeles County, 182 Cal. 392, 398, 188 P. 554 (1920). An up-stream riparian owner could not collect or gather surface waters and discharge them into a natural watercourse at a location or locations other than those where natural runoff would normally have occurred, even if that watercourse was incapable of accommodating the increased flow of water. *See, e.g*., *Deckert v. County of Riverside*, 115 Cal. App. 3d 885, 171 Cal. Rptr. 865 (1981).

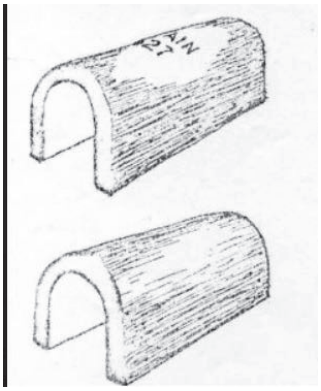
Stated another way, the pure form of the civil law rule provides that the downstream landowner must accept the "surface water" and water in "natural watercourses" that drain naturally onto his land, but the upper landowner can do nothing to change the natural system of drainage so as to increase the natural burden. *See Annotation, Modern Status of Rules Governing Interference with Surface Waters*, 93 A.L.R.3D 1193, 1218 (1997).

In *Harbison v. Hillsboro*, 103 Or 257, 271, 204 P 613 (1922), the court articulated the following reason for the rule:

> "The reason, or the theory, of this rule is based upon nature itself, or, in other words, nature has ordained that surface waters should follow the natural slope or contour of the earth's surface, and the civil law has adopted that rule because it is the natural one. Smurr on Farm Drainage, §§ 4, 5; *Kauffman v. Griesemer*, 26 Pa 407, 67 Am.Dec. 437, 440."

Id. at 272.

Under the purest form of the civil law rule, drainage easements for natural flows are recognized by operation of law. These easements, which are located at points of natural drainage, ensure that the upper landowner has the right to allow water naturally draining from his land to cross the lower landowner's property. *Rehfuss v. Weeks*, 93 Or 25, 33, 182 P 137 (1919). Note, again, that the civil law rule approaches the issue of drainage from a property law standpoint, as opposed to a tort law approach. The fact that the civil law rule is grounded in property law should not be overlooked, as it is relevant to any takings analysis stemming from flood damage.



The obvious downside of the pure form of the civil law rule is that it does not favor the development of land. For this reason, most jurisdictions that follow this doctrine have modified it by incorporating the right to "accelerate" natural drainage via the use of ditches and drain pipes, etc. Older cases refer to pipes as "tiles," due to the clay pipe technology employed at the time. (See photo at right).

2. Diversion of Water vs Acceleration of Water.

Like most states that use the civil law rule, Oregon has adopted a modification known as the "acceleration" principle. *See Garbarino v. Van Cleave,* 214 Or 54, 330 P2d 28 (1958); *Harbison v. Hillsboro*, 103 Or 257, 271, 204 P 613 (1922); *Rehfuss v. Weeks*, 93 Or 25, 33, 182 P 137 (1919); *Whitney v. Willamette Bridge Ry. Co*., 23 Or 188, 31 P 472 (1892). Under this principle, the upper landowner may, subject to a "reasonableness" limitation discussed below, make use of manmade features such as pipes, drainage ditches, tiles, and drains to rid his land of

surface water, even though such actions increase the rapidity with which water will collect and discharge *into natural drainage channels* which drain onto and/or traverse across the lower property.

This principle is expressed without its moniker in the following oft-cited passage from the treatise "Smurr on Farm Drainage" is quoted as a summary of the modified "civil rule:"

> "Under the rule of the civil law, which has found favor in most of the common- law courts of England and of this country, where two fields adjoin and one is lower than the other, as between the owners of such adjacent lands, the owner of the lower ground has no right to erect embankments or to do anything that will stop the natural flow of water thereto from the upper land, nor anything that will cast it back upon the land above; such lower field being necessarily subject to all the natural flow of water from the upper field. That is, the owner of the higher tract of land has the right to have the surface water flowing or coming naturally upon his premises by rains or melting snows pass off the same through the natural channels upon or over the lower or servient estate, and the owner of the dominant heritage may make such drains and ditches for agricultural purposes on his own lands as may be required by good husbandry, although by so doing the flow of water may be increased in the natural channels which carry the water from the upper to the lower fields; and no one has the right to complain that the volume of water in its natural channels is increased by the artificial drainage of lands which naturally drain therein." (Emphasis Added).

Smurr on Farm Drainage § 3, *quoted in Harbison*, 103 Or at 272.

The "acceleration" rule is perhaps the least understood principle of drainage law, because people often confuse an increase in *velocity* or *rapidity*, which is (within limits) legally permissible, with increases in water *quantity*, which is not. Simply put, increasing the *velocity* of water flow is not "increasing" the *quantity* of water. Engineers will measure the time required for runoff to travel from the hydraulically most distant point in the watershed to the outlet. This is referred to as the "Time of concentration" or (Tc). The hydraulically most distant point is the point with the longest travel time to the watershed outlet, and not necessarily the point with the longest flow distance to the outlet. Time of concentration is generally applied only to surface runoff and may be computed using many different methods.

As an example, consider a hypothetical wherein under natural conditions it takes a week for 100,000 gallons of water to percolate though the upper landowner's property, but the addition of drainage tiles or perforated pipes allows the same quantity of water to drain in two days. Under such conditions, the lower landowner may perceive an "increase" in the amount of water that passes across his drainage during those first two days. However, there is no legally recognizable "increase" in the quantity of water. Rather, there is simply an increased rapidity in which the water arrives and passes though the lower landowner's drainage channel. The lower landowner may not generally complain of such an "increase" unless it causes "unreasonable inconvenience." And the phrase "unreasonable inconvenience" should be taken with a grain of salt, especially in rural areas, as the following case makes clear.

To understand the acceleration principle, the facts of *Garbarino v. Van Cleave* are worth exploring in detail.[2] In 1953, the time of the flooding at issue, Ann Garbarino owned a farm that included land that had previously been the bottom of Lake Labish. This lake was drained in the early 20th century pursuant to the Federal Swamp Land Act of 1860. The lowland lake soils from Lake Labish were extremely rich dark to black loam. In fact, they were said to be amongst the richest soils in the Willamette Valley and were prized for growing onion and berries. In the briefs to the Oregon Supreme Court, the lands that comprise the lake bottom were referred to as "beaver-dam lands." Although the opinion does not mention this, by the 1950s, these beaver-dam lands were worth $1000 to $3000 an acre, making them the most valuable tillable land in Oregon by a considerable margin.



The Van Cleave property sits up-gradient of Ms. Garbarino's property. (Note: the "Van Cleave" property is currently owned by Pan American Berry Growers, 6826 55th Ave NE, Salem, OR 97305)[3]. In the fall of 1953, the Van Cleave family tiled their land in an effort to improve drainage. The Van Cleave family installed the tiles three to five feet deep, pursuant to the direction of soil conservation commission engineer. However, by the first rainy season after the tiles were installed, Ms. Garbarino's land began to flood.

[2] Some of the "facts" presented herein are not found in the opinion itself, but are rather found in the appellate briefs. General information about Lake Labish comes from: https://ndnhistoryresearch.com/2021/12/19/draining-lake-labish/

[3] Lat: 45° 0'58.34"N, Long: 122°56'35.34"W.



The tiles carried water in a northerly direction to two different locations. One of these locations was a drainage swale which had previously been an inlet of the former lake. This northerly swale drained surface water and shallow groundwater across Ms. Garbarino's valuable "beaver-dam lands." Further to the south, the tiles drained surface waters and shallow groundwater to a ditch located on the east side of a County Road [55th Ave NE], where the water was carried north until it eventually emptied out onto Ms. Garbarino's "beaver-dam lands."

Ms. Garbarino argued that under *Levene v. City of Salem*, the Van Cleave family was liable to her because it failed to "act reasonably not to damage the lower owner." However, *Levene* addressed, in part, the *diversion* of water from a natural channel, a key fact not present in Ms. Garbarino's case. Levene also involved the failure of the city to conduct what engineers refer to as a "downstream analysis," which is an evaluation of the carrying capacity of downstream pipes, ditches, and culverts. In finding against Ms. Garbarino, the Oregon Supreme Court noting that the modified civil law rule allows the up-gradient landowner to use natural drainage swales to rid its property of surface water.

Ms. Garbarinio also argued that ORS 549.110 provided a remedy for the Van Cleaves insomuch as it created a process for them to build a drainage ditch across Ms. Garbarino's land. Of course, that argument was self-serving since the "remedy" would have required the Van Cleave family to pay Ms. Garbarino damages for the loss of land as well as for a drainage right of way. The court found this to be inconsistent with the concept of a natural servitude. After all, why would someone be required to pay for something they already have by operation of law?

Garbarino v. Van Cleave gets cited by practitioners for all measure of things, many of which go far beyond the facts of the case. Some points that practitioners need to keep in mind when applying *Garbarino v. Van Cleave*:

- *Garbarino* is a case about surface waters, not the escape of water from a watercourse or the diversion of water.
- *Garbarino* does not apply to a situation where water is concentrated in one place, when it previously would naturally flow in a more diffuse form, or that a drainage channel was created where non previously existed.
- Ms. Garbarino was using the bottomland at the base of the natural drainage swales

as farmland, but the Van Cleave family has, by operation of law, a drainage easement over the natural place of drainage for natural and accelerated flows. It was unreasonable for Ms. Garbarino to think that she had a right to prevent those natural drainage swales to be used for their intended purpose.

- Ms. *Garbarino* did not do a good job proving causation, which is to say that she did not show that she would have not sustained the same damage in the absence of the accelerated flows. Her only evidence on this point is that her lands had not flooded prior to the installation of the tiles.

- An interesting application of *Garbarino* as it relates to immunity from liability for causing a landslide can be found at *Bazzaz v. Howe*, 262 Or App 519, 325 P3d 775 (2014), *rev den*, 356 Or 397 (2014).[4]

It is not clear why Ms. Garbarino's attorney did not advise her to install ditches on her own property to protect her valuable soils. In any event, the court correctly found that the Van Cleave family had a right to use drains to accelerate waters into natural drainage swales and ditches, and that the downstream owner's remedy was to improve the drainage and send the water further downstream.

The case of *Gibson v. Morris*, 270 Or App 348 P3d 1180 (2015) provides another good example of this last point. In that case, the installation of a dewatering system for a drainfield on the upper landowner's property caused the lower property owner's land to get soggy and muddy. The court held that the lower owner had no remedy, and, as a practical matter, had to accept that water and, if he so desired, build a French drain or certain drain to dry out his property.

The situation in *Garbarino* and *Gibson* stand in direct contrast to cases where water is "diverted." As previously mentioned, *supra*, the Oregon Court of Appeals defined what is meant by the phrase "diverting water:"

> Water is "diverted" when its flow is turned from the course it would otherwise follow. Thus, water can be diverted from one natural watercourse to another natural watercourse, *See, Brattain v. Conn*, 50 Or 156, 91 P 458 (1907), or from one artificial water conduit to another artificial water conduit. The most common use of the term, however, is when water is diverted from a natural watercourse to an artificial conduit.

Vandehey v. Wheeler, 13 Or App 25, 499 P2d 1319 (1972), *opinion withdrawn by* 13 Or App 25, 507 P2d 831 (1973). *See also Oregon Wash R. & N. Co. v. Reed*, 87 Or 398, 169 P342, *rehg. den*, 170 P 300 (1918). Diverting water can include an action as significant as rerouting an entire stream, or as minor as rerouting a roof downspout to a direction that the water would not have otherwise flowed. Sometimes this principle is stated in terms of "increasing" the amount of water. Water is most frequently "increased" when the upper landowner diverts channelized water from

[4] The landslide involved in the *Bazaz v. Howe* case is located at Lat: 45°23'47.00"N, Long: 122°39'30.58"W. For background on this case, See also: https://www.oregonlive.com/lake-oswego/2010/06/lake_oswego_family_that_lost_home_during_2009_landslide_sues_uphill_neighbor.html

one drainage basin to another.

There is a difference between using drainage pipes and tiles to increase the speed in which water reaches lower land within the same basin, versus rerouting water that would have normally flowed in a different basin. In *Whitney v. Willamette Bridge Ry Co*., 23 Or 188, 31 P 472 (1892), the Oregon Supreme Court recognized the rule that distinguished between natural drainage channels and artificial ones:

> A land owner has the right to divert[5] surface water that is coming upon his premises, and if he, in the ordinary course of the water's flow, causes the water to pass upon an adjoining proprietor, there is still no liability; but if the land owner collects surface water in ditches and artificial channels, and causes it in that manner to flow upon the land of an adjoining proprietor, and it does damage, he is responsible for damages thus caused. (Emphasis Added).

Id. at 190. The court restated the principle as follows:

> [A] land owner in improving his land may cause the surface water to flow upon an adjoining proprietor, and that when the water comes upon the premises of such land owner, he has the right to divert and turn it upon the land of another without liability to an action in either case, but that in no case could a land owner collect the surplus water upon his lands into a body and discharge it through a ditch upon the lands of another, or upon lands which do not form the natural drainage of such waters.

Id. at 191-2. *See also Rehfuss v. Weeks*, 93 Or 25, 33, 182 P 137 (1919) (same). Stated another way, surface water can be diverted onto a downstream landowner's property so long as it remains just that: diffuse surface water, but an upstream landowner can not lawfully redirect quantities of water via a pipe onto a downstream property at a location where no natural drainage channel already exists, if in doing so a new channel is created.

It is critical to understand that surface water, by its very definition, does not result in the creation of drainage "channels" where none previously existed. Because at the point where the water velocity becomes strong enough to erode land, a "watercourse" is created. Whether that watercourse is legal or not, in turn, depends on whether that watercourse is natural or artificial. No landowner has the right to create an artificial channel where none has previously existed. *See Street v. Ringsmyer,* 108 Or 349, 354, 216 P 1017 (1923).

Having said that, man-made channels will often be considered "natural channels" if such a channel has existed for a sufficient period of time. Typically, this is measured by the statute of limitations, prescriptive period, or statute of ultimate repose. *Cottel v. Berry*, 42 Or 593, 72 P 584 (1903); *Harrington v. Demaris*, 46 Or 111, 77 P 603 (1904). *See also Harris v. Southeast Portland Timber Co.,* 123 Or 549, 262 P243 (1927)(discussing prescriptive drainage easements);

[5] The Court uses unfortunate terminology here, as the case makes it clear the Court is referring to "acceleration" of water, not a true "diversion" of water.

Arrien v. Levanger, 263 Or 363, 502 P2d 573 (1972)(same); *Oregon-Wash. R. & N. Co. v. Reed*, 87 Or 398, 169 P 342 (1917); *rehearing denied,* 87 Or 398, 170 P 300 (1918)(example of where a lapse of time in asserting rights can result in the permanent diversion of water).

3. The "Reasonableness" Exception to the Acceleration Principle.

There are limits to the acceleration principle, particularly as related to urban areas. *Levene v. City of Salem,* 191 Or 182, 191, 229 P2d 255 (1951) provides a good example of the "reasonableness" exception. Strictly speaking, *Levene* involves the diversion of water. However, the author believes there is definitely some "unreasonableness analysis" aspect inherent in the court's opinion, and suspects the result in that case would have been the same even if no diversion had been involved.



Levene presents a particularly sad set of facts. In *Levene*, the plaintiff owned a building[6] that was close to a natural watercourse. The watercourse traveled under State Hwy 99 via two 24-inch culverts. The plaintiff used the building as a veterinary hospital.

In the fall of 1947, the City of Salem Public Works Department undertook three separate storm water improvement projects, the net effect of which was to greatly accelerate the amount of water that was ending up in the watercourse next to the plaintiff's building. Even worse, one of the projects resulted in an out-of-basin diversion by rerouting to the north water that would have otherwise drained to the south. Over the next winter, the plaintiff's basement flooded four times. Tragically, on the second of these occasions, four dogs that were tethered in the basement drowned.



[6] Lat 44°58'12.94"N, Long 123° 0'19.84"W

The Oregon Supreme Court found the city's actions to constitute "active wrongdoing," which constituted both a trespass and a nuisance. The court noted that a municipality must follow the same rules as an upstream landowner, and "must act with a reasonable consideration for the rights of the lower proprietor" and may not cause an "unusual or unreasonable amount of water" to be emptied upon the lower owner. *Id*. at 191.

This limitation can be found in older cases as well. For example, in *Harbison*, the court noted in dicta that the "due regard" must be observed "for the interest of the adjacent landowner so as to cause no unreasonable inconvenience." *Id*. at 273-4. In *Rehfuss*, the court stated that the up-gradient landowner must act "with prudent regard for the interests of such [down-gradient' owner." *Rehfuss,* 93 Or at 32. In adopting these limits to the acceleration principle, Oregon courts have added tort law concepts to the civil law rule.

In light of later cases such as *Garbarino* and *Gibson*, it is somewhat difficult to assess what is meant by the "unreasonable inconvenience / due regard" limitation. The *Garbarino* court seemed to express some frustration in these formulations, noting that "[n]one of the opinions give us a clue as to the exact meaning of this language or the extent of limitation, if any, imposed thereby on the right of the upland owner to accelerate the natural flow of surface water." *Garbarino*, 214 Or at 561.

One logical reading is that an upper landowner is not allowed to accelerate waters to the point that it causes flooding and unreasonable damage to the lower landowner. However, the *Garbarino* court seemed to reject that reasoning when it stated that "the opinions of the court do not measure the right or privilege [to drain surface water into natural channels] by the extent of the damage [to the down-gradient landowner]. However, in dicta, the *Garbarino* court suggested that "there may be circumstances under which the extraordinary acceleration of the flow of surface water in its natural channels may be enjoined."

It is true that, in general, the cases where down-gradient plaintiffs prevail generally present fairly extreme sets of facts. For example, in *Levene*, the City of Salem was found liable because it re-routed ditches in a manner that flooded a veterinarian's clinic, drowning four dogs in the process. The city's actions were considered to be active wrongdoing in part because the city never even bothered to consider how their actions would affect the ability of two 24-inch culverts to carry water downstream.

In *Harbison*, the City of Hillsboro was held liable for damming and obstructing a ditch with sewage that otherwise carried drainage away from an upstream landowner's property.

In *Senn v. Bunick,* 40 Or App 335, 94 P2d 837 (1979), *rev den*., 287 Or 149 (1979), a developer excavated his property for a subdivision without surveying property lines. In the process, his workers knocked over a fence, pushed dirt 25 feet onto plaintiff's property, and diverted a drainage ditch onto plaintiff's land, thereby causing flooding.

In *Volkoun v. City of Lake Oswego*, 335 Or 19, 56 P3d 396 (2002), the City of Lake Oswego increased a drainage basin from 1 acre to 6 acres, and in so doing, caused a very dangerous landslide on the Volkoun property.

Other cases provide examples where no liability was found: in *Rehfuss*, *supra*, the upstream landowner was not held liable for digging a ditch to drain his land, even though doing so damaged plaintiff's downstream land and orchard. In *Wimmer v. Compton*, *supra*, a landowner added fill to his land, which a neighbor thought was the cause of flooding on his property. However, the evidence at trial revealed that plaintiff's property had flooded prior to the time of the fill, and that other factors contributed to the flooding, such as lack of maintenance of a culvert and the presence of blackberries. A similar result occurred in *Nolan v. Martin Bros. Container and Timber Products Corp*, 236 Or 631, 390 P2d 175 (1964), where the plaintiff could not prove that defendant's act of raising the elevation of its land was the cause of floodwaters overflowing from a nearby river.

IV. Damming Back Water / Watercourse Obstruction & Surface Water Obstruction Cases.

The creation of a dam on a watercourse can result in two separate liabilities. First, if a dam breaks, the dam operator will usually be held responsible for that failure. Second, the dam operator will also face liability if the dam works as intended but results in the upstream property owner getting flooded. Each of these problems is considered separately below.

A. Damage to Downstream Landowners Caused by the Sudden Accidental or Purposeful Release of Water from a Dam.

In many cases, it will be fairly easy for downstream plaintiffs to prove direct causation of injury in a case involving the release of water from a failed dam. However, there are two circumstances in which causation could play an important role. The first involves a situation where the dam fails during an extremely large flood. In such cases, a defendant may be able to show that the plaintiff's property would have been flooded regardless of whether the dam had failed or not. In such a case, the release of waters impounded by the dam may have been the immediate and first cause of the damage, but flooding from some other source would have caused equivalent damage to the plaintiff's property. In such a situation, the plaintiff may not recover damages.

The second situation in which causation would be of significance is when several dams collapse like a series of dominoes. It may be difficult for a plaintiff to prove that any one owner caused damage. Nevertheless, advances in hydrology and hydraulic engineering make it possible to reconstruct the contribution each failure made to downstream damage. Conversely, a defendant may be able to show that their actions did not, in fact, cause harm to the plaintiff.

The case of *Crawford v. Cobbs & Mitchell Co.,* 121 Or. 628, 635, 257 P. 16 (1927) provides a good example of a plaintiff successfully proving that a dam operator was the cause of his damages. This case involves a farmer who sued the operator of a sawmill, because the defendant lowered the floodgates of a dam, and thereby released excess waters during a flood event. Cobbs & Mitchell Company[7] was a Michigan based forestry firm that moved to Oregon in the early 1900s after buying timber tracts in the Siletz Basin. They created a 500-acre to 600-acre

[7] Students of history may best remember the Cobbs and Mitchell Company as the founders of the company milling town of Valsetz, Oregon. Frank J. Cobbs was a lumber baron from Michigan who made his fortune harvesting the timber of the Siletz River Basin near the Oregon Coast in partnership with William W. Mitchell.

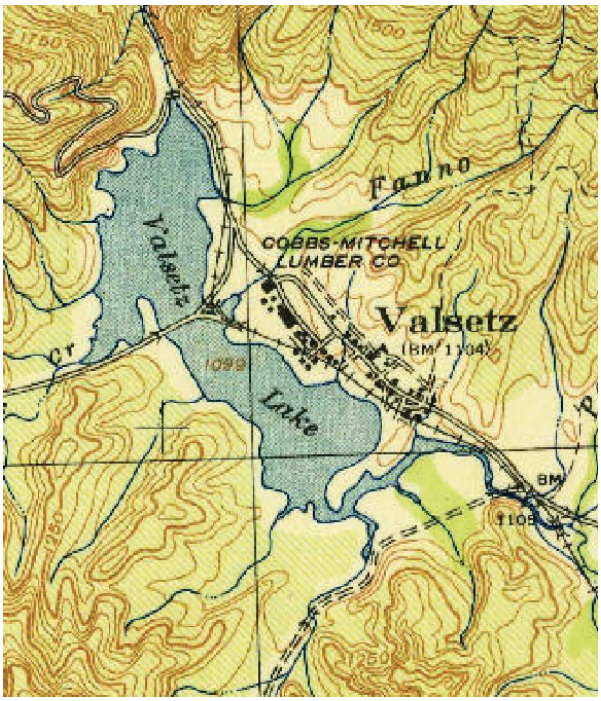
reservoir on the Siletz River at the town of Valsetz for use as a log pond. The dam[8] was 42 feet in height, 200 feet in length and was equipped with a floodgate eighteen feet in width and with a depth of 18 to 20 feet. During the course of a large flood event in November of 1921, the defendant opened the flood gates of the dam to release excess. The farmer – who lived 40 miles below the dam - sustained extensive damage resulting from the natural flooding *combined with* the excess water released from the dam. The trial court submitted the case to the jury, who found for the plaintiff.

The Oregon Supreme Court stated that there were three core principles that applied to the case. According to the court, the defendant had the right:

- To erect and maintain its dam at the place where it was constructed and to impound the water therein to the full height of the dam; and

- To permit flood waters to pass through or over the dam in such quantities as flowed into it, in the event of a flood or unusual high water;

However, the dam owner had no right to release water in larger quantities than were then flowing into it from above, thereby adding to the normal flow of waters so released by their act in raising the floodgate. Thus, the court concluded, a defendant can be liable for releasing large quantities of water in addition to the flood water then coming into its dam, if doing so causes damage to the plaintiff either solely by the water so released, or concurrently with the flood water which was going downstream.



On appeal, the defendant's primary defense was causation: they argued that because various other concurrent factors might have caused the injury complained of, the submission of the case to the jury was an invitation to decide it upon mere speculation. Among the concurrent factors were "a tremendous and unusual storm" in the area, with rainfall so heavy that it caused such a great rise in the water of the river that, if not unprecedented, it was without precedent in recent years; a highly swollen stage of water in several tributary streams below defendant's dam; and a landslide of several acres in extent, which, it was contended, had a tendency to divert the river water from its usual channel over and against plaintiff's land. The Oregon Supreme Court held that these matters, "were proper questions for the jury, and we do not think the consideration of their effect was wholly speculative, or that it reduced the question of what particular cause produced the injuries to plaintiff's property to a matter of mere speculation."

[8] Lat 44°51'0.50"N Long 123°40'1.27"W

On rehearing, the Oregon Supreme Court again said that it was beyond question that plaintiff sustained injury by the flood waters, but that whether his injury was caused by the negligence of the defendant was a serious question. In holding, however, that there was some evidence in support of each of the several material allegations of the complaint, the court stated:

> If there was no evidence in the case from which the jury could properly find that the defendant was negligent, as alleged, in releasing the impounded water through the dam, then the court should have granted defendant's motion for a nonsuit. But, in the consideration of the testimony as a whole, which includes not only the oral declarations of the witnesses, but the exhibits showing the topography of the country, we find that there was some evidence in support of each of the several material allegations of the complaint. As we have pointed out, under our system of jurisprudence it was the duty of the jury to weigh the testimony and determine the credibility of the respective witnesses, and to determine where the evidence preponderated. Under the rules of evidence, the jury had the power to accept, or to reject, in whole or in part, the testimony of any witness. The jury likewise had a right to infer from the evidence that the defendant released the impounded waters of its artificial lake for the purpose of lowering the waters of the reservoir, and that, in accomplishing its purpose, it acted negligently, and to the injury of plaintiff. We have seen that the company, through its superintendent, directed the opening of the gateway in the dam. In obedience to his order, the gate was elevated about 6 feet. Soon thereafter the superintendent, observing that the water was yet rising in the reservoir, directed that the gate be further opened. It was then elevated to a height of approximately 12 feet, thus permitting a quantity of water 12x18 feet under pressure to pour into the river below the dam, and augmenting the flow of that stream. The superintendent seems to have been satisfied that, by elevating the gate 12 feet, his desire to lower the water in the reservoir was accomplished. However, he testified that the waters in the reservoir were never lowered below 11.51. Notwithstanding the testimony to the contrary, the jury, doubtless, found from the evidence that the volume of water flowing down the South fork of the river below the dam was greater than the volume flowing into the artificial lake.

Id. at 641. *See also Hawkins v. City of La Grande,* 315 Or. 57, 843 P.2d 400 (1992) *recons.den.* (1993)



Whereas *Crawford* and *Hawkins* involved the release of excess water and/or sewer effluent from a dam, the case of *Allen v. K. P. Timber Co.*, 152 Or 176, 53 P2d 29 (1935) provides a good example of liability stemming from the *breakage* of a dam. Until the night of December 25, 1933, Milo C. Allen and his family were living in a house on a tract of land in Columbia County about one mile easterly of the town of Kerry. (See Blue Arrow) The house was located about 75 feet south of the Lower Columbia River Highway, and close to a small stream of water known as "OK Creek." That night, however, an immense wall of water carrying rocks, earth, logs and timbers, came down the creek gorge overflowing the banks of the stream and spread over the land, destroyed the house, and killed Mr. Allen. His estate sued the operator of the dam, defendant K.P. Timber Company.

The dam[9] at issue (See White Arrow) was part of a railroad which delivered timber from the Oregon Coast range to the town of Kerry. The railroad intersected OK Creek about one mile and one-third upstream from the residence of the deceased. It was built across OK Creek on a pile-trestle bridge 250 feet long and 90 feet high above the bed of the stream. The walls of the canyon or gorge through which the stream flows at that point, and for some distance above and below the bridge, were mostly rock and very precipitous - in some places almost perpendicular. The bed of the stream had a steep descending grade and the water flowed rapidly.

After the railroad had been constructed, the canyon under the bridge across OK creek was filled with earth, mostly sand, taken from other parts of the roadbed until it was filled up to nearly the top of the trestle. The intention of the builder and owner was to eventually supplant the trestle bridges with fills. The fill was made by hauling the material from other parts of the roadbed in dumpcars and dumping it from the track on the trestle. The process of filling extended over a five-year period. At the time of the accident, the fill had settled to a height of about 60 feet. To take care of the flow of the stream, a 14-inch corrugated iron culvert was enclosed in a wooden crib in

[9] Lat 46° 5'34.94"N, Long 123°18'48.58"W

the bottom of the fill. The base of the fill was about 200 feet wide up and down stream.

Unfortunately for Milo Allen, the miniscule 14-inch culvert predictably got clogged, and a wall of water built up behind the dam. As explained by the court:

> During the months of November and December, 1933, the rainfall in that locality was more continuous than usual and the ground became well saturated, causing slides and washouts. On December 21, 1933, the water began rising in the canyon above the fill. On the morning of December 25, the water had risen to a depth of somewhere between 20 and 40 feet. Under this pressure, the fill suddenly gave way carrying a large part of the bridge with it. A wall of water and debris came down the canyon, overflowed the banks, spread out over the flat land, doing the damage alleged in the complaint.

Id. at 178. Worse yet, a prior owner had experienced a close call with regard to this same site in 1921. Under these circumstances, the court had little difficulty concluding that the defendant had been negligent in maintaining the dam in that condition, and also because it did not alleviate the pressure on the dam by pumping water over the top once the danger was known.

It is also worth considering if the particular set of facts related to a dam give rise to strict liability. Forming a man-made water dam or reservoir is generally considered an ultra-hazardous activity, and strict liability applies if water escapes from the impoundment and causes damage downstream. *McGregor v. Barton Sand & Gravel, Inc*, 62 Or App 24, 660 P2d 175 (1983). *Cf. Brown v. Gessler,* 191 Or. 503, 230 P. 2d 541 (1951) (construction-related impoundment of water not an ultra-hazardous activity.); *Stroda v. State Highway Comm'n*, 22 Or App 403, 410-11, 539 P2d 1147 (1975) (building and constructing irrigation ditches are not an abnormally dangerous activity).

B. Damage Caused to Upstream Landowners by Damming Back a Watercourse or Surface Waters

The cases collected below address a situation where a down-gradient landowner blocks the natural flow of surface water, watercourses, or flood water, thereby flooding the up-gradient property. As mentioned above, a dam operator needs to make sure that a man-made "dam" or impoundment does not result in a reservoir that extends beyond the dam operator's property and thereby floods the land of an upgradient owner. *Esson v. Wattier,* 25 Or 7, 12, 34 P 756 (1893); *Mendenhall v. Harrisburg Water Co*., 27 Or. 38, 39 P. 399 (1895); *Hansen v. Crouch*, 98 Or 141, 193 P 454 (1920); *Wright v. Phillips,* 127 Or 420, 272 P 554 (1928); Butler v. Mass, 163 Or 201, 94 P2d 1116 (1939); *City of Kaiser v. Lake Labish Water Control Dist.*, 185 Or App 425 557 (2002).

The following Oregon cases in particular highlight this legal principle in action.

In *Wellman v. Kelley*, 197 Or 553, 252 P2d 816 (1953), an upstream owner sued a downstream landowner who obstructed the Powder River in Baker County. The river had an established and well-defined ordinary flood water course in this area. The upstream owner was

successful in prohibiting an adjacent downstream owner from obstructing that ordinary flood water course to the detriment of the upstream owner. The Oregon Supreme Court stated:

> In 56 Am Jur, Waters, 510 § 18, we find this cogent statement concerning the right of a lower proprietor to obstruct the natural flow of waters:
>
> > "* * * the obstruction of *the natural flow of a stream* is always done at the risk of being answerable in damages to him who sustains a loss thereby. Without the consent of the other proprietors who may be affected by his operations, an upper proprietor has no right unreasonably to interrupt or retard *the natural flow of water,* to the injury of lower owners, nor has a lower proprietor the right to throw the water back upon the proprietors above * * *." (Italics in original).

Id. at 566. The court went on to say that the same rule applies to surface waters, citing *Harbison v. Hillsboro*, 103 Or 257, 271, 204 P 613 (1922). *See also Wimmer v. Compton*, 277 Or 313, 560 P2d 626 (1977). *Accord*, 78 Am.Jur.2d 455-56, Waters §11.

In *Allen v. McCormick*, 193 Or 604, 238 P2d 220 (1951), the plaintiff's land was upgradient from the defendant's land. The defendant built a dam on Bear Creek,[10] located in Lane County. This caused the water levels of Bear Creek to rise and flood Plaintiff's upstream land. However, there were other factors in play with also contributed to the flooding, including (1) the presence of beavers which had created dams on plaintiff's property, and (2) flood waters caused an accumulation of brush and debris on plaintiff's property, which created an obstruction that held back waters. The trial court granted Plaintiff's request for an injunction, but found that an award of damages was not appropriate because it was not possible to definitively state that damages were caused by defendant's actions. The Oregon Supreme Court affirmed.



In *Kahl v Texaco, Inc.,* 281 Or 337, 574 P2d 650 (1978), Texaco raised the level of its land in order to build a service station. However, due to the raising of the land and the faulty construction of a culvert, the new development caused surface water to back up and flood the property of an adjoining beauty college. Prior to the filling and raising of Texaco's property, surface water from the beauty college's land naturally drained across the corporation's land. In constructing the service station, the contractor raised the level of the corporation's land some five

[10] Lat 44°12'7.50"N, Long 123°18'4.32"W.

feet and built a cement retaining wall along the boundary of the beauty college's property. The contractor built a culvert in the wall without a catch basin. The faulty construction of this culvert allegedly caused substantial flooding of the beauty college's property after heavy rains. The primary issue before the court was whether the corporation was liable for the acts of its contractor. In this regard, the court held that the corporation could not relieve itself of responsibility where it knew that the work performed by the contractor would, in the natural course of things, result in the flooding of the beauty college's land unless certain precautions were taken, such as building a proper drainage culvert in a retaining wall.

Finally, in *Lanning v. State Hwy Comm'n,* 15 Or App 310, 515 P2d 1355 (1973),[11] a landowner successfully sued the Oregon Highway Commission for negligence after a flood event. The flood resulted in a considerable amount of slashings, tree trucks, and debris being carried down Thomas Creek. That debris collected up against the supports of the Schindler Bridge, creating what amounted to a dam. The water backed up and eventually flooded the home of the Lanning family, who lived approximately 100 yards upstream of the dam. The case was decided in favor of the landowners on a negligence theory, although in dicta the Court of Appeals noted that the plaintiffs could have also recovered based on a theory of inverse condemnation. Although the court did not expressly discuss drainage law concepts in its opinion, the entire theory of recovery was premised on the concept that a lower landowner cannot obstruct a watercourse and create a dam which results in injury to an upstream landowner.



The Oregon Highway Commission argued that the design of the bridge was defective, and because it had immunity from such defects, it followed that they owed no duty to plaintiffs to remove debris that accumulated under the bridge because of its design. Hearing none of that argument, the Court of Appeals stated:

> We disagree with defendants' analysis. The fact that the design of the bridge was one of several causal factors leading to the damage to plaintiffs' property does not provide defendants with immunity for the negligent acts of their employees. The evidence in this case adequately supports the jury's finding that the agents were

[11] Lat 44º 42' 42.98" N, Long 122º 46' 12.86" W

> negligent in failing to recognize the seriousness of the danger posed by the accumulated debris and in waiting too long before taking action to alleviate such conditions. Given the facts of this case the question of whether these negligent acts were the proximate cause of the damage suffered by the plaintiffs was for the jury. *Allen v. Shiroma/Leathers*, 97 Or. Adv. Sh. 1665,514 P.2d 545 (1973).

Id. at 319.

C. Culverts Operating as a Dam.

The cases cited above all involve situations where the dam operator did not adequately consider how big of a reservoir would be created by the design of the dam. One interesting twist on dam operator's liability is raised in the context of culverts. ODOT operates many culverts, which can be the functional equivalent of a dam. Cases such as *Levene v. City of Salem*, 191 Or 182, 229 P.2d 255 (1951) highlight the fact that a failure to analyze the carrying capacity of a culvert can result in liability. Under the civil rule, the downstream landowner must accept the "surface water" and water in "natural watercourses" that drain naturally onto his or her land. But what happens when previously-adequate culverts no longer can transfer increasing amounts of water due to upstream development? Over time, a culvert that was once adequate can become inadequate.

However, ODOT takes the position in chapter 2 of its "Hydraulics Manual"[12] that it is not responsible to widen its highway culverts to accommodate upstream development:

> Another problem that occurs from land development is that ODOT drainage structures that were once adequate are now inadequate due to increased flows from the development. If the upper landowner increases the flow such that the highway drainage facilities are no longer adequate, it is the upper landowner's responsibility for paying for enlarging the highway drainage facilities to adequately pass the increased flow. They are also responsible for damages that the lower landowners may claim were caused by the increased flow. (Emphasis Added).

ODOT Manual at 2-6. ODOT states that its liability to upstream owners is limited to the flows that were anticipated at the time the culvert was constructed:

> From a legal standpoint, the determination of liability is based on *whether the waterway opening was adequate for a flow that reasonably could have been anticipated at the time the opening was* constructed (this will include considering the likelihood of possible flood conditions).

The author is aware of no Oregon appellate court case that precisely addresses the question,

[12] Available at https://www.oregon.gov/odot/hydraulics/pages/hydraulics-manual.aspx.

but one older case, *Price v. Oregon R. Co.,* 47 Or 350, 83 P 843 (1906), does contain some language that might support that conclusion. Given that state agencies are required to generally make decisions consistent with local government comprehensive plans, it remains unclear whether ODOT can continue to rely on the "*reasonably could have been anticipated" argument.* ORS 197.180. *See also* ORS 197.524: 197.530 (Moratorium statutes).

The case law does appear to be in flux. *Compare City of Atlanta v. Kleber*, 285 Ga 413, 677 SE2d 134 (2009) (In a case that was not likely correctly pled, court did not find a nuisance where the culvert was adequately sized at the time of installation, but became inadequate due to development) with *Board of Ed. of Borough of Manasquan v. State Dept. of Transp*., 669 NJ 92, 351 A2d 17 (1976)(holding that railroad which piped natural watercourse under its embankment when tracks were laid many years ago was subject to injunction on complaint of upstream owners for flooding attributable to fact that pipe would no longer accommodate volume of water which now flowed through watercourse.).

V. Proximate Cause of Damages Caused by Flood Waters

To be successful in a suit alleging negligence or trespass related to a flooding event, a plaintiff must show the damages sustained with reasonable certainty, both as to the nature and the extent of the damages. *McKinley v. Owyhee Project North Board of Control*, 103 Or App 253, 265-66, 798 P2d 673 (1990), *modified on reconsideration on other grounds,* 104 Or App 576, 802 P2d 677 (1990) *adhered to*, 106 Or App 366, 807 P2d 338 (1991), *rev denied*, 311 Or 426 (1991); *Allen v. McCormick*, 193 Or 604, 238 P2d 220 (1951); *Wimmer v. Compton*, 277 Or 313, 560 P2d 626 (1977).

In general, the issue of whether a defendant's actions were the proximate cause of flood damage is one for the jury. *Nolen v. Martin Bros. Container & Timber Products Corp*., 236 Or 631, 632-33, 390 P2d 175 (1964); *Schweiger v. Solbeck*, 191 Or 454, 230 P2d 195 (1951); *Crawford v. Cobbs & Mitchell Co.*, 121 Or 628, 635, 253 P 3, 257 P 16 (1927). However, the jury is not allowed to speculate about whether the defendant's actions were the proximate cause of the damage sustained. Therefore, the plaintiff has the initial burden to show that the actions of the defendant had *some causal connection* with the injury to plaintiff's property. *Nolen*, 236 Or at 632–33.

In *Nolen*, the Oregon Supreme Court noted that the record in that case documented the presence of an overwhelming, unprecedented flood. *Nolan v. Martin Bros. Container and Timber Products Corp*, 236 Or 631, 390 P2d 175 (1964). In addition, the record did not reveal any evidence that surface waters or waters from defendant's mill pond were diverted to plaintiff's land due to defendant's act of filling a slough. The court held that it was not important to analyze whether defendant could have caused damage to plaintiff's property had there been no flood. Rather, the court said it was clear from the record that the whole countryside was flooded with overflow from the Calapooia River and that defendant's actions had nothing to do with the flooding on plaintiff's land. The court reversed a verdict for the plaintiffs on the ground that there was no evidence of causation. The court stated:

> Whether defendant's conduct in raising the elevation of the land adjoining plaintiffs' property was a substantial factor in causing the water damage is normally a question for the jury. But in the present

> case we are unable to find in the record any evidence which supports the theory that defendant's conduct had any causal connection with the injury to plaintiffs' property. There is no evidence to show that surface or pond overflow waters normally moving toward the Calapooia Creek were diverted to the plaintiffs' land by the defendant's act of filling in the slough. On the contrary, it was shown that as a substitute for the slough defendant constructed an artificial water-course which provided a more efficient drainage device for such waters. Nor is there evidence tending to show that the raising of the elevation of the adjoining land caused the flood waters of the creek to be directed upon plaintiffs' land.

Id. at 632–33.

Oregon courts have stated that "if the injury may have been due to one of several causes, any of which may have been the sole proximate cause, there can be no recovery unless it is shown that, as between the causes in question, it was the negligence of the defendant that brought about the injury." *Schweiger v. Solbeck*, 191 Or 454, 230 P2d 195 (1951) (citing *Lippold v. Kidd*, 126 Or. at 170, 269 P. 210; *Goldfoot v. Lofgren*, 135 Or. at 545, 296 P. 843.). The plaintiff does not have to prove with certainty the proximate cause of his injury. *Id.* Rather, the plaintiff must show that of the various causes of the injury, that the one for which defendant is responsible is the "most probable." *Id.*

VI. Common Causes of Action.

1. Trespass Resulting from Various Drainage Law Violations.

Generally speaking, a trespass arises when an entry on the land of another disturbs the possessor’s interest in the right to exclusive possession of the land. The entry may have been caused by defendant’s intentional, negligent, reckless, or ultra-hazardous conduct, and the entry may have been direct or indirect. *Martin v. Union Pac. R.,* 256 Or 563, 565, 474 P2d 739 (1970)(fire resulting from negligence is a trespass).

Oregon recognizes that the unlawful diversion of water onto property in quantities that exceed the carrying capacity of the drainage channels is a trespass. *Levene v. City of Salem,* 191 Or 182, 191, 229 P2d 255 (1951). Oregon also recognizes that a trespass can result when the development of a residential subdivision causes “an increased amount and velocity of ordinary flood waters and surface waters” across a plaintiff’s land. *Senn v. Bunick*, 40 Or. App. 33, 594 P2d 837 (1979) *rev den,* 287 Or 149 (1979).

Oregon had previously subscribed to the traditional distinction between the direct and immediate injury characteristic of trespass law and the consequential and indirect injury which characterized nuisance law. *See Miller v. City of Woodburn*, 126 Or. 621, 270 P. 781 (1928). *Norwood v. Eastern Oregon Land Co.,* 112 Or. 106 227 P. 1111 (1924). However, in *Davis v. Georgia-Pacific Corp.,* 251 Or. 239, 242-43, 445 P.2d 481 (1968), the court abandoned the traditional rule as set forth in *Norwood, supra*, that a trespass must be a direct intrusion by a tangible object.

Defendant will sometimes argue that they can only be held liable in trespass if, at the time the flood event occurs, it has control over the storm water improvements that caused the trespass. However, a trespass may be caused by indirect means. *Senn,* 40 Or. App. at 38. In other words, a defendant may be liable for a trespass if it takes an action that sets the wheels in motion to cause a trespass, even if the ultimate trespass occurs via nothing more than the force of nature at a later point in time. *See, e.g., Zimmer v. Stephenson*, 403 P.2d 343(Wash., 1965) (farmer liable for trespass when a spark emitted by his tractor caused a fire that burned down neighboring farmer's ripe wheat field); *Steiger v. Nowakowski*, 227 N.W.2d 104 (Wis. 1975)("Under the law of trespass, entry upon another's land need not be in person, but may be made '. . . by causing or permitting a thing to cross the boundary of the premises.); *Mark Down Inc., v. McCormick Properties, Inc*., 441 A.2d 1119 (Md 1982) (Flooding caused by tropical storm may nonetheless be a trespass); *W.T. Ratcliff v. Hanley*, 405 So.2d 141 (Ala 1981); 87 C.J.S. Trespass § 13, c, page 966.

The Oregon Supreme Court has adopted the view of Restatement (Second) of Torts §§158 and 165 (1965 & Supp 2004).[13] Section 158 governs intentional intrusions on land, whereas Section 165 governs liability resulting from negligent conduct:

> § 158 Liability for Intentional Intrusions on Land.
>
> One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally
> (a) enters land in the possession of the other, or causes a thing or a third person to do so, or
> (b) remains on the land, or
> (c) fails to remove from the land a thing which he is under a duty to remove.
>
> § 165 Liability for Intrusions Resulting From Reckless or Negligent Conduct and Abnormally Dangerous Activities.
>
> One who recklessly or negligently, or as a result of an abnormally dangerous activity, enters land in the possession of another or causes a thing or third person so to enter is subject to liability to the possessor if, but only if, his presence or the presence of the thing or the third person upon the land causes harm to the land, to the possessor, or to a thing or a third person in whose security the possessor has a legally protected interest. (Emphasis added).

As the underlined provisions indicate, a person can be found liable for a trespass for causing a "thing" such as water to enter property owned by another person. Comment i to §158 further explains:

[13] *Hudson v. Peavey Oil Co.,* 279 Or 3, 6–7, 566 P2d 175 (1977) (plaintiff's property was damaged when gasoline seeped from adjacent service station's underground storage tank); *Loe v. Lenhardt,* 227 Or 242, 248, 362 P2d 312 (1961) (crop damage resulting from aerial crop-dusting on adjacent property). *Furrer v. Talent Irr. Dist*., 258 Ore. 494, 466 P.2d 170 (1971).

> Causing entry of a thing. The actor, without himself entering the land, may invade another's interest in its exclusive possession by throwing, propelling, or placing a thing either on or beneath the surface of the land or in the air space above it. Thus, in the absence of the possessor's consent or other privilege to do so, it is an actionable trespass to throw rubbish on another's land, even though he himself uses it as a dump heap, or to fire projectiles or to fly an advertising kite or balloon through the air above it, even though no harm is done to the land or to the possessor's enjoyment of it. In order that there may be a trespass under the rule stated in this Section, it is not necessary that the foreign matter should be thrown directly and immediately upon the other's land. It is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter. Thus one who so piles sand close to his boundary that by force of gravity alone it slides down onto his neighbor's land, or who so builds an embankment that during ordinary rainfalls the dirt from it is washed upon adjacent lands, becomes a trespasser on the other's land.

In the regard, the treatise "American Jurisprudence 2d" states the following:

> A trespass may be committed by consequential and direct acts, as well as by direct force. A direct or immediate invasion is accomplished by means that the trespasser knew or reasonably should have known would result in the physical invasion of the plaintiff's land. An entry may be accomplished by setting an agency in motion, which affects the plaintiffs land to material injury. A landowner who sets into motion a force, that in the usual course of events, will damage another's property is guilty of a trespass on that property.
>
> * * * * *.
>
> The four elements that a plaintiff must prove in order to recover for an indirect trespass are: (1) an invasion affecting an interest in the exclusive possession of the property; (2) an intentional doing of the act that results in the invasion; (3) reasonable foreseeability that the act could result in an invasion of the plaintiffs possessory interest; and substantial damage to the property. (Emphasis added).

75 Am Jur 2d §25, p. 38. Given the recognition of the 'indirect force" concept, there is simply no applicable principle of trespass law that allows the trespasser to escape liability by transferring the "instrumentality" of the trespass to another person. *See also* 87 C.J.S.§31, p. 690 ("the person who actually does the act is liable for the trespass, even if acting for another person, as an agent, attorney, or contractor."); Thompson on Real Property, §68.06(A)(2) ("The proper defendant in a trespass action is the party or parties who actually commit the trespass or cause others to commit the act of trespass, or whose actions result in a trespass by others."); 7 American Law of Torts

§23.27 (The rule is elementary that whoever commits or causes another to commit an act of trespass is liable therefore.").

Consider this simple example: Person "A" shoots a bullet onto landowner "B's" property using a rifle. "A" has committed a trespass, and is liable to B for damages caused by the impact of the bullet.[14] "A" cannot raise as a defense the fact that "A," subsequent to the trespass, has sold the rifle to "C."

2. Nuisance.

Oregon courts have recognized that "[t]he periodic flooding of plaintiffs' building brought about by defendant's acts constitutes a private nuisance." *Levene v. City of Salem*, 191 Or. 182, 192, 229 P.2d 255 (1951)[15] (citing 39 Am Jur., Nuisances, 298, § 16); *See also Wellman v. Kelley*, 197 Or. 553, 559, 252 P.2d 816 (1953); *Amphitheaters Inc. v. Portland Meadows*, 184 Or. 336, 346, 198 P.2d 847, 851 (1948). As discussed *infra*, there does not have to be any ongoing human intervention or activity after trespasser's initial alteration of the drainage basin. Obviously, there may be a time lapse between the time the human agency occurs and the time a sufficient rain storm occurs that causes flooding downstream. *See, e.g*., *Levene*, 191 Or. at 188 (noting that the city of Salem did work in October and November 1947 that resulted in flooding on December 29, 1947 and January 6, 1948).

When evaluating whether a nuisance exists, it is important to consider that are two different classes of nuisance-creating activities. While it is true that many activities that typically would cause a nuisance are activities that have ongoing human activity and intervention (such the creation of noise, dust, smoke, odors, etc), the Restatement of Torts (2d) recognizes that some nuisances may arise indirectly, by the man-made creation of harmful physical conditions on land that result in ongoing damage despite the fact that direct human intervention has ceased. As discussed below, flood-related nuisances most often occur as the result one one-time human construction / activity that alters, diverts, or accelerates natural drainage flow in a manner that interferes with the right of downstream property owners' use and quiet enjoyment of their land.

The Restatement of Torts(2d) § 824 recognizes that conduct may be either a direct or an indirect cause of a nuisance:

> § 824 Type of Conduct Essential to Liability
>
> The conduct necessary to make the actor liable for either a public or a private nuisance may consist of
> (a) an act; or
> (b) a failure to act under circumstances in which the actor is under a duty to take positive action to prevent or abate the interference with

[14] *Martin v. Reynold Metals Co.,* 221 Or 86, 342 P.2d 790 (1959), *cert. den*., 362 U.S. 918 (1960) (dicta). *See also* 87 C.J.S. §13 ("Trespass may also be committed by shooting a firearm onto or over the land, * * *." (citing *Hall v. Browning*, 24 S.E.2d 392 (Ga. 1943); *Dewey v. Gardner*, 248 A.D.2d 876, 669 N.Y.S.2d 766 (3d Dept. 1998).

[15] In *Levene*, the Supreme Court referred to the same conduct as a trespass. Granted, the flooding at issue in *Levene* was particularly egregious: the plaintiff's property was flooded three times between December 29, 1947 and February 10, 1949, there is no legal requirement that the flooding occur that frequently in order to be actionable.

> the public interest or the invasion of the private interest.
>
> *Comment b. Acts*. The word "act" is defined in § 2. In the ordinary case, the liability stated in § 822 arises because one person's acts set in motion a force or chain of events resulting in the invasion. The acts may be a direct and immediate cause of the invasion, as in the case where the noise from the actor's operation of a riveting machine is the thing complained of, or they may be an indirect cause of the invasion, as in the case where the offensive smells from a garbage pile or other physical condition created by the actor are the thing complained of. * * *. (Emphasis Added).

The Restatement of Torts(2d) §834 further expounds on the concept:

> Persons Carrying on an Activity
>
> One is subject to liability for a nuisance caused by an activity, not only when he carries on the activity but also when he participates to a substantial extent in carrying it on.

Comment *b* to §834 defines the term "activity" for purposes of the rule of law set forth above. It states, in relevant part:

> b. * * *. The term ["activity"] includes all acts that are a cause of harm to another's interest in the use and enjoyment of land. These activities fall into two general classes, those that cause harm only so long as the activity continues -- such as directly sending noise, smoke, heat or gases over neighboring land -- and those that create physical conditions that are harmful to neighboring land after the activity that created them has ceased -- such as structures, excavations, cesspools, piles of refuse, bodies of water, oil and other substances. (Emphasis Added).

Thus, the Restatement recognizes that an activity can cause a nuisance long after the activity has ceased. Comment *e* to §834 further explains the basis for imposing liability upon a tortfeaser who only committed a single non-recurring act:

> *e. Continuing liability for harmful physical conditions*. Activities that create a physical condition differ from other activities in that they may cause an invasion of another's interest in the use and enjoyment of land after the activity itself ceases. When the invasion continues only so long as the activity is carried on, a person who ceases to have any part in the activity is not liable for the continuance of the invasion by others. But if the activity has resulted in the creation of a physical condition that is of itself harmful after the activity that created it has ceased, a person who carried on the activity that created the condition or who participated to a substantial extent in the activity is subject to the liability for a nuisance, for the

> continuing harm. His active conduct has been a substantial factor in creating the harmful condition and so long as his condition continues the harm is traceable to him. This is true even though he is no longer in a position to abate the condition and to stop the harm. If he creates the condition upon land in his possession and thereafter sells or leases it to another, he is subject to liability for invasions caused by the condition after the sale or lease as well as for those occurring before. When the vendor or lessor has created the condition his liability continues until the vendee or lessee discovers it and has reasonable opportunity to take effective precautions against it. In this respect the duration of the liability differs from that stated in § 839. The rule stated in § 373 (2) as to the liability of the vendor for physical harm is equally applicable to this Section, and Comment *c* under § 373 applies equally here. (Emphasis Added).

Nuisances created by activities causing flooding fall into this latter category. Flood-causing activities are perhaps somewhat unique in this regard, because the human activity at issue does not cause immediate nuisance conditions. Rather, it is not until the coming of forces of nature (*i.e*. storm events) does the harm (flooding) actually occur. The Restatement (2d) of Torts, § 834, Comment *f* further recognizes that it may be "forces of nature" that complete the harm:

> *f. Causation.* In some cases the physical condition created is not of itself harmful, but becomes so upon the intervention of some other force -- the act of another person or force of nature. In these cases the liability of the person whose activity created the physical condition depends upon the determination that his activity was a substantial factor in causing the harm, and that the intervening force was not a superseding cause.

To the author's knowledge, no Oregon court has either adopted or rejected Section 834 of Restatement (2d) Torts. Nonetheless, Oregon courts have cited to the Restatement of Torts (2d) on nuisance-related issues on numerous occasions, and there is no indication in existing case law that Oregon courts would categorically reject the analysis set forth above.[16] *See also*, *Richardson v. Murphy*, 198 Or. 640, 653, 259 P.2d 116 (1953) ("It has been held that a nuisance may arise from the creation or maintenance of a condition having a natural tendency to cause danger and inflict injury.")(quoting 66 C.J.S. Nuisances, §19, p.768); *Arneil v. Schnitzer*, 173 Or. 179, 144 P.2d 707 (1944)(maintaining flammable material on a property is a nuisance, and the fact that a trespasser

[16] *But see Brewer v. Erwin*, 287 Or. 435, 455n12, 600 P.2d 398 (1979), where the Oregon Supreme Court cautioned practitioners as follows: *"*Although this court frequently quotes sections of the Restatements of the American Law Institute, it does not literally "adopt" them in the manner of a legislature enacting, for instance, a draft prepared by the Commissioners on Uniform State Laws, such as the Residential Landlord and Tenant Act. In the nature of common law, such quotations in opinions are no more than shorthand expressions of the court's view that the analysis summarized in the Restatement corresponds to Oregon law applicable to the facts of the case before the court. They do not enact the exact phrasing of the Restatement rule, complete with comments, illustrations, and caveats. Such quotations should not be relied on in briefs as if they committed this court or lower courts to track every detail of the Restatement analysis in other cases. The Restatements themselves purport to be just that, "restatements" of law found in other sources, although at times they candidly report that the law is in flux and offer a formula preferred on policy grounds."

actually caused the actual fire via a cigarette does not absolve the landowner of liability from resulting damages.).

Moreover, based on *Phillips Ranch, Inc. v. Banta,* 273 Or. 784, 543 P.2d 1035 (1975), it is clear that Oregon does not require on-going conduct to support a claim for nuisance.

Phillips Ranch is one of the lead Oregon cases addressing nuisances resulting from activities that cause flooding. The plaintiff in that case sued a neighbor who had obstructed a river in order to create a pool with heightened water levels, for the purpose of facilitating irrigation operations. Unfortunately, the act of damming back river waters caused a flood during a winter storm event. The trial court awarded damages to the plaintiff, but denied plaintiff's request for an injunction "because [the] defendant had removed the obstruction which had caused the damage." *Id*. at 789. Defendant appealed the damage award. In affirming the trial court, the Oregon Supreme Court rejected the precise "continuing act / condition" argument:

> Defendant's basic assumption that a nuisance by its very nature is a continuing condition is not well founded. There are statements in the cases to this effect, but they do not represent the prevailing view. As noted in the introductory note to Chapter 40 of 4 Restatement of Torts, p. 223 (1939), substantial harm is necessary to liability for private nuisance, and a continuance or recurrence of the condition is often necessary to satisfy this requirement. But if the interference causes substantial harm, it subjects the defendant to liability "however brief in duration the interference may be." The fact that plaintiff alleged a continuing nuisance does not preclude him from proving his case by establishing a nuisance which occurred in a non-recurring fashion. (Footnotes omitted).

Id. at 789-90.

One issue that arises frequently in flood damage litigation is whether a developer who caused the condition that caused the flooding can still be liable once that developer divests itself of its property. The general rule with regard to nuisances, seems to be well settled and can be found in the Restatement of Torts (2d) (1979). First, comment *e* to §834 states:

> If he creates the condition upon land in his possession and thereafter sells or leases it to another, he is subject to liability for invasions caused by the condition after the sale or lease as well as for those occurring before.

Along those same lines, § 840A states:

> Continuing Liability After Transfer of Land
>
> (1) A vendor or lessor of land upon which there is a condition involving a nuisance for which he would be subject to liability if he continued in possession remains subject to liability for the continuation of the nuisance after he transfers the land.

> (2) If the vendor or lessor has created the condition or has actively concealed it from the vendee or lessee the liability stated in Subsection (1) continues until the vendee or lessee discovers the condition and has reasonable opportunity to abate it. Otherwise the liability continues only until the vendee or lessee has had reasonable opportunity to discover the condition and abate it.

Comment c to § 840A states:

> c. If the vendor or lessor has himself created on the land a condition that results in a nuisance, he cannot escape liability for the continuation of the nuisance by selling or leasing the land to another. In these cases, it frequently has been said that by transferring the land with the condition existing upon it he has authorized the continuation of the nuisance. This is usually somewhat fictitious; and a better reason is that his responsibility toward those outside of his land is such that he is not free to terminate his liability to them for the condition that he has himself caused or concealed, by passing the land itself on to a third person. * * *.

The Restatement of Torts (2d) provides two flood related illustrations to drive the point home:

> A, B and C are severally in possession of adjoining lands, through which a stream flows from A's land to B's and then to C's. Without B's consent, C enters B's land and there builds a dam across the stream. The dam to B's knowledge floods A's land to an unreasonable extent and seriously interferes with A's use and enjoyment. B does nothing to prevent this. B leases his land to X and X takes possession. The flooding of A's land continues. B is subject to liability to A for the harm occurring after as well as before he leases the land.
>
> A purchases from B land upon which B has erected a building. At the time of the purchase a cornice of the building is in such condition as to shed rainwater upon the steps leading into the basement of C's adjoining building. A discovers this condition and does nothing to remedy it. A leases the land to D, who takes possession. Thereafter, during a heavy rainfall water shed by the cornice onto the steps floods C's basement. A is subject to liability for this harm.

See also A Practical Guide to Disputes between Adjoining Landowners--Easements, §9.04(1)(b).[17] *See also Keeley v. Manor Park Apartments*, 99 A.2d 248 (Del. Ch. 1953);

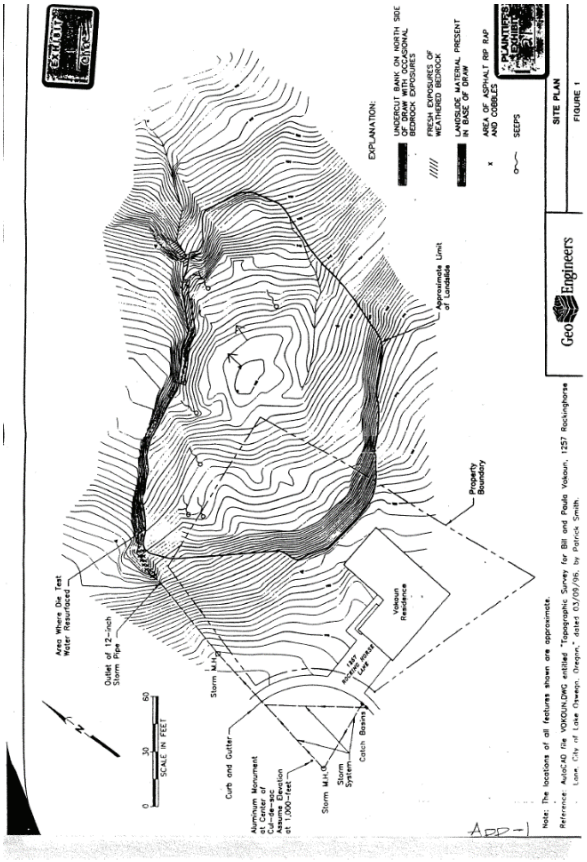
[17] "One who creates a nuisance through use of land and then transfers the land to another usually remains liable for the continuation of the nuisance." (citing *Virginia R. Co. v. Mullens*, 271 U.S. 220, 46 S.Ct. 526 (1926); *Cumberland Tel. & Tel.Co. v. Lawrence*, 271 F. 89 (9th Cir. 1921); *Philadelphia Elect. Co. v. Hercules, Inc*., 587 F. Supp 144 (E.D. Pa. 1984), *rev'd and vacated*, 762 F.2d 303 (3d Cir 1985), *cert den*., 474 U.S. 980, 106 S.Ct 384 (1985); *State ex rel. Bailes v. Guardian Realty Co*., 186 So 168 (Ala 1939); *Lamb v. Roberts*, 72 So. 309 (Ala 1916);

Walter v. Wagnor, 8 SW.2d 421 (Ky. 1928) (claim of private nuisance allowed to go forward against defendant who sold the property after raising its surface, causing flooding and mud slides onto plaintiff's property.); *Dorman v. Ames*, 12 Minn 451(Minn 1867) (defendant held liable for nuisance caused by a mill dam that he had constructed despite having sold it to a third party.); *Merrick v. Murphy*, 371 N.Y.S. 97 (1975) (Prior owner of land who had torn down a retaining wall between a public road and a deep excavation on the land could be held liable for nuisance when plaintiff drove off road into excavation area).

3. Negligence.

Oregon case law draws a distinction between negligent design and construction, on the one hand, versus negligent operations and/or maintenance.

The *Vokoun* case provides an example. *Vokoun v. City of Lake Oswego*, 335 Or. 19, 56 P.3d 396 (2002), *on remand*, *Vokoun v. City of Lake Oswego*, 189 Or App 499, 76 P3d 677 (2003), *rev den*, 336 Or. 406, 84 P.3d 1082 (2004). In *Vokoun,* the storm pipe outlet that caused damage to the Plaintiff's property was constructed in 1973. The plaintiffs had initially filed a Complaint based, among other things, on a "defective design and construction" theory. *Vokoun*, 189 Or App at 505. That claim was dismissed by the trial court. *Id*. The negligence case ended up going to the jury on the theory of negligent maintenance and inspection – because the City had ongoing obligation to ensure the proper operation of its storm-drainage system. *Vokoun*, 335 Or at 23. The jury found for the plaintiffs on both the inverse condemnation claim and the negligence claim – despite the fact that the infrastructure at issue was built 23 years prior to the date of the damage. *Id*. at 25. The Supreme Court affirmed. *Vokoun v. City of Lake Oswego*, 335 Or. at 34.



The case of *Holdner v. Columbia County,* 51 Or App 605, 627 P2d 4 (1981) provides a similar example. In 1974, Columbia County performed road work that caused water to drain onto Holdner's property. Mr. Holdner did not file the required tort claims notice until December 22, 1977. Because of the 180-day notice requirement in ORS 30.275, Mr. Holdner was barred from

State v. Tibbetts, 527 A.2d 688 (Conn 1987); *Henriques v. Rockefeller*, 173 A.2d 596 (Conn 1961); *Keeley v. Manor Park Apartments*, 99 A.2d 248 (Del. Ch. 1953); *Walter v. Wagner*, 8 SW2d 421 (Ky. 1928); *Minaya v. Mass. Credit Union Share Ins. Corp*., 467 N.E.2d 874 (Mass 1984); *Mansfield v. Tenney*, 88 N.E. 892 (Mass 1909); *Sloggy v. Dilworth,* 36 N.W. 451 (Minn 1888); *Bixby v. Thurber*, 118 A 99 (N.H. 1922); Cavanaugh v. Pappas, 222 A.2d 34 (N.J. Super 1966); *Sarnicandro v. Lake Developers, Inc.,* 151 A.2d 48 (N.J. Super 1959); *Conhocton Stone Rd. v. Buffalo*, 51 N.Y. 573 (Ny Sup. Ct 1973); *Wilks v. New York Tel. Co.,* 203 N.Y.S. 665 (N.Y Sup Ct 1924); *Louisville & N. Terminal Co. v. Jacobs*, 72 S.W.954 (Tenn 1903); *Monroe City v. Arnold*, 452 P.2d 321 (Utah 1969); *Flanagan v. Gregory & Poole, Inc*., 136 W. Va 554, 67 S.E.2d 865 (W. Va. 1951); *Karns v. Allen*, 115 N.W. 357 (Wis. 1908).

suing the county for claims accruing more than 180 days before December 22, 1977. However, Holdner alleged that the county was engaged in "the continuing tort of negligent upkeep of [its] ditches and culverts, resulting in an ongoing nuisance or trespass." *Holdner, Id*. at 613. The court held that the notice was timely for the claim of failure to maintain the ditches and culverts. Because the statute of limitations is an affirmative defense, the defendant was charged with the burden of proving what items of damage were barred by the 180-day notice requirement. Because the plaintiff did not claim damages accruing during the period barred by the notice requirement, the court declined to rule whether those damages were recoverable. *Holdner, supra,* 51 Or App at 615.

It is also worth noting that the continuous tort doctrine has been also used to avoid a statute of ultimate repose. *See Little v. Wimmer,* 303 Or. 580, 739 P.2d 564 (1987) (court held negligence claims filed more than 10 years after construction were not time-barred in that state's mandatory and continuous obligation of supervision and control of all matters pertaining to improvement, maintenance, operation, and administration of state's highways continued from time of construction through date of accident).

4. Inverse Condemnation.

The term "inverse condemnation" is the popular description of a cause of action against a governmental defendant to recover the value of personal or real property[18] which has been taken in fact by the government defendant, even though no formal exercise of the power of eminent domain has been attempted by the governmental agency.[19] *Thornberg v. Port of Portland*, 233 Or 178, 180, n1, 376 P2d 100 (1963).

Practitioners should consider whether a city or county effectively exercised its right of eminent domain by taking actions which are the equivalent of appropriating, for public use, a storm drainage easement used for overflow flood waters in excess of what can be accommodated by the City's existing storm water facility. In cases where the local government has not initiated formal condemnation proceedings, a plaintiff may, under the appropriate set of facts, an action in inverse condemnation.

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[18] Personal property, such as dwellings, furniture, livestock and crops, can be taken; there is no requirement that the realty on which the personal property is located must also be taken. *See Coos Bay Oyster Co-op. v. Highway Com*., 219 Or. 588, 348 P.2d 39 (1959) (oysters are personal property, and allegations that oysters were taken will support inverse condemnation action); *Hawkins v. City of La Grande,* 315 Or. 57, 843 P.2d 400 (1990) (taking of livestock and crops).

[19] The Restatement of Property (Second), section 8.1, comment (d) at 263 (1977) provides background on the claim of inverse condemnation:

> "Inverse condemnation is the name given to a cause of action against a governmental agency to recover the value of property which has been taken in fact by the governmental agency, even though there has been no formal exercise of the power of eminent domain. Successful litigation against the governmental agency is a factual determination that there has been a 'taking' and in effect forces the governmental agency to purchase the interest taken. The 'taking' in that case relates back to the date of the beginning of the governmental conduct that is determined to be a 'taking.' "

Two sets of facts are the most common candidates for an inverse condemnation claim. First, when a government water detention facility dams back water that repeatedly floods a landowner's property, a cause of action in inverse condemnation should be considered. Second, when an inlet which is part of a municipal stormwater system becomes too small to accommodate floodwaters, the path taken by the overflow waters may constitute the taking of private property. This is particularly true when the government granted development approval such as building permits that result in an increase in water flow. Both such complaints rest on the allegation that the plaintiffs' property has become a *de-facto* part of the local government's storm water system, insomuch as it serves as a basin to store excess water that cannot, due to the physical constraints in the system located downstream of the subject property, drain away from the vicinity of plaintiffs' property in a timely and efficient manner during moderately heavy but not unprecedented storm events. The case of *North v. United States*, 94 F Supp 824, 825 (D Utah 1950) is instructive:

> "[I]n order to constitute a 'taking' there must be: (A) a direct invasion of plaintiff's property by the waters of the government; and (B) that the invasion of such waters must be permanent so that the lands of the plaintiff are practically destroyed or that the invasion is a recurrent one amounting to an easement. Otherwise, the damage, if any, is consequential and amounts to tort only." (Emphasis Added)

Id. at 825. As *North* makes clear, recurrent flooding that creates a *de-facto* easement for flood waters is a taking.

The origins of state "takings" law resulting from flood damage begins 140 years ago with the seminal case of *Pumpelly v. Green Bay & Mississippi Canal Co*., 80 US 166 (13 Wall) (1871). In *Pumpelly*, the state of Wisconsin authorized the construction of a dam, which caused plaintiff's 640 acres of farmland to be permanently inundated with floodwaters. Plaintiff filed an inverse condemnation lawsuit. The state argued that it had the right to flood private property, without compensation, in order to improve the navigability of the river. The United States Supreme Court held that pursuant to the Wisconsin Constitution,[20] the State was required to compensate the landowner for such damage. The doctrine has undergone significant evolution since the time of *Pumpelly*. Practitioners must be cautious when relying on older case law, because the law of takings has evolved considerably in favor of property owners over the last 100 years.

Inverse condemnation is an implied action arising under the Oregon Constitution. In this regard, Art I. §18 provides:

> Private property shall not be taken for public use, * * * without just compensation * * *. [T]he use of all roads, ways, and waterways[21] * * * or water for * * * drainage is necessary to the development and welfare of the state and is declared a public use.

[20] Congress adopted the 14th Amendment on July 9, 1868. The claims set forth in *Pumpelly* originated prior to that time, and therefore, the Fifth Amendment only applied to the Federal government at that time of the flood. The court noted that the Wisconsin Constitution was virtually identical in wording to the Fifth Amendment.

[21] The term "waterways" used in Art I, § 18 is the same as "water course," regardless of whether such a waterway is natural or man-made. *Smith v. Cameron*, 123 Or. 501, 262 P. 947 (1928).

The Oregon Supreme Court has identified four elements to the claim: "(1) there must be a taking of private property for a public use by (2) a state agency authorized to exercise the power of eminent domain, (3) it must be property that is subject to be taken for a public use," and (4) the governmental acts alleged to constitute a taking of private property were done with the intent to take the property. *Tomasek v. State Hwy Comm'n*, 196 Or. 120, 147, 248 P.2d 703 (1952); *Vokoun v. City of Lake Oswego*, 335 Or. 19, 56 P.3d 396 (2002).

Oregon courts have long recognized that government-sponsored activities causing flooding of privately-owned land can result in a taking. *Metzger v. City of Gresham*, 152 Or. 682, 54 P 311 (1936).[22] Importantly, the claimant does not need to prove that the municipality was negligent in any manner. *Lanning v. State Hwy Comm'n,* 15 Or. App. 310, 318-19, 515 P2d 1355 (1973). Similarly, the fact that the government action in question was also negligent does not defeat an inverse claim. *Vokoun*, 335 Or. at 24-5 (case submitted to jury on both negligence and takings claims).

Two issues typically emerge when inverse condemnation is brought up in a drainage case:

- ❖ whether the government *intended* to take Plaintiffs' property for public use;
- ❖ whether or not the government divested Plaintiffs of property rights sufficient to conclude that the property has been "taken" for a public use; and

These issues are explored below.

1. <u>An Plaintiff in an Inverse Condemnation Case Does Not Need to Prove State of Mind: A Taking May Occur Even Though the Government's Conduct Did Not cause the Damage on Purpose.</u>

In the past, government defendants argued a taking claim fails when the plaintiff only alleges negligent conduct on the part of the government. The government would argue that an inverse condemnation claim cannot be based solely on negligent conduct. The government would argue that the plaintiffs have a burden to show that the government committed a "purposeful act." The Oregon Supreme Court rejected that argument in *Vokoun v. City of Lake Oswego*, 335 Or. 19, 26, 56 P.3d 396 (2002). *See also Lanning v. State Hwy Comm'n*, 15 Or App 310, 515 P2d 1355 (1973) (describing highway maintenance as not a discretionary function, which would subject the government to liability for negligence.).

A physical occupation of another person's land without license or easement is a trespass. *See Levene v. City of Salem*, 191 Or. 182, 190-1, 229 P.2d 255 (1951). A trespass based on overflow of water is considered active wrongdoing. *Id*. The *Levene* Court stated:

[22] *See also Morrison v. Clackamas County*, 141 Or. 564, 568, 18 P.2d 814 (1933); *Tomasek v. Oregon Hwy Com'n,* 196 Or. 120, 150-51, 248 P.2d 703, 248 P.2d 703 (1952) (flood damage may support claim for inverse condemnation); *Patterson v. Horsefly Irr. Dist*., 157 Or. 1, 18-19, 69 P.2d 282 (1937) (same); *City of Kaiser v. Lake Labish Water Control Dist.*, 185 Or. App. 425 557 (2002) (same); *Hawkins v. City of La Grande,* 315 Or. 57, 843 P.2d 400 (1992) *recons.den.* (1993)(release of flood water mixed with untreated sewer effluent effectuated a taking of crops and livestock).[22] *Cereghino v. State Highway Comm'n*, 230 Or. 439, 370 P.2d 694 (1962).

> "The gist of the injury * * * is the casting of an increased volume of water into the watercourse crossing plaintiffs' premises without there being an outlet therefore. Such a positive act is a tort 'arising from wrongful and unauthorized conduct rather than negligence, and the maxim that a man must use his own as to not unnecessarily to do injury to another is applicable."

Id. at 190-91.

The case of *Metzger v. City of Gresham,* 152 Or 682, 54 P2d 311 (1936) also sheds light on this issue. In *Metzger*, the plaintiff sought damages from the city after it redirected surface water onto plaintiff's property via a pipe. The Oregon Supreme Court agreed that a taking had occurred, and stated the applicable law as follows:

> "If a city or town negligently constructs or maintains the bridges or culverts in a highway across a navigable river, or a natural watercourse, so as to cause the water to flow back upon and injure the land of another, it is liable to an action of tort, to the same extent that any corporation or individual would be liable for doing similar acts. So if a city, by its agents, without authority of law, makes or empties a common sewer upon the property of another to his injury, it is liable to him in an action of tort. But in such cases, the cause of action is not neglect in the performance of a corporate duty, rendering a public work unfit for the purposes for which it is intended, but it is the doing of a wrongful act, causing a direct injury to the property of another, outside of the limits of the public work." (Citations omitted) (Underline added).

Id. at 687. *Levene* and *Metzger* are instructive insomuch as they recognize that a city's conduct in constructing or maintaining storm drainage improvements, whether negligent or otherwise, will be considered an intentional "wrongful act" if a trespass of water results from that conduct.

Similarly, in *Theiler v. Tillamook County*, 75 Or. 214, 146 P. 828 (1915), a landowner sued Tillamook County seeking to recover damages caused to his premises by the construction of a fill, bridge and culvert in a county road. The county's improvements had changed the ancient course of a natural stream and discharged the water on the premises of the plaintiff, destroying trees, shrubs, and grass, and washing away soil. The Oregon Supreme Court allowed an action in inverse condemnation, stating:

> "Though a purely municipal corporation does not ordinarily sustain to a person injured by its negligence the exact relation of a *quasi* public corporation, it is believed that the analogy is sufficient to render a county liable in damages for a trespass upon private property when such invasion practically amounts to a taking of any part of the premises without condemnation." (Emphasis in Original).

Id. at 218. *See also Vokoun*, 335 Or. at 28.

The concept of government-sponsored acts rising to the level of "active wrongdoing" is also illustrated in the nuisance case entitled *Adams v. City of Toledo*, 163 Or. 185, 96 P.2d 1078 (1939). In *Adams*, the City of Toledo condemned an unoccupied building due to the fact that it constituted a fire hazard. City officials decided to abate the public nuisance by conducting a controlled burn of the building. Unfortunately, the resulting fire escaped and burned down a neighboring residence. The Supreme Court found the city liable for creating a temporary nuisance.[23] The Court described the purposeful burning of the condemned building as "active wrongdoing," as distinguished from negligence, even though there was no intent on the part of the city to allow the fire spread to plaintiff's building. *Id*. at 192. The Court allowed the plaintiff's case to proceed on the grounds of temporary nuisance.

To prevail in an inverse condemnation claim, the property owner must prove that the governmental entity intended to take action, the natural result of which would be cause a substantial interference with property rights. *Vokoun,* 335. Or. at 28-9. Note that this is different that saying that the property owner must prove that the governmental entity *intended to cause damage to plaintiff* via its actions.

It goes without saying that in a case seeking recompense for inverse condemnation, the governmental entity has not openly announced its intention to take private property for a public use. In response, courts have instead looked to other manifestations or proof of intent.

For example, in *Morrison v. Clackamas County*, 141 Or. 564, 18 P.2d 814 (1933), the county was found liable for taking a portion of the plaintiff's property when the county built a jetty in the Sandy River which diverted the flow of water onto plaintiff's property. The Court found the requisite intent by virtue of the simple fact that the jetty had been built:

> In an action of this character it is no defense that there was no specific intention on the part of defendant to appropriate plaintiff's property, but the defendant must be held to have intended to do those things which are the natural and ordinary consequences of its act. Doubtless the defendant county intended to construct the jetty. The natural consequence, [i.e. the flooding of plaintiff's land] of course, followed.

Id. at 569.

In *Vokoun*, the plaintiffs' suit alleged claims for both negligence and inverse condemnation. The Supreme Court held that both of these claims were properly submitted to the jury.[24] Although ruling in favor of the Vokouns, the Supreme Court used the case as an

[23] Oregon's more modern precedents consider the spread of fire to constitute a trespass, *Gymnastics USA v. McDougal*, 92 Or App 453, 758 P.2d 881 (1988), but the concept is the same.

[24] Previously, Oregon courts required plaintiffs to elect their remedies before submission to the jury. *See Lanning v. State Hwy. Comm*., 15 Or. App. 310, 515 P.2d 1355 (1973). In *Lanning*, the Plaintiff sued the state for negligence under the Oregon Tort Claims Act for damage to property resulting from the failure of highway employees to remove debris that accumulated next to bridge piers which caused plaintiff's land to be flooded. The state appealed a judgment for the landowners, contending that the highway commission and highway engineer were immune under the discretionary duty or function exception to tort liability, and that the appropriate remedy was inverse condemnation rather than negligence. The court of appeals affirmed, holding that highway maintenance is a ministerial rather than a

opportunity to clarify the law with regard to the "intent" issue.

The Vokouns argued that they could prevail in their inverse condemnation claim without proving *any element of intent* on the part of the city. The Vokouns acknowledged cases such as *Gearin v. Marion County*[25] and *Patterson v. Horsefly Irr. Dist.,*[26] but argued that subsequent case law such as *Morrison* and *Tomasek* had eliminated the requirement that a landowner show

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discretionary act. The court noted that while it is true that the inverse condemnation remedy may have developed because of the existence of sovereign immunity to tort claims, the removal of sovereign immunity meant, under appropriate circumstances, that alternative remedies now exist for a plaintiff whose property may have been damaged by the tortious act of a governmental body. The court concluded fact that plaintiff may have alternative remedies is no ground for finding the remedy selected to be improper.

[25] In *Gearin v. Marion County*, 110 Or. 390, 223 P. 929 (1924), a landowner sued Marion County in inverse condemnation to recover damages sustained to his property during a flood. The county had taken steps to protect a bridge, located upstream of plaintiff's property, from damage caused by logs, trees, and stumps that were lodged against the bridge during the flood. The county directed its work crew to remove the logs and place them at a location, the result of which was to cause that debris to float across plaintiff's land, instead of releasing them in the main channel of the river where they would float down without harm to plaintiff''s property. Those released trees, logs, and stumps were carried by the water and floated against the buildings on plaintiff''s farm, causing plaintiffs buildings and their contents to be destroyed.

Because *Gearin* predated the OTCA, the County could not be held to answer in negligence. Plaintiff's inverse condemnation claim failed, however, because the allegations in the Complaint sounded purely in tort. The plaintiff alleged only one-time damage stemming from negligent acts of the county. The plaintiff did not allege that the county had taken a de-facto easement or otherwise created a reoccurring situation. In fact, plaintiff acknowledge that future damage could be avoided simply by releasing the jammed logs, trees, and stumps into the main channel of the river where they could be carried further downstream, and away from plaintiff's land.

Notably, the result in *Gearin* is somewhat difficult to square with the facts of *Hawkins v. City of La Grande*, 315 Or. 57, 843 P.2d 400 (1992). Under *Hawkins*, Mr. Gearin should have at least been able to seek damages for the taking of his building and its contents. Perhaps it could not be said, under the facts presented in *Gearin*, that the destruction of Mr. Gearin's buildings was not the natural and ordinary consequence of depositing trees, logs and stumps outside of the main river channel. On the other hand, it may be that *Gearin* was just pled poorly. The Supreme Court distinguished *Gearin* in *Morrison* by simply stating that *Gearin* "was an action purely in tort," suggesting the Supreme Court simply concluded that *Gearin* was incorrectly pled. *Morrison*, 141 Or. at 574-5.

[26] In *Patterson v. Horsefly Irr. Dist.*, 157 Or. 1, 18-19, 69 P.2d 282 (1937), *reh'g den*. 157 Or 1, 70 P2d 36 (1937), the Supreme Court held that seepage resulting from the failure to properly maintain irrigation ditches would not normally give rise to an inverse condemnation claim, because "the right of eminent domain cannot be exercised to permit unnecessary damage and waste." *Id*. at 22. The court distinguished lack-of-maintenance-related seepage from seepage which is the necessary and ordinary consequence of the operation of an irrigation canal. The court quoted approvingly from the distinction drawn by *Hooker v. Farmers' Irr. Dist.,* 272 F. 600, 603 (8th Cir. 1921), as follows:

> "If the plaintiff sustained damage, as in our opinion there is substantial evidence here tending to prove, by the temporary negligence of the defendant to so maintain, operate, and use its canal as not to injure plaintiff's property, it is liable on account of its negligence to pay that damage. * * *. If, on the other hand, the defendant has inflicted damage upon the property of the plaintiff that is the necessary effect of its permanent maintenance and operation of this canal in a lawful and careful manner, which the state has authorized it to do for the public use, it is liable to pay this damage to the plaintiff because the infliction of such damage without compensation is a violation of the constitutional prohibition against the taking or damaging of private property for public use without just compensation therefor. (Citations omitted)

Id. at 22-23.

government intent to take property for private use.

The Supreme Court reviewed the history of inverse condemnation in Oregon courts and rejected that claim: "This court long has held that a claim for inverse condemnation requires a showing that the governmental acts alleged to constitute a taking of private property were done with the intent to take the property * * *." *Id*. at 27. However, the court also held, consistent with prior precedent, that "[a] factfinder may *infer* the intent to take from the governmental defendant's action if, as this court stated in *Morrison*, the natural and ordinary consequence of that action was the substantial interference with property rights." *Id.* at 29 (emphasis added).

Thus, in *Vokoun*, the plaintiffs were only required to show that the city intended to use the ditch next to the Vokoun property to drain a seven-acre drainage basin. The Vokouns did not have to prove that the city intended to cause damage to the Vokoun's property. Rather, the damage (*i.e.* the failure of the hillside holding up the Vokoun's backyard) was deemed by the court to be the natural and ordinary consequence of the action of diverting five times the amount of water towards the outfall than would otherwise have naturally flowed in that direction.

2. Damage v. Taking.

Real property is not "taken" in the legal sense if it is merely damaged. *Moeller v. Multnomah County*, 218 Or. 413, 425-7, 345 P.2d 813 (1959). In *Moeller*, the Supreme Court noted that the Oregon Constitution, unlike those in some other states, has not been amended to include "damage" within the meaning of a "taking." *Id.* at 425-6. Of course, "damage" is a relative - and perhaps even conclusory - term, as was demonstrated by the fact that the *Vokouns* were able to pursue a takings claim against the City of Lake Oswego even though their land had merely been "damaged" during the Great Willamette flood of 1996. *Vokoun v. City of Lake Oswego*, 335 Or. 19, 56 P.3d 396 (2002).

Interference with property rights is a concept that is completely separate from the issue of "damage." Property rights include the full bundle of sticks associated with ownership of land, including, for example, the right to exclude others and the right to not be burdened by public servitudes. *Lingle v. Chevron USA Inc.,* 544 US 528, 548, 125 S.Ct 2074 (2005). ("A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property -- perhaps the most fundamental of all property interests."). As in *Vokoun*, it can involve the right of lateral support. *Vokoun*, 335 Or. at 30-1.

The successful inverse condemnation case based on flooding will typically involve the right of a property owner to not have his property used as a drainage servitude. The government must provide just compensation when it demands an easement. For example, in *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct 383 (1979), the Supreme Court held that that the U.S. Army Corps of Engineers ("USACE") could not require the developers of the Hawaii Kai development to open a large pond and marina to the public for access and boating without paying just compensation for the "taking" of an easement.[27] The amount of damage caused by the potential

[27] Although the Kuapa pond on Oahu has historically been separated from the ocean by a barrier beach, the developers had dredged the pond to make it navigable by boats. In addition, the developers had, at considerable expense, created a canal connecting the pond to the ocean. USACE argued that the developers had made the pond navigable by opening it up to the ocean, and had thereby subjected the development's waterways to both federal jurisdiction and a navigable servitude. The Supreme Court disagreed, and held that the federal government had to pay

that the public might have boat access to the pond and marina was not monetarily significant in relation to the value of the multi-million-dollar Hawaii Kai development. Nonetheless, since the government was seeking to divest the property owner of one of the bundle of sticks by taking an easement for public use, a taking occurred. The court explained:

> "This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioner's private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina. . . . And even if the Government physically invades only an easement in property, it must nonetheless pay compensation." (Emphasis added).

Id. at 180. In this regard, practitioners should be mindful of the teachings of *Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. 419, 102 S.Ct 3164 (1982):[28]

> Property rights in a physical thing have been described as the rights "to possess, use and dispose of it." *United States v. General Motors Corp*., 323 U.S. 373, 378 (1945). To the extent that the government permanently occupies physical property, it effectively destroys each of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights. See *Kaiser Aetna,* 444 U.S., at 179 -180; *see also* Restatement of Property 7 (1936). Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, see *Andrus v. Allard, supra,* at 66, it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

Id. at 435-6.

The second key issue is the recognition that there can be a substantial interference with

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just compensation if it wanted to create a public easement over privately owned property.

[28] *See also Yee v. Escondido,* 503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992) ("The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land. * * *. Thus, whether the government floods a landowner's property or does no more than require the landowner to suffer the installation of a cable, the Takings Clause requires compensation if the government authorizes a compelled physical invasion of property.").

property rights even though the landowner is not dispossessed of the property.

One way that a "substantial interference" occurs is if there is a material decrease in the value of private property as a result of government-caused flooding. *Levene*, 191 Or. at 196. *Cereghino v. State Hwy Com*., 230 Or. 439, 443, 370 P.2d 694 (1962);[29] *Tomasek v. Oregon Hwy Com'n*, 196 Or. 120, 248 P.2d 703 (1952). It is not necessary that the landowner suffer actual dispossession or a complete destruction of their property. *Levene v. City of Salem*, 191 Or. 182, 229 P.2d 255 (1951). The *Levene* court stated:

> 'Where the acts of the municipality result in a direct and continuous trespass upon real property, as by diverting the flow of a stream from its natural course onto the property, or by flooding the property through a drain or sewer so constructed that such flooding is a necessary result of the construction, this constitutes a 'taking' within the meaning of a constitutional provision requiring compensation to be made for property taken for a public use. And this is so even if the owner of the property is not actually dispossessed or the property completely destroyed by the taking. *Morrison v. Clackamas County*, 141 Or. 564, 569, 18 P.2d 814; *Stephens v. City of Eugene, supra,* 90 Or. 167, 173, 175 P. 855; Annotations: 75 A.L.R. 1198, 173 A.L.R. 1045; 128 A.L.R. 1195, 1197. (Emphasis Added).

191 Or at 196.[30]

More recently, in *Lincoln Loan Co. v. State Hwy Comm'n*, 274 Or 49, 545 P2d 105 (1976), the Oregon Supreme Court reduced that analysis down to more practical terms:

> The proper test to determine whether there has been a compensable invasion of the individual's property rights in a case of this kind is whether the interference with use and enjoyment is sufficiently direct, sufficiently particular, and of sufficient magnitude to support a conclusion that the interference has reduced the fair market value of the plaintiff's land by a sum certain in money.

Id. at 57.

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[29] The discussion by the *Cereghino* Court is useful to draw a distinction between "substantial interference with the right to property" and "mere damage" to the property at issue. *Cereghino v. State Hwy Comm'n*, 230 Or. 439, 370 P.2d 694 (1962). In finding a taking, the Court noted that "the word 'property' as used in Article I, Section 18, is not used in its vulgar and non-technical sense of the physical thing with respect to which the citizen exercises rights recognized by law * * *." Rather, said the Court, property "denote[s] the group of rights to possess, use, and dispose of it." *Id*. at 445. When the state directed water across the Cereghino farm, it had not just damaged topsoil, which might be replaced. Rather, the state effectively occupied or possessed Cereghino's land for its own purposes and taken away the Cereghino's own right to possess and use the property. A taking occurs, said the Court, where the effects of "[g]overnmental action * * * are so complete so as to deprive the owner of all or most of his interest in the subject matter * * *." *Id*.

[30] *See also Morrison v. Clackamas County*, 141 Or. 564, 18 P.2d 816 (1933) ("It is not necessary that the owner of property be actually dispossessed or that the property be completely destroyed in order to constitute a taking within the meaning of the constitutional provision.").

The question becomes whether the flooding becomes so onerous that is no longer viewed as mere "damage" but is rather viewed as a government appropriation of land. Under *Vokoun*, the test to distinguish a flood-related "taking" from mere "damage" is relatively straightforward: a taking which gives rise to a claim for inverse condemnation occurs if the flood damage causes "substantial interference" with the property rights of a landowner. *Vokoun*, 335 Or. at 29.

In *Vokoun*, the City of Lake Oswego's storm drainage system emptied into a creek adjacent to the Vokoun family's backyard. During the Great Willamette Flood of February, 1996, large amounts of water from that outfall scoured out and undermined the toe of the hillside on which the Vokoun house stood. As a result of this erosion, a large portion of the Vokoun's backyard slumped down the hillside and was washed away. Although the Vokoun's house itself was not damaged, there was some damage to a side deck and a dog run. The Supreme Court found that this was sufficient to cause a substantial interference.

The case most often cited by the local government defendant is *Moeller v. Multnomah County*, 218 Or. 413, 425-7, 345 P.2d 813 (1959). In *Moeller*, the plaintiffs brought an inverse condemnation claim against Multnomah County for damages to their property by blasting operations conducted by the county at their prison rock quarry near the plaintiffs' home. *Id*. at 414. The county appealed following a jury verdict in the Moellers' favor. On review, the Supreme Court reversed, holding that the Moeller's evidence of property damage at trial did not amount to a taking. The Court framed the issue as follows: "[d]oes damage to plaintiffs property resulting from jars and concussions from blastings, causing some damage but not causing loss of occupancy, amount to a 'taking' under Article I, Section 18, Oregon Constitution, by inverse condemnation[?]" *Id*. at 415.

The Court noted that a taking occurs if the governmental action has deprived the owner of a "substantial part of his property as well as the use thereof, and usually permanently." *Id*. at 427. The evidence showed that the blasting had caused cracks:

> "in the concrete of the basement and patio floors and in the walls and ceilings of some rooms. On one occasion the top of the brick chimney in the patio was knocked or shaken off. There was damage to the cesspool which catches the water from wash basins and the eaves, and this caused some water to back up into the basement of the house. Various other substantial items of damage were testified to, and the cost of repairs and estimation of repairs were substantial."

Id. at 415-16. The Court concluded:

> "The plaintiffs in this case have failed to prove either actual physical taking of the plaintiffs' property by the defendant, or sufficient evidence of destruction, restriction or interruption of the necessary use and enjoyment of their property to warrant recovery under the theory of inverse condemnation * * *."

Id. at 427, 430-31. The Court noted that a taking requires "destruction, restriction or interruption of the necessary use and enjoyment of [the] property." *Moeller*, 218 Or. at 431, and that "[m]ost cases boil this definition down to a test of whether there has been a 'substantial' interference with

property rights," *Hawkins*, 315 Or at 68.

Moeller is inapposite to the typical flood damage case for three reasons. First, there was no physical invasion of private property in *Moeller*. Rather, the invasion amounted to a mere nuisance. As previously noted, a *physical occupation* taking is treated differently than the type of invasion at issue in *Moeller*. *See generally, Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government * * *."). In fact, the *Moeller* Court went out of it way to distinguish the facts of that case from other blasting cases that involved actual physical invasions of private property. *Id*. at 427-9.

Second, unlike the case where a *de-facto* drainage easement is appropriated, the damage was not permanent, and therefore the Moellers could not show either a substantial loss in property value or an inability to continue to live in the home. Blasting activities on Rocky Butte have ceased, and the hill is now used for residential and park purposes. The Moeller's residence is still in residential use today. In contrast, where a *de-facto* drainage easement is appropriated, flooding on a plaintiff's land can reasonably be expected to reoccur.

Third, part of the difficulty the Moellers may have experienced in proving loss of property value undoubtedly stemmed from the fact that the blasting had occurred prior to the time the Moellers bought their home, and so the property values in the neighborhood had already adjusted to account for the temporary blasting activities occurring at the rock quarry.

Notably, in the *Vokoun* case, defendant City of Lake Oswego tried to rely on *Moeller,* arguing, as that the plaintiffs could still live in their home. The City of Lake Oswego argued:

> Plaintiffs could still walk on their land, plant landscaping, build structures, occupy their house and engage in all of the other activities of residential use. There was no damage to the house itself, apart from the side deck and dog run. Because plaintiffs' land was merely damaged and its use was not functionally impaired, there was no "taking" of real property.

See Brief of Defendant-Appellant City of Lake Oswego, Oregon Court of Appeals File 96-11-052, dated June 7, 1999, at p. 25. The Supreme Court ultimately found this argument unavailing, stating that the damage constituted substantial interference.

Generally speaking, one-time flooding <u>*which is unlikely to re-occur*</u> due to the circumstances of the case and which merely causes relatively minor damage is not likely going to rise to the level of a taking. *Hawkins v. City of La Grande,* 315 Or. 57, 843 P.2d 400 (1990).[31] An

[31] *See also Northern Pacific Ry. v. Sunnyside Valley Irr. Dist.,* 540 P.2d 1387, 1390 (Wash App.1975) ("Temporary interference with a private property right, which is not continuous nor likely to be recurring, does not constitute condemnation."); *Brazos River Auth. v. City of Graham*, 354 S.W.2d 99, 108 (Tex. 1962) (Until a plaintiff is in a position so to establish the repetitious nature of the injury, he should be confined in his demand for damages to those flowing directly from the single injury or flooding.).It appears to be generally recognized that a single flood of short duration, or occasional temporary flowage, is not sufficient to constitute a taking under federal law. *Accardi v. United States,* 599 F.2d 423, 429 (Ct. Cl. 1979) (probability of serious flood occurring every "400 to 500" years did not constitute "frequent and inevitably reoccurring overflows"; therefore, no taking occurred); *Barnes v. United States*, 538 F.2d 865, 210 Ct.Cl. 467 (1976).

example of an event that is not likely to re-occur is flooding caused by temporary construction-related diversions. *Sells v. Nickerson*, 76 Or. App. 686, 711 P.2d 171 (1985).

However, if the circumstances are such that the flooding is likely to re-occur based on predictions of future foreseeable storm events, then a taking may occur. *Hawkins*, 315 Or at 68. In *Hawkins,* the Court stated that "the test of inverse condemnation is * * * application of the substantial interference test, that is, whether there has been flooding that destroys or materially decreases the value of private property." *Id*. Then the court held that even a single flood event can constitute a taking:

> Defendant relies on *Barnes v. United States*, 538 F.2d 865, 210 Ct.Cl. 467 (1976), for the proposition that a single flooding of land, that does not threaten to recur, is not sufficient to state a real property taking claim. However, in Oregon the test for inverse condemnation is not a counting of the number of interfering floods, but application of the substantial interference test, that is, whether there has been flooding that destroys or materially decreases the value of private property. (Footnote and citations omitted).

Id. [32] The *Hawkins* court goes on to say:

> "although it is true that a single flood that does not permanently damage the land, or threaten to recur on a regular basis, will often not be a 'substantial' enough interference with property rights to constitute a 'taking' of land." However, no stretch of the Oregon definition of 'taking' is required to hold that one flood can substantially lessen the value of or destroy personal property, such as the livestock and crops in this case. (Emphasis Added).

Id. at 69.

VII. Act of God Defense.

An Act of God or vis major is defined as: an unusual, extraordinary, sudden, and unexpected manifestation of the forces of nature, such as earthquakes, violent storms, lightning, and extraordinary or unprecedented floods, which could not have been reasonably anticipated, guarded against, or resisted. American Jurisprudence, 1 Proof of Facts, "Act of God" p. 143. The Restatement of Torts, 2nd, sets forth a concise summation of the common law concerning the "act of God" defense, as follows:

> § 451 Extraordinary Force of Nature Intervening to Bring About Harm Different From That Threatened by Actor's Negligence.
>
> An intervening operation of a force of nature without which the other's harm would not have resulted from the actor's negligent

[32] This point may highlight the only significant divergence between federal and Oregon law on the topic of flooding constituting a taking.

> conduct prevents the actor from being liable for the harm, if
> (a) the operation of the force of nature is extraordinary, and
> (b) the harm resulting from it is of a kind different from that the likelihood of which made the actor's conduct negligent.

Whether a particular rain event constitutes an "act of God" for which there can be no recovery in tort or inverse condemnation is typically an issue of fact which is reserved for the jury. *Price v. Oregon R. & Nav. Co.,* 47 Or 350, 83 P 843 (1906); *Allen v. K. P. Timber Co.*, 152 Or. 176, 181-82, 53 P.2d 29 (1935). *Nolen v. Martin Bros. Container & Timber Products Corp*., 236 Or. 631, 632, 390 P.2d 175 (1964). The "act of God" defense may be available even though the activity is considered "ultra-hazardous" or abnormally dangerous. *Trotter v. R.D. Callens*, 89 NM 19, 21, 546 P2d 867 (1976).

In *Allen v. K. P. Timber Co.*, 152 Or. 176, 53 P.2d 29 (1935), the court held that the act of God defense is only available if the flood is considered "extraordinary" and "unprecedented" in magnitude:

> "Floods such as from climatic and geographical conditions may reasonably be expected, whether of frequent or infrequent occurrence must be taken into consideration in estimating hazards attending the obstruction of water courses. The term 'act of God,' in its legal sense, applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them. And that rule must be regarded as the proper one. The Illinois court of appeals held that extraordinary floods are those not occurring annually. But the mere fact that a flood does not occur annually will not make it an extraordinary one, if, from the climatic conditions and the character of the country, it is likely to occur, and has been known to occur, with sufficient frequency to warn those living in the vicinity that it is likely to occur at any time. The question whether a flood is ordinary or extraordinary is in most cases for the jury." (Emphasis Added).

Id. at 181-2 (citing Farnham, THE LAW OF WATERS AND WATER RIGHTS, Vol II, 1904, at Ch. XX, §577a & b. P. 1840-1).

Thus, Oregon Courts are in agreement with the vast majority of other jurisdictions holding that a defendant cannot successfully assert the "act of God" defense unless the rain event in question is unprecedented in magnitude. *Schweiger v. Solbeck*, 191 Or. 454, 464, 230 P.2d 195 (1951). A previous event of the same or greater magnitude indicates that the defendant should have been prepared for a subsequent recurrence. *See Fairbury Brick, Co. v. Chicago R.I. & Pac. Ry. Co*., 113 N.W. 535, 537 (Neb. 1907) (earlier rainfall of similar proportions should have directed defendant to be prepared); *Gulf, Colo. & Santa Fe Ry. Co. v. Pomeroy*, 3 S.W. 722, 724 (Tex. 1887) (history of similar events made the event in question foreseeable and therefore not an act of God); *McKinley v. Hines*, 215 P. 301, 302-03 (Kan. 1923)(blizzard not an act of God since it was not the worst in the region recorded).

Oregon Courts also hold that a defendant can only successfully assert the "act of God"

defense if the unprecedented nature of the rain event is the sole proximate cause of the plaintiff's injury. *Northwestern Mut. Ins. Co. v. Peterson*, 280 Or. 773, 777, 572 P.2d 1023 (1977); *Schweiger v. Solbeck,* 191 Or 454, 230 P.2d 195, 200 (1951) (holding that act of God was not a defense when defendants' negligence in permitting an accumulation of logging debris was a concurring cause in an alleged landslide). *See also McClaskey v. U.S.*, 261 F Supp 912, 914 (D Or 1966), *aff'd*, 386 F2d 807 (9th Cir 1967) ("An act of God, excusing failure to perform a duty, excludes all circumstances produced by a human agency."); *Hummell v. Seventh Street Terrace Co*., 20 Or. 401, 26 P. 277 (1891).

To counter an "act of God" defense, a plaintiff will need to produce expert testimony that the rain event at issue was an ordinary event. A mentioned above, "ordinary floods" include those floods that "from the climatic conditions and the character of the country, it is likely to occur, and has been known to occur, with sufficient frequency to warn those living in the vicinity that it is likely to occur at any time." *See Wellman v. Kelley*, 197 Or 553, 252 P2d 816 (1953). *See also Schweiger v. Solbeck*, 191 Or. 454, 464, 230 P.2d 195 (1951); *Allen v. K.P. Timber Co*., 152 Or. 176, 181-82, 53 P.2d 29 (1953) ("A common test of the character of a flood as ordinary, rather than extraordinary, in any case is whether its occurrence in magnitude should be or might have been anticipated, in view of the flood history of the locality and the existing conditions effecting the likelihood of floods, by a person of reasonable prudence.").

Unless the flood at issue is the largest on record, defendants are usually better served arguing that there is a lack of causation between the damages and the actions or inaction of the defendant. This is because any negligence on the part of the tortfeaser eviscerates the act of God defense. Having said that, it is generally not recommended to argument that the overflow of storm water is itself an "intervening / superseding cause of plaintiff's damages."

VIII. Discretionary Immunity Defense.

When suing a government defendant for damages stemming from negligence for flood damage, the governmental entity will typically assert discretionary immunity. The Oregon Tort Claim Act ("OTCA") is classified as an "open ended" waiver of governmental immunity, which is to say that immunity is generally considered to be waived unless the government defendant can demonstrate that its act or omission falls within a specifically enumerated exception. Discretionary immunity can be a statutory defense to negligence claims filed against public entities.

The doctrine protects governmental defendants from liability for certain types of "discretionary" decisions, namely, those that require supervisors or policy makers to assess costs and benefits, and to make a choice among competing goals and priorities. *McBride v. Magnuson*, 282 Or. 433, 437, 578 P.2d 1259 (1978). The doctrine is rooted in separation of power principles: courts have expressed concern that the judiciary not become the final arbiter of what are essentially political decisions. *Comley v. Emanuel Lutheran Charity Bd.*, 35 Or App 465, 582 P2d 443 (1978). Also note that discretionary immunity applies only in actions for monetary damages and not for injunctive relief. *Penland v. Redwood Sanitary Sewer Service Dist*., 327 Or. 1, 7-8, 956 P.2d 964 (1998). For this reason, plaintiffs should seek an injunction where feasible.

To qualify for discretionary immunity under ORS 30.265(3)(c), the city must show that the decision involved the exercise of judgment, and that it made a decision "involving the making of

policy" as opposed to a "routine decision[] made by employees in the course of their day-to-day activities[.]" *See Mosley v. Portland School Dist*. No. 1J, 315 Or. 85, 89, 843 P.2d 415 (1992) (stating test for discretionary immunity). The government must also show that the decision was made by a person with either direct or delegated responsibility or authority. *Ramirez v. Hawaii T & S Enterprises, Inc.,* 179 Or. App. 416, 419, 39 P.3d 931 (2002).

As the name suggests, discretionary immunity does not protect a local government against claims stemming from non-discretionary (aka: ministerial) acts. *Hawkins v. City of La Grande,* 315 Or.57, 843 P.2d 400 (1990) (City's decision to release untreated effluent from its sewerage treatment plant during a storm event is not a discretionary decision); *Vokoun*, 335 Or at 33 (City's failure to correct known maintenance problem is not a discretionary policy decision, but rather the day-to-day decision of city employees in the course of their duties.).[33]

Importantly, the doctrine also does not immunize a decision to not exercise care at all, if action of some kind is required. *See Garrison v. Deschutes County*, 334 Or. 264, 274, 48 P.3d 807 (2002) (so stating).

In situations where the plaintiff is suing the local government for negligence in the review of development plans, it will want to frame the negligent act at issue as the approval of the final plat or the construction plans. Those ministerial acts are not subject to discretionary immunity.

Acts typically accomplished during the final plat phase of a subdivision approval process, such as reviewing and approving construction plans and storm water reports, are ministerial in nature. *Hutcheson v. City of Kaiser,* 169 Or. App. 510, 518-21, 8 P.3d 1010 (2000); *J. Gregcin, Inc. v. City of Dayton,* 39 Or. App. at 747 (failure to follow state-mandated procedures not a subject of discretion). In *Hutcheson*, the plaintiff bought a lot in a new subdivision located adjacent to a ditch. 169 Or App at 512-3. After two flood events inundated the plaintiffs' land in 1996, the plaintiff sued both the city and the developer to recover damages caused by the flooding. *Id.* at 512-3. The plaintiff argued that the city had been negligent in approving the construction plans for the subdivision. *Id*. at 513. The city argued that the approval of a subdivision is a discretionary act protected by the immunity doctrine. *Id*. at 515. The court held that the negligent act at issue was the approval of the construction plans by the city engineer and public works director, and that such acts are not discretionary in nature. *Id.* at 518.

Discretionary immunity also does not apply in the case to active wrongdoing, such as flood damage caused by trespass of flood waters. In *Allen v. City of Gold Beach*, 12 Or. App. 196, 506 P.2d 507 (1973), the Oregon Court of Appeals cited to *Levene et ux. v. City of Salem*, 191 Or. 182, 229 P.2d 255 (1951) for the proposition that the city cannot use an immunity defense to shield itself from liability in situations where water from public storm drainage systems flood private property.

[33] *See also Lowrimore v. Dimmitt*, 301 Or. 291, 296, 797 P.2d 1027 (1990) (decision by deputy sheriff to pursue a vehicle driven by a criminal suspect is not discretionary); *Tozer v. City of Eugene,* 115 Or. App. 464, 838 P.2d 1104 (1992) ("negligence in the implementation of [a traffic sign inspection and maintenance] program or in the performance of particular maintenance activities is not sheltered by discretionary immunity."); *Saracco v. Multnomah County*, 50 Or. App. 145, 151, 622 P.2d 118 (1981) (failure to inspect bridge); *Miller v. Grant's Pass Irr. Dist*. 297 Or. 312, 316, 686 P.2d 324 (1984) (failure to warn of a danger or take preventative measures).

Finally, a claim for inverse condemnation is not a tort, but rather an action against a public body to enforce a constitutional right. Therefore, the Torts Claim Act, including the discretionary immunity defense created thereunder, do not apply in that context. *Sells v. Nickerson*, 76 Or. App. 686, 691 n4, 711 P2d 171 (1985), *rev den*., 300 Or. 722 (1986); *Suess Builders v. City of Beaverton*, 294 Or. 254, 656 P.2d 306 (1982).

Appendix A.
Further Reading.

Angell, *Treatise on the Law of Watercourses,* (6th ed. 1854)

Annotation, *Liability of one who diverts stream into new channel for overflow*, 12 A.L.R. 187 (1921).

Dennison, *Proof of Landowner's Unreasonable Interference With Surface Water Drainage*, 87 AM. JUR. TRIALS 423 (2003)

Dougherty, *Extinguishment by Prescription of Natural Servitude for Drainage of Surface Waters*, 42 A.L.R.4th 462 (1985)

Fairchild, *Modern Status of Rules Governing Interference with Surface Waters*, 93 A.L.R.3d 1193, 1218 (1997).

Farnham, *The Law of Waters and Water Rights*, Vol II (1904).

Fry, *From Good Husbandry to Reasonable Use: Illinois Surface Water Drainage Law Evolves in Subdivision Case*, 52 CHICAGO-KENT LAW REVIEW 1 (April 1975).

Kinyon & McClure, *Interferences with Surface Water*, 24 MINN. L. REV. 891, 933-35 (1940)
McMahon, *Liability for Diversion of Surface Water by Raising Surface Level of Land,* 88 A.L.R.4th 891 (1991)

Larsson, *Unreasonable Alteration of Surface Drainage*, 109 AM. JUR. PROOF OF FACTS 3d 403 (2009)

Locke, *Act of God*, 6 AM. JUR. PROOF OF FACTS 3d 319 (1989)

Note, *The Application of Surface Water Rules in Urban Areas*, 42 MO. L.REV. 76, 76 (1977).

Schopler, *When Statute of Limitation Commences to Run Against Damage from Overflow of Land Caused by Artificial Construction or Obstruction*, 5 A.L.R.2d 302 (1949)

Smurr on Farm Drainage

Tellier, Liability of person obstructing stream, ravine, or similar area by debris or waste, for damages caused by flooding or the like, 29 A.L.R.2d 447 (1953)

Thompson, *Surface Water,* 23 AM L. REV 372 (1889)

Waters and Water Rights, Chapter 59 (“Drainage”) 1991 Ed. Lexis Law Publishing.

Weston, *Gone with the Water: Drainage Rights and Storm Water Management in Pennsylvania,* 22 VILL. L. REV. 901, 902 (1977)

Appendix B.
Oregon Case Law Addressing Storm Drainage/Flooding Law

Davidson v. Oregon & C.R. Co., 11 Or 136, 1 P 705 (1883)

Wattier v. Miller, 11 Or 329, 8 P 354 (1884)

Tucker v. Salem Flouring Mills Co., 13 Or 28, 33, 7P 53 (1885)

West v. Taylor, 16 Or 165, 13 P 665 (1887)

Bush v. City of Portland, 19 Or 45, 23 P 667 (1890)

Simmons v. Winters, 21 Or 35, 27 P 7 (1891)

Whitney v. Willamette Bridge RY. Co., 23 Or 188, 31 P 472 (1892)

Esson v. Wattier, 25 Or 7, 34 P 756 (1893)

Mendenhall v. Harrisburg Water Co., 27 Or. 38, 39 P. 399 (1895)

Moss v. Rose, 27 Or 595, 41 P 666 (1895)

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Davis v. Bostick, 282 Or 667, 580 P2d 544 (1978)

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Hamilton v. State of Oregon, 42 Or App 821, 601 P2d 882 (1979)

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Miller v. Grant's Pass Irr. Dist. 297 Or 312, 316, 686 P2d 324 (1984)

Sells v. Nickerson, 76 Or App 686, 711 P2d 171 (1985) *rev den*, 300 Or. 722 (1986)

McKinley v. Owyhee Project North Board of Control, 103 Or App 253, 265-66, 798 P2d 673 (1990), *modified on reconsideration on other grounds,* 104 Or App 576, 802 P2d 677 (1990) *adhered to*, 106 Or App 366, 807 P2d 338 (1991), *rev denied*, 311 Or 426 (1991).

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Chapter 18

Housing Justice: Disparate Impact Discrimination in the Sale and Rental of Real Estate

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Housing Justice:
Disparate Impact Discrimination in the Sale and Rental of Real Estate

FAIR HOUSING COUNCIL OF OREGON

Presentation Overview

- Introduction
- Overview of Fair Housing Laws
- Protected Classes
- Types of Allegations
- Disparate Treatment
- Disparate Impact

Introduction

Fair Housing Initiatives Program

- Information and Referral
- Investigation and Informal Advocacy
- Systemic Advocacy
- Formal Complaints and Legal Action
- Education and Outreach

FAIR HOUSING COUNCIL OF OREGON

Fair Housing Laws

Key Fair Housing Laws

- Federal Laws
  - The Fair Housing Act
  - The Civil Rights Act of 1866
- Oregon Revised Statutes
  - ORS 659A.145
  - ORS 659A.421
  - ORS 659A.425
  - ORS 90.449

What is Fair Housing

- Fair Housing is the right of all people to be free from illegal discrimination in the rental, sale, or financing of housing.
- In rental housing, these laws cover the application process, tenancy, and move out.

What is Fair Housing

- Treating a person differently in any housing transaction because that person is a member of a “protected class”

Who Must Comply

- Owners/Landlords
- Housing authorities
- Property managers
- Maintenance Staff
- Homeowners' Associations
- Real Estate Agents
- Mortgage Lenders & Financial Institutions
- Insurers
- Neighbors
- Jurisdictions
- Advertising media

"Dwellings" Under Fair Housing

- Houses
- Apartments (regardless of the # of units)
- Condos and floating homes
- Mobile homes
- Retirement housing, assisted living, etc.
- Nonprofit housing and shelters
- Possibly motel rooms

Protected Classes

Federally Protected Classes

- **Race**
- **Color**
- **National Origin**
- **Religion**
- **Sex**
  - **Includes Domestic Violence Survivors**
  - **Sexual Orientation**
  - **Gender identity**
- **Familial Status (families with children)**
- **Disability**

Oregon Protected Classes

Marital Status

Source of Income

- **Section 8**
- **Agency rent payments**
- **TANF, SSI, SSDI***

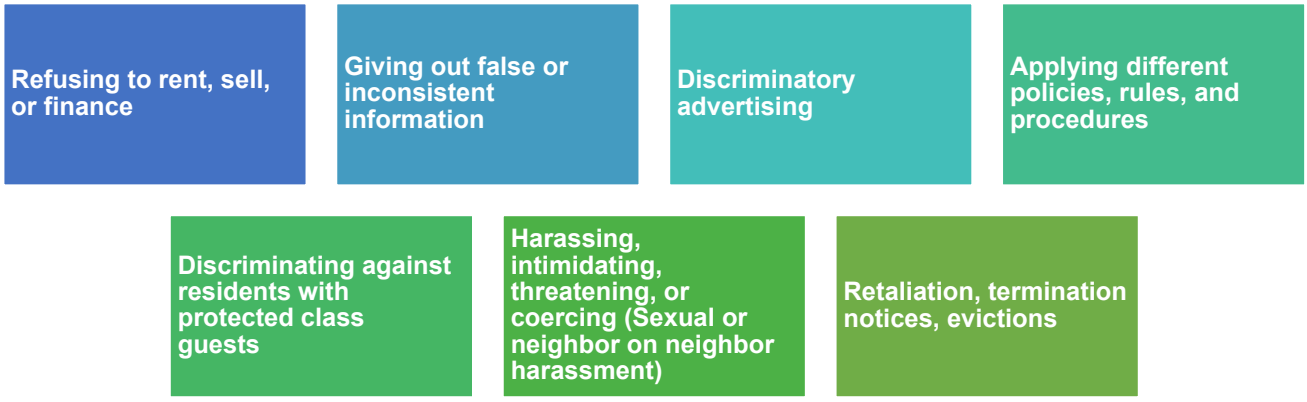
Sexual Orientation

Gender Identity

Local protected classes

Types of Allegations

Types of Allegations



Types of Allegations

- Disability-specific violations:
  - Denying reasonable accommodation
  - Inquiring about severity or nature of disability
  - Discriminatory terms, conditions, or privileges or in service of facilities

Disparate Treatment

Disparate Treatment

- "Intentional" discrimination
  - Plaintiff must establish that the defendant had a discriminatory intent or motive

Disparate Impact

Disparate Impact

- "Unintentional" discrimination
  - Not in and of itself illegal
  - Becomes illegal if the housing provider cannot justify the policy or practice
- Neutral Policy
  - Not discriminatory on its face
  - Identical policy applied to everyone

Disparate Impact

- Discriminatory in its application or effect
- Adverse effect on a protected class
  - Disproportionately adverse effect on members of a protected class, as compared to non-members.
- Unjustifiable impact on members of a protected class

Disparate Impact

- Prima Facie Case
  - Causal connection between a policy or practice and disparate impact or statistical disparity
- Defendant's Burden
  - Necessary to achieve substantial, legitimate, non-discriminatory interests

Disparate Impact

- Plaintiff's Rebuttal
  - Legitimate, nondiscriminatory interests could be served by an alternative practice that has a less discriminatory effect

Disparate Impact

- Case Law
  - *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015)
    - "Recognition of disparate impact liability under the FHA plays an important role in uncovering discriminatory intent: it permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."
  - *Southwest Fair Housing Council, Inc. v. Maricopa Domestic Water Improvement District*, 17 F.4th 950 (9th Cir 2021)

Disparate Impact

- HUD Guidance on Criminal Background
  - "Implementation of the Office of General Counsel's Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions" (June 2022)

Disparate Impact

- HUD Guidance on Criminal Background
  - Blacks represent 13 percent of the total US population, but 27 percent of all arrests
  - The incarceration rate of Black males was 5.7 times that of White non-Hispanic males
  - "Criminal history is not a good predictor of housing success"

Disparate Impact

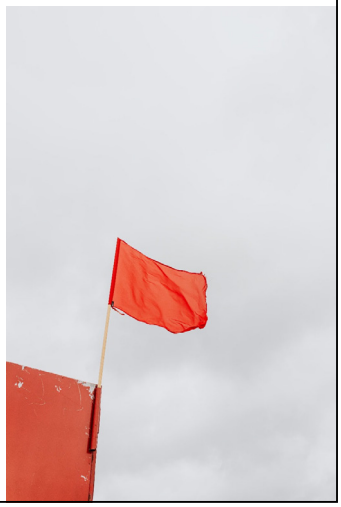
- HUD Guidance on Criminal Background
  - Background check policy should consider "nature, severity, and recency" of crimes
  - Before making an adverse decision
    - Provide applicant criminal record
    - Indicate part of record relied upon to deny
    - Give applicant opportunity to correct or explain extenuating circumstances

Disparate Impact

- HUD Guidance on Criminal Background
  - Some criminal background checks are required by statute for HUD-assisted programs
  - "[C]onsider limiting criminal records screening to the minimum statutory requirements to avoid fair housing violations."

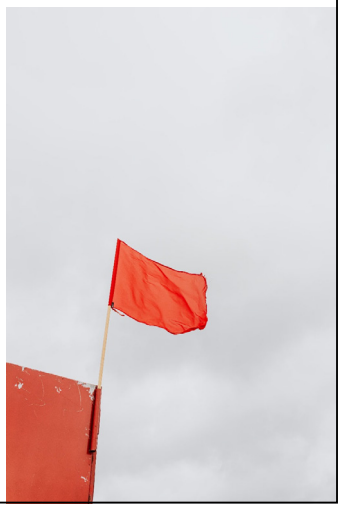
Disparate Impact

- HUD Guidance on Criminal Background
  - Background check reports with info that is inaccurate, incomplete, or has no relation to tenancy
  - Third-party screeners that use algorithms that contain racial or other bias by design



Disparate Impact

- HUD Guidance on Criminal Background
  - Deterrent: "We do not rent to persons with 'criminal records.'"
  - Evicting
    - for criminal behavior that has no bearing on tenancy
    - entire families due to activity of one person
    - victims of crime



Disparate Impact

- HUD Guidance on Criminal Background
  - Three Theories of Liability
    - Disparate Treatment
    - Disparate Impact
    - Denial of Reasonable Accommodation

Disparate Impact

- State law also permits disparate impact claims under Oregon fair housing statute
  - ORS 659A.425 (Violations based on facially neutral housing policy)

QUESTIONS?

What Can You Do?

- Report Discrimination
  - Fair Housing Council of Oregon
    - ✓ Website: https://fhco.org/
    - ✓ Email: inquiries@fhco.org
  - Dept. of Housing and Urban Development
    - ✓ Website: https://www.hud.gov/
    - ✓ Phone: 1-800-669-9777 or 1-800-877-8339
  - Oregon Bureau of Labor and Industries
    - ✓ Website: https://www.oregon.gov/
    - ✓ Phone: 971-673-0761

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Housing Justice:

Disparate Impact Discrimination in the Sale and Rental of Real Estate

FAIR HOUSING COUNCIL OF OREGON

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-2000

ASSISTANT SECRETARY FOR
FAIR HOUSING AND EQUAL OPPORTUNITY

June 10, 2022

MEMORANDUM FOR: Office of Fair Housing & Equal Opportunity
Fair Housing Assistance Program Agencies
Fair Housing Initiatives Program Grantees

FROM: Demetria L. McCain, Principal Deputy Assistant Secretary for Fair Housing and Equal Opportunity

SUBJECT: Implementation of the Office of General Counsel's Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions

Decent, stable, and affordable housing is a critical prerequisite to health, safety, education, jobs, and the economy.[1] Unfortunately, individuals with a criminal history consistently face daunting barriers to obtaining and maintaining housing.

On March 31, 2022, President Biden declared April as Second Chance Month, emphasizing the importance of helping persons who have had criminal involvement reenter society, reunite with their families, and find stable and safe homes. And on April 12, 2022, Secretary Fudge issued a memorandum instituting an agency-wide effort to review this Department's programs to ensure HUD, its funding recipients, and program participants are as inclusive as possible of individuals with criminal involvement. This directive highlights the importance of applying the principles of the Department's Office of General Counsel's 2016 Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, which cannot be overemphasized.

This memorandum reviews those principles, highlights the need for FHEO investigators, Fair Housing Initiatives Program grantees (FHIPs), and Fair Housing Assistance Program agencies (FHAPs) to be aware of the ways in which criminal background screening policies and practices can violate the Fair Housing Act (the "Act"), provides tips for conducting investigations relating to criminal background screening, and sets out some best practices FHIP and FHAP staff can suggest to housing providers who may be concerned about potential liability relating to the use of criminal background screening information on applicants or tenants.

[1] *See, e.g.,* Carnemolla, Phillippa and Skinner, Vivienne. *Outcomes Associated with Providing Secure, Stable, and Permanent Housing for People Who Have Been Homeless: An International Scoping Review*. Journal of Planning Literature. 2021, 36 (4): 508-525, *available at* https://journals.sagepub.com/doi/pdf/10.1177/08854122211012911; *see also* Fontaine, Jocelyn and Biess, Jennifer. *Housing as a Platform for Formerly Incarcerated Persons*. The Urban Institute. April 2012, *available at* https://www.urban.org/sites/default/files/publication/25321/412552-Housing-as-a-Platform-for-Formerly-Incarcerated-Persons.PDF.

HOUSING & DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM[2]

Disparities throughout the United States' criminal justice system are well established and persistent. Blacks represent roughly 13 percent of the total U.S. population but account for roughly 27 percent of all arrests.[3] In 2019, the incarceration rate of Black males was 5.7 times that of White non-Hispanic males, while the incarceration rate of Black females was 1.7 times the rate of White non-Hispanic females.[4] A recent study also reflects that Hispanics are incarcerated in state prisons at a rate that is 1.3 times the incarceration rate of White non-Hispanics.[5] In addition, updated data shows that individuals with disabilities are also disproportionately impacted by the criminal justice system.[6] Research shows that these disparities cannot be simply attributed to certain groups committing more crimes and are better explained by biases in the criminal justice system.[7]

These disparities extend to housing. Housing providers frequently employ policies or practices that exclude individuals with criminal involvement from housing, which should raise red flags for investigators. For example, housing providers commonly use tenant screening companies that provide background check reports that are often inaccurate, incomplete, or have no relationship to whether someone will be a good tenant. This information is then used to deny housing to otherwise qualified applicants. As another example, housing providers sometimes utilize third-party companies to independently screen and reject applicants using algorithms that may contain racial or other prohibited bias in their design. Also at times, some housing providers inform potential tenants that they do not rent to persons with "criminal records," deterring those with any criminal involvement from applying. On other occasions, housing providers evict individuals based on criminal activity that has no bearing on their tenancy, evict entire families because of criminal

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[2] While "Latinx" is the commonly preferred term, the term "Hispanic" is used as consistent with U.S. Census Bureau terminology.

[3] *See* Nembhard, Susan and Robin, Lily. *Racial and Ethnic Disparities throughout the Criminal Legal System: A Result of Racist Policies and Discretionary Practices*. Urban Institute (August 2021), *available at* https://www.urban.org/sites/default/files/publication/104687/racial-and-ethnic-disparities-throughout-the-criminal-legal-system.pdf. (citing, QuickFacts population estimates, July 1, 2019, United States Census Bureau, https://www.census.gov/quickfacts/fact/table/US/PST045219; Crime in the United States, Table 43A: Arrests by Race and Ethnicity, 2019, United States Department of Justice, Federal Bureau of Investigation Uniform Crime Reporting Program, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topicpages/tables/table-43.)

[4] *See* Carson, E. Ann. *Prisoners in 2019*. U.S. Department of Justice. Office of Justice Programs. Bureau of Justice Statistics (October 2020), *available at* https://bjs.ojp.gov/content/pub/pdf/p19.pdf.

[5] *See* Nellis, Ashley. *The Color of Justice: Racial and Ethnic Disparity in State Prisons.* The Sentencing Project (2021), *available at*, file:///C:/Users/h53470/Downloads/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons%20(1).pdf.

[6] *See* Laura M. Maruschak, et al., Bureau of Just. Stat., U.S. Dep't of Just., *Disabilities Reported by Prisoners: Survey of Prison Inmates, 2016,* at 2 (Mar. 2021), *available at* https://bjs.ojp.gov/library/publications/disabilities-reported-prisoners-survey-prison-inmates-2016; Erin J. McCauley, *The Cumulative Probability of Arrest by Age 28 Years in the United States by Disability Status, Race/Ethnicity, and Gender*, Am. J. Pub. Health (Nov. 8, 2017), https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2017.304095.

[7] *See, e.g.,* Emma Pierson, et al.. *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*. Nature Human Behaviour, Vol. 4, 736-745 (July 2020) (analyzing data showing that police search Black and Hispanic drivers more often than White drivers, but are less likely to turn up contraband during searches of Black and Hispanic drivers compared to searches of White drivers), *available at* https://www.nature.com/articles/s41562-020-0858-1; *id* (showing that black drivers are less likely to be pulled over at night (when their race is obscured)); Nembhard, Susan and Robin, Lily. *Racial and Ethnic Disparities throughout the Criminal Legal System: A Result of Racist Policies and Discretionary Practices*. Urban Institute (August 2021) (citing multiple studies also showing the racial disparities in the criminal justice system cannot be explained by differences in criminality between racial groups, but instead can be explained by racial bias); *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform, American Civil Liberties Union* (April 2020) (citing data showing that Black people are 3.6 times as likely to get arrested for marijuana possession than White people, despite similar usage rates), *available at* https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf.

activity of one person that has nothing to do with the rest of the household, or evict because a household member was a *victim* of a crime that occurred at or near their home. These and many other policies and practices frequently result in discrimination against protected class groups, including Blacks, Hispanics, and individuals with disabilities.

THE 2016 GUIDANCE & THREE THEORIES OF LIABILITY

On April 4, 2016, HUD's Office of General Counsel issued its Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions. ("2016 Guidance"). This guidance described how to assess claims of illegal discrimination under the Act. It applies to a wide-range of entities covered by the Act, including private landlords, management companies, condominium associations or cooperatives, third-party screening companies, HUD-subsidized housing providers, and public entities that operate, administer or fund housing or that enact ordinances that restrict access to housing based on criminal involvement.[8]

Using criminal history to screen, deny lease renewal, evict, or otherwise exclude individuals from housing may be illegal under the Fair Housing Act under three different theories of liability – discriminatory intent (also known as disparate treatment), discriminatory effects, and refusal to make reasonable accommodations. Each of these theories of liability is explained more fully below.

Complaints concerning criminal involvement will generally require investigation and analysis to determine if the alleged discrimination involved both intentional discrimination and an unjustified discriminatory effect, even if the complainant does not directly allege either specific theory. In certain instances, both intentional discrimination and unjustified discriminatory effects may be present. Complaints alleging disability discrimination may also require investigation under a reasonable accommodation framework.

It is not the complainant's burden to either prove discrimination or disprove respondent's defenses or assertions. That obligation rests with FHEO or the FHAP conducting the investigation and requires independent investigation to establish the facts.

1. DISCRIMINATORY INTENT

Claims that a housing provider has used criminal records or other criminal history information to discriminate intentionally in violation of the Act should be investigated in a manner similar to other allegations of intentional discrimination. Criminal records or other criminal history information may be a pretext for unequal treatment of individuals because of race, color, national origin, disability, or another protected characteristic.

Unless there is direct evidence of discriminatory intent such as written or oral statements, evidence usually is gathered and analyzed using the *McDonnell Douglas* shifting burdens

[8] See Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services (Sept. 2016), *available at* https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.

framework, although there may be cases where evidence showing intentional discrimination does not fit within a *McDonnell Douglas* framework. In such instances, this evidence should also be documented and analyzed to determine if there is reasonable cause to believe discrimination occurred.

Examples of evidence that would support a finding of reasonable cause to believe that disparate treatment occurred include (not an exhaustive list):

- A housing provider routinely advises Native American applicants about a criminal records screening policy but does not advise White applicants about the policy.
- A housing provider applied a criminal background screening policy to a Black applicant but did not apply the policy to a White applicant.
- A housing provider rejected a Hispanic applicant based on his criminal record but rented to a White applicant with a comparable criminal record.
- A property manager discouraged a Black applicant with a criminal record from applying, saying their record would likely lead to a rejection, but encouraged a White individual with a comparable criminal record to apply, saying that it was possible their record would not turn up and offering them an application form.
- A housing provider evicted a Black tenant who was convicted of a crime but did not evict a White tenant who was convicted of a similar crime.
- After learning that an applicant was previously homeless and hospitalized for treatment of a mental health condition, a management company departed from its standard procedures and conducted a criminal background screening of the applicant.
- A locality applies a crime-free ordinance requiring the eviction of criminally involved residents in a neighborhood with a significant Black or Hispanic population but does not apply the ordinance in neighborhoods that are predominantly populated by White households.

2. Discriminatory Effects

Claims that a housing provider's policy or practice concerning criminal background screening or other criminal history information create an unjustified discriminatory effect in violation of the Act should be investigated using the analysis described in the 2016 Guidance. The three steps to a discriminatory effects analysis follow.

Three Steps to a Discriminatory Effects Analysis

Step One (*prima facie* showing)

Investigators must gather evidence regarding whether the challenged criminal history policy or practice *actually or predictably results* in a disparate impact on a protected class. This involves 1) identifying the housing provider's relevant practices or policies, both written and in practice, and 2) identifying statistics which show whether the identified policies actually or predictably result in a disparate impact on a protected class.

General Guidelines/Tips	Examples and further guidance
Identify all policies, including written and unwritten policies or practices.	If a landlord has a written policy that requires rejections for persons with felony convictions less than two years old, but complainant says they were told by housing staff that their application would be rejected based on any felony conviction regardless of date, the investigator should investigate both the written policy and the oral policy conveyed to complainant by staff. If a landlord says that they have no particular criminal records policy, but instead rely on a third-party screening company to make the determination as to which applicants are approved, the investigator should conduct interviews and request information (email communications, contracts, etc.) from the third-party screening company to determine whether the landlord or the screening company itself set the screening criteria. Consider whether the third-party screening company should be an additional respondent in the matter.
Statistics should relate as closely as possible to the particular policy or policies at issue.	Investigators should first attempt to identify statistics that are specifically tailored to the policy at issue. For example, if a policy requires the eviction of anyone who becomes incarcerated during tenancy, the investigator should focus on incarceration data for the relevant populations (see next box). If a policy denies tenancy to anyone with a felony arrest or conviction over the past 10 years, the investigator should focus on felony conviction and arrest data over the past 10 years for the relevant populations. • Many up-to-date criminal justice statistics can be found on the Department of Justice's Bureau of Justice Statistics website, available at https://bjs.ojp.gov/library. • Many statistics regarding local and national incarceration rates broken down by race and ethnicity can be found at https://trends.vera.org/. • The investigator may have to contact state or local government or criminal justice agencies to obtain relevant criminal justice data. • Information regarding a protected class's percentage of the general population (locally and nationally) can be found at the United States' Census Bureau's website, available at https://www.census.gov/en.html. • Demographic information specific to tenants in HUD-subsidized buildings is available at https://www.huduser.gov/portal/datasets/assthsg.html#2009-2021_query. In all cases involving the use of statistics to prove disparate impact, investigators should consult with counsel and an economist or statistician to ensure the most comprehensive and relevant data is retrieved. Perfect data may not always be available, but an economist or statistician may be able to assist in identifying relevant alternative data.
Relevant populations will	Investigators should gather data regarding *actual* applicants and tenants where

General Guidelines/Tips	Examples and further guidance
be case specific.	available to determine the actual disparate impact of a challenged policy. For example, data showing that Hispanics consist of 20% of the respondent's applicants but 70% of those excluded due to a criminal record policy is evidence that the criminal record screening policy has a disproportionate impact on Hispanic applicants. Data showing that Black individuals comprise 65% of the housing provider's tenants, but 95% of those evicted under a policy to evict based on an arrest indicates that the policy to evict for an arrest has a disproportionate impact on Black tenants. If actual data are unavailable or unreliable, investigators should consult with an economist or statistician to determine what data may be sufficient. The investigator may need to be consider the following, in consultation with an economist or statistician: • What is the relevant market area for applicants? • Are there income or other restrictions that may narrow the relevant population? What are the other screening criteria at the property? Although investigators should seek out localized data in most circumstances, national or statewide statistics on racial and ethnic disparities in the criminal justice system may be sufficient in some instances, such as where there is no reason to believe that the local characteristics would differ from the national statistics; where the actual applicant pool for certain housing might not reflect the potential applicant pool, due to a self-recognized inability on the part of potential applicants to meet the very standards challenged as discriminatory; or where actual applicant data is not available or is too small of a sample size.

Step Two - Defense

If the respondent raises any defenses, investigators should seek evidence concerning respondent's asserted defenses. Regardless of the assertions, however, investigators should anticipate common defenses and independently determine whether there is evidence that supports or refutes a potential defense in the course of the general investigation. The complainant should always be advised about any defenses a respondent is asserting and given the opportunity to provide evidence related to the asserted defenses.

Potential Defense	Guidelines for Investigators	Examples and further guidance
The screening policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest. Many respondents will assert concerns for the	Investigators should determine whether safety or property concerns are the actual reason behind the policy, and if so, whether the policy is necessary to achieve those interests. There must be reliable evidence that	Because an arrest (without more information or a consequent adjudication) is not proof of criminal activity, policies or practices that exclude because of arrests do not serve substantial, legitimate, nondiscriminatory interests and do not constitute valid defenses to disparate impact liability. Policies or practices that ban all convictions do

Potential Defense	Guidelines for Investigators	Examples and further guidance
safety of other residents or the protection of property as the substantial, legitimate, nondiscriminatory interest for the policy or practice.	the policy or practice actually assists in protecting resident safety and/or property. Bald assertions based on generalizations or stereotypes do not constitute a valid defense.	not serve substantial, legitimate, nondiscriminatory interests and thus do not constitute valid defenses to disparate impact liability. Policies or practices that deny housing based on an accurate record of convictions that indicate a demonstrable risk to resident safety and/or property *may* serve substantial, legitimate, nondiscriminatory interests. *However, policies or practices that fail to consider the nature, severity, and recency of an individual's conduct are unlikely to be necessary to serve a substantial, legitimate, nondiscriminatory interest.*
Some respondents may dispute that there is sufficient evidence that the policy results in a disparate impact on a protected group.	Sometimes, there will not be direct evidence of an actual disparate impact of a criminal records screening policy, including because a respondent does not keep demographic data of its applicants or tenants, or because the racial balance at a building may reflect the racial balance of the potential or actual applicant pool. Respondents may also dispute whether there is sufficient evidence that their policy predictably disproportionately impacts a protected class.	In these cases, the investigator should consult with an economist or statistician and counsel to determine the validity of respondent's claim.

Step Three – Less Discriminatory Alternative

If the policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest, investigators should gather information and analyze whether the same interest could be served by another practice that has a less discriminatory effect. If so, respondent's defense fails.

Although the identification of a less discriminatory alternative will depend on the particulars of the criminal history policy or practice under challenge, individualized assessment of relevant mitigating information beyond that contained in an individual's criminal record is likely to have a less discriminatory effect than categorical exclusions that do not take such additional information into account. Relevant individualized evidence might include: the facts or circumstances surrounding the criminal conduct; the age of the individual at the time of the conduct; evidence that

the individual has maintained a good tenant history before and/or after the conviction or conduct; and evidence of rehabilitation efforts.

3. REASONABLE ACCOMMODATION

Some complaints relating to criminal involvement may allege that a respondent discriminated because of disability by failing to make an exception or adjustment to a criminal background screening policy or practice, when such exception or adjustment may be necessary to afford a person with a disability the equal opportunity to use and enjoy a dwelling, in violation of the Act. Investigators should gather evidence in these cases just as they would in any other reasonable accommodation case.

For example, a reasonable accommodation to a criminal background screening policy or practice may be required when there is evidence that the individual's disability contributed to the criminal conduct at issue, and there are mitigating circumstances that eliminate or significantly reduce the risk of harm to others or property, such as improvements resulting from previous on ongoing therapy or treatment.

The Fair Housing Act provides that the current illegal use of controlled substances is not considered a disability under the Act.[9] Additionally, the Act does not protect a person whose tenancy would constitute a "direct threat" to the health and safety of other individuals or result in substantial physical damage to the property of others, *unless* the threat can be eliminated or significantly reduced by reasonable accommodation.[10] The housing provider thus must have reliable, objective evidence that a person with a disability currently poses a direct threat that cannot be significantly reduced before excluding them from housing on that basis. For additional information, please refer to guidance on reasonable accommodations under the Fair Housing Act.[11]

TIPS FOR FHIPS AND FHAPS PROVIDING TECHNICAL ASSISTANCE TO HOUSING PROVIDERS

In providing technical assistance to housing providers who want to avoid violating the Act when screening applicants or tenants, FHIPs and FHAPs should recommend the following best practices:

- Private housing providers should consider not using criminal history to screen tenants for housing. Criminal history is not a good predictor of housing success. Most housing providers are not required by law to exclude persons with criminal histories as tenants and can rely instead on other screening criteria that more closely relate to whether an applicant or resident would be a good tenant, such as ability to pay rent, prior rental history, or personal references. Some HUD-assisted housing providers have statutory obligations to exclude persons with certain criminal histories and should consider limiting criminal records screening to the minimum statutory requirements to avoid fair housing violations.

[9] 42 U.S.C. § 3602(h).
[10] 42 U.S.C. § 3604(f)(9).
[11] *See* Joint Statement of the U.S. Department of Housing and Urban Development and the U.S. Department of Justice on Reasonable Accommodations under the Fair Housing Act, *available at* https://www.hud.gov/sites/dfiles/FHEO/documents/huddojstatement.pdf.

- Housing providers should evict for criminal activity only as a last resort (which includes conducting an individualized assessment to determine if the eviction is necessary).
- Housing providers should never evict a person or family because they have been victims of criminal activity.
- Housing providers should not ban a tenant's invited guest from visiting that tenant based on the guest's criminal involvement. In most jurisdictions, landlords may not bar a tenant's invited guests, regardless of circumstance. Local laws may provide options that can be used when a housing provider has evidence that the visitor engaged in criminal activity on the premises. If a housing provider uses a remedy under local law, the housing provider still must be careful to ensure its actions do not violate the Fair Housing Act under any of the principles discussed in this memorandum.
- If housing providers choose to use criminal background screening policies or practices, they should consider taking the following steps to avoid potential violation of the Fair Housing Act:
    - Have a written criminal background screening policy that is made available to all applicants.
    - Ensure they can justify their policy with reliable evidence showing that it actually assists in protecting resident safety and/or property.
    - Ensure that any policy considers the nature, severity, and recency of criminal conduct.
    - Avoid the use of third-party screening companies that utilize algorithms that may contain racial or other prohibited bias in their design, have not been shown to reliably predict risk, may produce inaccurate information about the applicant, or make the decision for the housing provider (rather than providing information to the housing provider to make its own determination).
    - Before making an adverse decision related to an applicant's or tenant's criminal involvement, provide the applicant or tenant with the criminal record, indicate which specific part of the record may form the basis of an adverse decision, and give the applicant or tenant the opportunity to correct inaccurate information or explain extenuating circumstances related to that record.
    - Comply with any state or local law that limits the landlord's ability to run criminal background checks during the screening process or use criminal background information when making rental determinations[12] (unless, in the case of certain HUD-subsidized landlords, federal law *requires* such exclusion). While federal program rules allow certain HUD subsidized landlords discretion to screen certain applicants from housing based on specific criminal records, this discretion is limited by both civil rights laws such as the Fair Housing Act and local laws that limit the kinds of crimes or the manner in which a landlord may screen for criminal background.
    - Consider delaying consideration of criminal history until after an individual's financial and other qualifications are verified and a conditional offer is made.
    - Conduct an individualized assessment that considers relevant mitigating information beyond that contained in an individual's criminal record, as this is

[12] For example, the Just Housing Amendment in Cook County, Illinois forbids housing providers from denying applications for housing based anything but convictions less than 3 years old, and only after a consideration of individualized circumstances, with limited exceptions. *See* https://www.cookcountyil.gov/content/just-housing-amendment-information-landlords/.

likely to have a less discriminatory effect than categorical exclusions that do not take such additional information into account. Relevant individualized evidence might include: the facts or circumstances surrounding the criminal conduct; the age of the individual at the time of the conduct; how long ago the criminal conduct occurred, evidence that the individual has maintained a good tenant history before and/or after the conviction or conduct; and evidence of rehabilitation efforts.

- Housing providers must ensure that that they are not engaging in disparate treatment in any individualized review process. One study found that when housing providers used discretionary criminal record screening policies — or policies that evaluated prospective tenants on a "case by case" basis—they favored White applicants over similarly situated Black applicants 55% of the time.[13]
- Therefore, these individualized reviews should be utilized only in clearly delineated circumstances when the individual would otherwise be excluded because of current, reliable evidence that the specific crime at issue would threaten safety and/or property.
- Identifying and training or hiring individuals who are aware of potential bias issues and qualified to perform individualized assessments can also help mitigate bias that may arise during these assessments. Individuals involved in applicant and tenant screening also need to understand and know how to apply the Fair Housing Act's reasonable accommodation requirements.

CONCLUSION

Fair housing is critical to the mission of HUD and its fair housing partners. We will continue to work collaboratively to ensure that the Fair Housing Act's protections are realized by all protected classes. I am grateful for our FHIP and FHAP partners' longstanding commitment to fair housing and civil rights and their tireless dedication to the public they serve. Together, we will continue to combat discrimination in housing to ensure that individuals with criminal justice involvement can find and secure safe, affordable, and accessible housing in areas of opportunity.

The National Fair Housing Training Academy will be providing trainings on how to investigate cases involving alleged violations of the Fair Housing Act involving criminal records policies in the coming months. FHIPs and FHAPs are strongly encouraged to attend such trainings.

[13] Matthew Ciardullo, et al., *Locked Out Criminal Background Checks as a Tool for Discrimination* Greater New Orleans Fair Housing Action Center (October 2015) *available at* https://lafairhousing.org/wp-content/uploads/2021/12/Criminal_Background_Audit_FINAL.pdf

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS ET AL. *v.* INCLUSIVE COMMUNITIES PROJECT, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13–1371. Argued January 21, 2015—Decided June 25, 2015

The Federal Government provides low-income housing tax credits that are distributed to developers by designated state agencies. In Texas, the Department of Housing and Community Affairs (Department) distributes the credits. The Inclusive Communities Project, Inc. (ICP), a Texas-based nonprofit corporation that assists low-income families in obtaining affordable housing, brought a disparate-impact claim under §§804(a) and 805(a) of the Fair Housing Act (FHA), alleging that the Department and its officers had caused continued segregated housing patterns by allocating too many tax credits to housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods. Relying on statistical evidence, the District Court concluded that the ICP had established a prima facie showing of disparate impact. After assuming the Department's proffered non-discriminatory interests were valid, it found that the Department failed to meet its burden to show that there were no less discriminatory alternatives for allocating the tax credits. While the Department's appeal was pending, the Secretary of Housing and Urban Development issued a regulation interpreting the FHA to encompass disparate-impact liability and establishing a burden-shifting framework for adjudicating such claims. The Fifth Circuit held that disparate-impact claims are cognizable under the FHA, but reversed and remanded on the merits, concluding that, in light of the new regulation, the District Court had improperly required the Department to prove less discriminatory alternatives.

The FHA was adopted shortly after the assassination of Dr. Martin Luther King, Jr. Recognizing that persistent racial segregation had

left predominantly black inner cities surrounded by mostly white suburbs, the Act addresses the denial of housing opportunities on the basis of "race, color, religion, or national origin." In 1988, Congress amended the FHA, and, as relevant here, created certain exemptions from liability.

Held: Disparate-impact claims are cognizable under the Fair Housing Act. Pp. 7–24.

(a) Two antidiscrimination statutes that preceded the FHA are relevant to its interpretation. Both §703(a)(2) of Title VII of the Civil Rights Act of 1964 and §4(a)(2) of the Age Discrimination in Employment Act of 1967 (ADEA) authorize disparate-impact claims. Under *Griggs* v. *Duke Power Co.*, 401 U. S. 424, and *Smith* v. *City of Jackson*, 544 U. S. 228, the cases announcing the rule for Title VII and for the ADEA, respectively, antidiscrimination laws should be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose. Disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain the free-enterprise system. Before rejecting a business justification—or a governmental entity's analogous public interest—a court must determine that a plaintiff has shown that there is "an available alternative . . . practice that has less disparate impact and serves the [entity's] legitimate needs." *Ricci* v. *DeStefano*, 557 U. S. 557, 578. These cases provide essential background and instruction in the case at issue. Pp. 7–10.

(b) Under the FHA it is unlawful to "refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to a person because of race" or other protected characteristic, §804(a), or "to discriminate against any person in" making certain real-estate transactions "because of race" or other protected characteristic, §805(a). The logic of *Griggs* and *Smith* provides strong support for the conclusion that the FHA encompasses disparate-impact claims. The results-oriented phrase "otherwise make unavailable" refers to the consequences of an action rather than the actor's intent. See *United States* v. *Giles*, 300 U. S. 41, 48. And this phrase is equivalent in function and purpose to Title VII's and the ADEA's "otherwise adversely affect" language. In all three statutes the operative text looks to results and plays an identical role: as a catchall phrase, located at the end of a lengthy sentence that begins with prohibitions on disparate treatment. The introductory word "otherwise" also signals a shift in emphasis from an actor's intent to the consequences of his actions. This similarity in text and structure is even more compelling because Congress passed the FHA only four years after Title VII and four months after the

ADEA. Although the FHA does not reiterate Title VII's exact language, Congress chose words that serve the same purpose and bear the same basic meaning but are consistent with the FHA's structure and objectives. The FHA contains the phrase "because of race," but Title VII and the ADEA also contain that wording and this Court nonetheless held that those statutes impose disparate-impact liability.

The 1988 amendments signal that Congress ratified such liability. Congress knew that all nine Courts of Appeals to have addressed the question had concluded the FHA encompassed disparate-impact claims, and three exemptions from liability in the 1988 amendments would have been superfluous had Congress assumed that disparate-impact liability did not exist under the FHA.

Recognition of disparate-impact claims is also consistent with the central purpose of the FHA, which, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of the Nation's economy. Suits targeting unlawful zoning laws and other housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification are at the heartland of disparate-impact liability. See, *e.g., Huntington* v. *Huntington Branch, NAACP*, 488 U. S. 15, 16–18. Recognition of disparate-impact liability under the FHA plays an important role in uncovering discriminatory intent: it permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.

But disparate-impact liability has always been properly limited in key respects to avoid serious constitutional questions that might arise under the FHA, *e.g.,* if such liability were imposed based solely on a showing of a statistical disparity. Here, the underlying dispute involves a novel theory of liability that may, on remand, be seen simply as an attempt to second-guess which of two reasonable approaches a housing authority should follow in allocating tax credits for low-income housing. An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest their policies serve, an analysis that is analogous to Title VII's business necessity standard. It would be paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in the Nation's cities merely because some other priority might seem preferable. A disparate-impact claim relying on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement is important in ensuring that defendants do not resort to the use of racial quotas. Courts must

therefore examine with care whether a plaintiff has made out a prima facie showing of disparate impact, and prompt resolution of these cases is important. Policies, whether governmental or private, are not contrary to the disparate-impact requirement unless they are "artificial, arbitrary, and unnecessary barriers." *Griggs,* 401 U. S., at 431. Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision. These limitations are also necessary to protect defendants against abusive disparate-impact claims.

And when courts do find liability under a disparate-impact theory, their remedial orders must be consistent with the Constitution. Remedial orders in disparate-impact cases should concentrate on the elimination of the offending practice, and courts should strive to design race-neutral remedies. Remedial orders that impose racial targets or quotas might raise difficult constitutional questions.

While the automatic or pervasive injection of race into public and private transactions covered by the FHA has special dangers, race may be considered in certain circumstances and in a proper fashion. This Court does not impugn local housing authorities' race-neutral efforts to encourage revitalization of communities that have long suffered the harsh consequences of segregated housing patterns. These authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset. Pp. 10–23.

747 F. 3d 275, affirmed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and THOMAS, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 13–1371

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, ET AL., PETITIONERS *v.* THE INCLUSIVE COMMUNITIES PROJECT, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 25, 2015]

JUSTICE KENNEDY delivered the opinion of the Court.

The underlying dispute in this case concerns where housing for low-income persons should be constructed in Dallas, Texas—that is, whether the housing should be built in the inner city or in the suburbs. This dispute comes to the Court on a disparate-impact theory of liability. In contrast to a disparate-treatment case, where a "plaintiff must establish that the defendant had a discriminatory intent or motive," a plaintiff bringing a disparate-impact claim challenges practices that have a "disproportionately adverse effect on minorities" and are otherwise unjustified by a legitimate rationale. *Ricci* v. *DeStefano*, 557 U. S. 557, 577 (2009) (internal quotation marks omitted). The question presented for the Court's determination is whether disparate-impact claims are cognizable under the Fair Housing Act (or FHA), 82 Stat. 81, as amended, 42 U. S. C. §3601 *et seq.*

I

A

Before turning to the question presented, it is necessary

to discuss a different federal statute that gives rise to this dispute. The Federal Government provides low-income housing tax credits that are distributed to developers through designated state agencies. 26 U. S. C. §42. Congress has directed States to develop plans identifying selection criteria for distributing the credits. §42(m)(1). Those plans must include certain criteria, such as public housing waiting lists, §42(m)(1)(C), as well as certain preferences, including that low-income housing units "contribut[e] to a concerted community revitalization plan" and be built in census tracts populated predominantly by low-income residents. §§42(m)(1)(B)(ii)(III), 42(d)(5)(ii)(I). Federal law thus favors the distribution of these tax credits for the development of housing units in low-income areas.

In the State of Texas these federal credits are distributed by the Texas Department of Housing and Community Affairs (Department). Under Texas law, a developer's application for the tax credits is scored under a point system that gives priority to statutory criteria, such as the financial feasibility of the development project and the income level of tenants. Tex. Govt. Code Ann. §§2306.6710(a)–(b) (West 2008). The Texas Attorney General has interpreted state law to permit the consideration of additional criteria, such as whether the housing units will be built in a neighborhood with good schools. Those criteria cannot be awarded more points than statutorily mandated criteria. Tex. Op. Atty. Gen. No. GA–0208, pp. 2–6 (2004), 2004 WL 1434796, *4–*6.

The Inclusive Communities Project, Inc. (ICP), is a Texas-based nonprofit corporation that assists low-income families in obtaining affordable housing. In 2008, the ICP brought this suit against the Department and its officers in the United States District Court for the Northern District of Texas. As relevant here, it brought a disparate-impact claim under §§804(a) and 805(a) of the FHA. The

ICP alleged the Department has caused continued segregated housing patterns by its disproportionate allocation of the tax credits, granting too many credits for housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods. The ICP contended that the Department must modify its selection criteria in order to encourage the construction of low-income housing in suburban communities.

The District Court concluded that the ICP had established a prima facie case of disparate impact. It relied on two pieces of statistical evidence. First, it found "from 1999–2008, [the Department] approved tax credits for 49.7% of proposed non-elderly units in 0% to 9.9% Caucasian areas, but only approved 37.4% of proposed non-elderly units in 90% to 100% Caucasian areas." 749 F. Supp. 2d 486, 499 (ND Tex. 2010) (footnote omitted). Second, it found "92.29% of [low-income housing tax credit] units in the city of Dallas were located in census tracts with less than 50% Caucasian residents." *Ibid.*

The District Court then placed the burden on the Department to rebut the ICP's prima facie showing of disparate impact. 860 F. Supp. 2d 312, 322–323 (2012). After assuming the Department's proffered interests were legitimate, *id.*, at 326, the District Court held that a defendant—here the Department—must prove "that there are no other less discriminatory alternatives to advancing their proffered interests," *ibid.* Because, in its view, the Department "failed to meet [its] burden of proving that there are no less discriminatory alternatives," the District Court ruled for the ICP. *Id.*, at 331.

The District Court's remedial order required the addition of new selection criteria for the tax credits. For instance, it awarded points for units built in neighborhoods with good schools and disqualified sites that are located adjacent to or near hazardous conditions, such as high crime areas or landfills. See 2012 WL 3201401 (Aug. 7,

2012). The remedial order contained no explicit racial targets or quotas.

While the Department's appeal was pending, the Secretary of Housing and Urban Development (HUD) issued a regulation interpreting the FHA to encompass disparate-impact liability. See Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (2013). The regulation also established a burden-shifting framework for adjudicating disparate-impact claims. Under the regulation, a plaintiff first must make a prima facie showing of disparate impact. That is, the plaintiff "has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect." 24 CFR §100.500(c)(1) (2014). If a statistical discrepancy is caused by factors other than the defendant's policy, a plaintiff cannot establish a prima facie case, and there is no liability. After a plaintiff does establish a prima facie showing of disparate impact, the burden shifts to the defendant to "prov[e] that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." §100.500(c)(2). HUD has clarified that this step of the analysis "is analogous to the Title VII requirement that an employer's interest in an employment practice with a disparate impact be job related." 78 Fed. Reg. 11470. Once a defendant has satisfied its burden at step two, a plaintiff may "prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect." §100.500(c)(3).

The Court of Appeals for the Fifth Circuit held, consistent with its precedent, that disparate-impact claims are cognizable under the FHA. 747 F. 3d 275, 280 (2014). On the merits, however, the Court of Appeals reversed and remanded. Relying on HUD's regulation, the Court of Appeals held that it was improper for the District Court to

have placed the burden on the Department to prove there were no less discriminatory alternatives for allocating low-income housing tax credits. *Id.*, at 282–283. In a concurring opinion, Judge Jones stated that on remand the District Court should reexamine whether the ICP had made out a prima facie case of disparate impact. She suggested the District Court incorrectly relied on bare statistical evidence without engaging in any analysis about causation. She further observed that, if the federal law providing for the distribution of low-income housing tax credits ties the Department's hands to such an extent that it lacks a meaningful choice, then there is no disparate-impact liability. See *id.*, at 283–284 (specially concurring opinion).

The Department filed a petition for a writ of certiorari on the question whether disparate-impact claims are cognizable under the FHA. The question was one of first impression, see *Huntington* v. *Huntington Branch, NAACP*, 488 U. S. 15 (1988) (*per curiam*), and certiorari followed, 573 U. S. ___ (2014). It is now appropriate to provide a brief history of the FHA's enactment and its later amendment.

B

De jure residential segregation by race was declared unconstitutional almost a century ago, *Buchanan* v. *Warley*, 245 U. S. 60 (1917), but its vestiges remain today, intertwined with the country's economic and social life. Some segregated housing patterns can be traced to conditions that arose in the mid-20th century. Rapid urbanization, concomitant with the rise of suburban developments accessible by car, led many white families to leave the inner cities. This often left minority families concentrated in the center of the Nation's cities. During this time, various practices were followed, sometimes with governmental support, to encourage and maintain the separation

of the races: Racially restrictive covenants prevented the conveyance of property to minorities, see *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); steering by real-estate agents led potential buyers to consider homes in racially homogenous areas; and discriminatory lending practices, often referred to as redlining, precluded minority families from purchasing homes in affluent areas. See, *e.g.,* M. Klarman, Unfinished Business: Racial Equality in American History 140–141 (2007); Brief for Housing Scholars as *Amici Curiae* 22–23. By the 1960's, these policies, practices, and prejudices had created many predominantly black inner cities surrounded by mostly white suburbs. See K. Clark, Dark Ghetto: Dilemmas of Social Power 11, 21–26 (1965).

The mid-1960's was a period of considerable social unrest; and, in response, President Lyndon Johnson established the National Advisory Commission on Civil Disorders, commonly known as the Kerner Commission. Exec. Order No. 11365, 3 CFR 674 (1966–1970 Comp.). After extensive factfinding the Commission identified residential segregation and unequal housing and economic conditions in the inner cities as significant, underlying causes of the social unrest. See Report of the National Advisory Commission on Civil Disorders 91 (1968) (Kerner Commission Report). The Commission found that "[n]early two-thirds of all nonwhite families living in the central cities today live in neighborhoods marked by substandard housing and general urban blight." *Id.,* at 13. The Commission further found that both open and covert racial discrimination prevented black families from obtaining better housing and moving to integrated communities. *Ibid.* The Commission concluded that "[o]ur Nation is moving toward two societies, one black, one white—separate and unequal." *Id.*, at 1. To reverse "[t]his deepening racial division," *ibid.*, it recommended enactment of "a comprehensive and enforceable open-occupancy law making it an offense to discriminate in the sale or rental of

any housing . . . on the basis of race, creed, color, or national origin." *Id.*, at 263.

In April 1968, Dr. Martin Luther King, Jr., was assassinated in Memphis, Tennessee, and the Nation faced a new urgency to resolve the social unrest in the inner cities. Congress responded by adopting the Kerner Commission's recommendation and passing the Fair Housing Act. The statute addressed the denial of housing opportunities on the basis of "race, color, religion, or national origin." Civil Rights Act of 1968, §804, 82 Stat. 83. Then, in 1988, Congress amended the FHA. Among other provisions, it created certain exemptions from liability and added "familial status" as a protected characteristic. See Fair Housing Amendments Act of 1988, 102 Stat. 1619.

II

The issue here is whether, under a proper interpretation of the FHA, housing decisions with a disparate impact are prohibited. Before turning to the FHA, however, it is necessary to consider two other antidiscrimination statutes that preceded it.

The first relevant statute is §703(a) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255. The Court addressed the concept of disparate impact under this statute in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). There, the employer had a policy requiring its manual laborers to possess a high school diploma and to obtain satisfactory scores on two intelligence tests. The Court of Appeals held the employer had not adopted these job requirements for a racially discriminatory purpose, and the plaintiffs did not challenge that holding in this Court. Instead, the plaintiffs argued §703(a)(2) covers the discriminatory effect of a practice as well as the motivation behind the practice. Section 703(a), as amended, provides as follows:

> "It shall be an unlawful employer practice for an employer—

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. §2000e–2(a).

The Court did not quote or cite the full statute, but rather relied solely on §703(a)(2). *Griggs*, 401 U. S., at 426, n. 1.

In interpreting §703(a)(2), the Court reasoned that disparate-impact liability furthered the purpose and design of the statute. The Court explained that, in §703(a)(2), Congress "proscribe[d] not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.*, at 431. For that reason, as the Court noted, "Congress directed the thrust of [§703(a)(2)] to the consequences of employment practices, not simply the motivation." *Id.,* at 432. In light of the statute's goal of achieving "equality of employment opportunities and remov[ing] barriers that have operated in the past" to favor some races over others, the Court held §703(a)(2) of Title VII must be interpreted to allow disparate-impact claims. *Id.,* at 429–430.

The Court put important limits on its holding: namely, not all employment practices causing a disparate impact impose liability under §703(a)(2). In this respect, the Court held that "business necessity" constitutes a defense to disparate-impact claims. *Id.,* at 431. This rule provides, for example, that in a disparate-impact case,

§703(a)(2) does not prohibit hiring criteria with a "manifest relationship" to job performance. *Id.,* at 432; see also *Ricci*, 557 U. S., at 587–589 (emphasizing the importance of the business necessity defense to disparate-impact liability). On the facts before it, the Court in *Griggs* found a violation of Title VII because the employer could not establish that high school diplomas and general intelligence tests were related to the job performance of its manual laborers. See 401 U. S., at 431–432.

The second relevant statute that bears on the proper interpretation of the FHA is the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602 *et seq*., as amended. Section 4(a) of the ADEA provides:

> "It shall be unlawful for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> "(3) to reduce the wage rate of any employee in order to comply with this chapter." 29 U. S. C. §623(a).

The Court first addressed whether this provision allows disparate-impact claims in *Smith* v. *City of Jackson*, 544 U. S. 228 (2005). There, a group of older employees challenged their employer's decision to give proportionately greater raises to employees with less than five years of experience.

Explaining that *Griggs* "represented the better reading of [Title VII's] statutory text," 544 U. S., at 235, a plurality of the Court concluded that the same reasoning pertained

to §4(a)(2) of the ADEA. The *Smith* plurality emphasized that both §703(a)(2) of Title VII and §4(a)(2) of the ADEA contain language "prohibit[ing] such actions that 'deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's' race or age." 544 U. S., at 235. As the plurality observed, the text of these provisions "focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer" and therefore compels recognition of disparate-impact liability. *Id.,* at 236. In a separate opinion, JUSTICE SCALIA found the ADEA's text ambiguous and thus deferred under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), to an Equal Employment Opportunity Commission regulation interpreting the ADEA to impose disparate-impact liability, see 544 U. S., at 243–247 (opinion concurring in part and concurring in judgment).

Together, *Griggs* holds and the plurality in *Smith* instructs that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose. These cases also teach that disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system. And before rejecting a business justification—or, in the case of a governmental entity, an analogous public interest—a court must determine that a plaintiff has shown that there is "an available alternative . . . practice that has less disparate impact and serves the [entity's] legitimate needs." *Ricci*, *supra*, at 578. The cases interpreting Title VII and the ADEA provide essential background and instruction in the case now before the Court.

Turning to the FHA, the ICP relies on two provisions.

Section 804(a) provides that it shall be unlawful:

> "To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U. S. C. §3604(a).

Here, the phrase "otherwise make unavailable" is of central importance to the analysis that follows.

Section 805(a), in turn, provides:

> "It shall be unlawful for any person or other entity whose business includes engaging in real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." §3605(a).

Applied here, the logic of *Griggs* and *Smith* provides strong support for the conclusion that the FHA encompasses disparate-impact claims. Congress' use of the phrase "otherwise make unavailable" refers to the consequences of an action rather than the actor's intent. See *United States* v. *Giles*, 300 U. S. 41, 48 (1937) (explaining that the "word 'make' has many meanings, among them '[t]o cause to exist, appear or occur'" (quoting Webster's New International Dictionary 1485 (2d ed. 1934))). This results-oriented language counsels in favor of recognizing disparate-impact liability. See *Smith*, *supra*, at 236. The Court has construed statutory language similar to §805(a) to include disparate-impact liability. See, *e.g., Board of Ed. of City School Dist. of New York* v. *Harris*, 444 U. S. 130, 140–141 (1979) (holding the term "discriminat[e]" encompassed disparate-impact liability in the context of a statute's text, history, purpose, and structure).

A comparison to the antidiscrimination statutes examined in *Griggs* and *Smith* is useful. Title VII's and the ADEA's "otherwise adversely affect" language is equivalent in function and purpose to the FHA's "otherwise make unavailable" language. In these three statutes the operative text looks to results. The relevant statutory phrases, moreover, play an identical role in the structure common to all three statutes: Located at the end of lengthy sentences that begin with prohibitions on disparate treatment, they serve as catchall phrases looking to consequences, not intent. And all three statutes use the word "otherwise" to introduce the results-oriented phrase. "Otherwise" means "in a different way or manner," thus signaling a shift in emphasis from an actor's intent to the consequences of his actions. Webster's Third New International Dictionary 1598 (1971). This similarity in text and structure is all the more compelling given that Congress passed the FHA in 1968—only four years after passing Title VII and only four months after enacting the ADEA.

It is true that Congress did not reiterate Title VII's exact language in the FHA, but that is because to do so would have made the relevant sentence awkward and unclear. A provision making it unlawful to "refuse to sell[,] . . . or otherwise [adversely affect], a dwelling to any person" because of a protected trait would be grammatically obtuse, difficult to interpret, and far more expansive in scope than Congress likely intended. Congress thus chose words that serve the same purpose and bear the same basic meaning but are consistent with the structure and objectives of the FHA.

Emphasizing that the FHA uses the phrase "because of race," the Department argues this language forecloses disparate-impact liability since "[a]n action is not taken 'because of race' unless race is a *reason* for the action." Brief for Petitioners 26. *Griggs* and *Smith*, however,

dispose of this argument. Both Title VII and the ADEA contain identical "because of" language, see 42 U. S. C. §2000e–2(a)(2); 29 U. S. C. §623(a)(2), and the Court nonetheless held those statutes impose disparate-impact liability.

In addition, it is of crucial importance that the existence of disparate-impact liability is supported by amendments to the FHA that Congress enacted in 1988. By that time, all nine Courts of Appeals to have addressed the question had concluded the Fair Housing Act encompassed disparate-impact claims. See *Huntington Branch, NAACP* v. *Huntington*, 844 F. 2d 926, 935–936 (CA2 1988); *Resident Advisory Bd.* v. *Rizzo*, 564 F. 2d 126, 146 (CA3 1977); *Smith* v. *Clarkton*, 682 F. 2d 1055, 1065 (CA4 1982); *Hanson* v. *Veterans Administration*, 800 F. 2d 1381, 1386 (CA5 1986); *Arthur* v. *Toledo*, 782 F. 2d 565, 574–575 (CA6 1986); *Metropolitan Housing Development Corp.* v. *Arlington Heights*, 558 F. 2d 1283, 1290 (CA7 1977); *United States* v. *Black Jack*, 508 F. 2d 1179, 1184–1185 (CA8 1974); *Halet* v. *Wend Investment Co.*, 672 F. 2d 1305, 1311 (CA9 1982); *United States* v. *Marengo Cty. Comm'n*, 731 F. 2d 1546, 1559, n. 20 (CA11 1984).

When it amended the FHA, Congress was aware of this unanimous precedent. And with that understanding, it made a considered judgment to retain the relevant statutory text. See H. R. Rep. No. 100–711, p. 21, n. 52 (1988) (H. R. Rep.) (discussing suits premised on disparate-impact claims and related judicial precedent); 134 Cong. Rec. 23711 (1988) (statement of Sen. Kennedy) (noting unanimity of Federal Courts of Appeals concerning disparate impact); Fair Housing Amendments Act of 1987: Hearings on S. 558 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 100th Cong., 1st Sess., 529 (1987) (testimony of Professor Robert Schwemm) (describing consensus judicial view that the FHA imposed disparate-impact liability). Indeed, Con-

gress rejected a proposed amendment that would have eliminated disparate-impact liability for certain zoning decisions. See H. R. Rep., at 89–93.

Against this background understanding in the legal and regulatory system, Congress' decision in 1988 to amend the FHA while still adhering to the operative language in §§804(a) and 805(a) is convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the Courts of Appeals finding disparate-impact liability. "If a word or phrase has been . . . given a uniform interpretation by inferior courts . . . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 322 (2012); see also *Forest Grove School Dist.* v. *T. A.*, 557 U. S. 230, 244, n. 11 (2009) ("When Congress amended [the Act] without altering the text of [the relevant provision], it implicitly adopted [this Court's] construction of the statute"); *Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U. S. 320, 336 (1934) (explaining, where the Courts of Appeals had reached a consensus interpretation of the Bankruptcy Act and Congress had amended the Act without changing the relevant provision, "[t]his is persuasive that the construction adopted by the [lower federal] courts has been acceptable to the legislative arm of the government").

Further and convincing confirmation of Congress' understanding that disparate-impact liability exists under the FHA is revealed by the substance of the 1988 amendments. The amendments included three exemptions from liability that assume the existence of disparate-impact claims. The most logical conclusion is that the three amendments were deemed necessary because Congress presupposed disparate impact under the FHA as it had been enacted in 1968.

The relevant 1988 amendments were as follows. First,

Congress added a clarifying provision: "Nothing in [the FHA] prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status." 42 U. S. C. §3605(c). Second, Congress provided: "Nothing in [the FHA] prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance." §3607(b)(4). And finally, Congress specified: "Nothing in [the FHA] limits the applicability of any reasonable . . . restrictions regarding the maximum number of occupants permitted to occupy a dwelling." §3607(b)(1).

The exemptions embodied in these amendments would be superfluous if Congress had assumed that disparate-impact liability did not exist under the FHA. See *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 574 (1995) ("[T]he Court will avoid a reading which renders some words altogether redundant"). Indeed, none of these amendments would make sense if the FHA encompassed only disparate-treatment claims. If that were the sole ground for liability, the amendments merely restate black-letter law. If an actor makes a decision based on reasons other than a protected category, there is no disparate-treatment liability. See, *e.g., Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 254 (1981). But the amendments do constrain disparate-impact liability. For instance, certain criminal convictions are correlated with sex and race. See, *e.g., Kimbrough* v. *United States*, 552 U. S. 85, 98 (2007) (discussing the racial disparity in convictions for crack cocaine offenses). By adding an exemption from liability for exclusionary practices aimed at individuals with drug convictions, Congress ensured disparate-impact liability would not lie if a landlord excluded tenants with such convictions. The same is true of the provision allowing for reasonable restrictions on occupancy. And the

exemption from liability for real-estate appraisers is in the same section as §805(a)'s prohibition of discriminatory practices in real-estate transactions, thus indicating Congress' recognition that disparate-impact liability arose under §805(a). In short, the 1988 amendments signal that Congress ratified disparate-impact liability.

A comparison to *Smith*'s discussion of the ADEA further demonstrates why the Department's interpretation would render the 1988 amendments superfluous. Under the ADEA's reasonable-factor-other-than-age (RFOA) provision, an employer is permitted to take an otherwise prohibited action where "the differentiation is based on reasonable factors other than age." 29 U. S. C. §623(f)(1). In other words, if an employer makes a decision based on a reasonable factor other than age, it cannot be said to have made a decision on the basis of an employee's age. According to the *Smith* plurality, the RFOA provision "plays its principal role" "in cases involving disparate-impact claims" "by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable.'" 544 U. S., at 239. The plurality thus reasoned that the RFOA provision would be "simply unnecessary to avoid liability under the ADEA" if liability were limited to disparate-treatment claims. *Id.,* at 238.

A similar logic applies here. If a real-estate appraiser took into account a neighborhood's schools, one could not say the appraiser acted because of race. And by embedding 42 U. S. C. §3605(c)'s exemption in the statutory text, Congress ensured that disparate-impact liability would not be allowed either. Indeed, the inference of disparate-impact liability is even stronger here than it was in *Smith*. As originally enacted, the ADEA included the RFOA provision, see §4(f)(1), 81 Stat. 603, whereas here Congress added the relevant exemptions in the 1988 amendments against the backdrop of the uniform view of the Courts of Appeals that the FHA imposed disparate-impact liability.

Recognition of disparate-impact claims is consistent with the FHA's central purpose. See *Smith*, *supra*, at 235 (plurality opinion); *Griggs*, 401 U. S., at 432. The FHA, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of our Nation's economy. See 42 U. S. C. §3601 ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States"); H. R. Rep., at 15 (explaining the FHA "provides a clear national policy against discrimination in housing").

These unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Suits targeting such practices reside at the heartland of disparate-impact liability. See, *e.g.*, *Huntington*, 488 U. S., at 16–18 (invalidating zoning law preventing construction of multifamily rental units); *Black Jack*, 508 F. 2d, at 1182–1188 (invalidating ordinance prohibiting construction of new multifamily dwellings); *Greater New Orleans Fair Housing Action Center* v. *St. Bernard Parish*, 641 F. Supp. 2d 563, 569, 577–578 (ED La. 2009) (invalidating post-Hurricane Katrina ordinance restricting the rental of housing units to only "'blood relative[s]'" in an area of the city that was 88.3% white and 7.6% black); see also Tr. of Oral Arg. 52–53 (discussing these cases). The availability of disparate-impact liability, furthermore, has allowed private developers to vindicate the FHA's objectives and to protect their property rights by stopping municipalities from enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units. See, *e.g.*, *Huntington*, *supra*, at 18. Recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this

way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.

But disparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity. Disparate-impact liability mandates the "removal of artificial, arbitrary, and unnecessary barriers," not the displacement of valid governmental policies. *Griggs*, *supra*, at 431. The FHA is not an instrument to force housing authorities to reorder their priorities. Rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.

Unlike the heartland of disparate-impact suits targeting artificial barriers to housing, the underlying dispute in this case involves a novel theory of liability. See Seicshnaydre, Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act, 63 Am. U. L. Rev. 357, 360–363 (2013) (noting the rarity of this type of claim). This case, on remand, may be seen simply as an attempt to second-guess which of two reasonable approaches a housing authority should follow in the sound exercise of its discretion in allocating tax credits for low-income housing.

An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies. This step of the analysis is analogous to the business necessity standard under Title VII and provides a defense against disparate-impact liability. See 78 Fed. Reg. 11470 (explaining that HUD did not use the phrase "business necessity" because that "phrase may not be easily under-

stood to cover the full scope of practices covered by the Fair Housing Act, which applies to individuals, businesses, nonprofit organizations, and public entities"). As the Court explained in *Ricci*, an entity "could be liable for disparate-impact discrimination only if the [challenged practices] were not job related and consistent with business necessity." 557 U. S., at 587. Just as an employer may maintain a workplace requirement that causes a disparate impact if that requirement is a "reasonable measure[ment] of job performance," *Griggs*, *supra*, at 436, so too must housing authorities and private developers be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest. To be sure, the Title VII framework may not transfer exactly to the fair-housing context, but the comparison suffices for present purposes.

It would be paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation's cities merely because some other priority might seem preferable. Entrepreneurs must be given latitude to consider market factors. Zoning officials, moreover, must often make decisions based on a mix of factors, both objective (such as cost and traffic patterns) and, at least to some extent, subjective (such as preserving historic architecture). These factors contribute to a community's quality of life and are legitimate concerns for housing authorities. The FHA does not decree a particular vision of urban development; and it does not put housing authorities and private developers in a double bind of liability, subject to suit whether they choose to rejuvenate a city core or to promote new low-income housing in suburban communities. As HUD itself recognized in its recent rulemaking, disparate-impact liability "does not mandate that affordable housing be located in neighborhoods with any particular characteristic." 78 Fed. Reg. 11476.

In a similar vein, a disparate-impact claim that relies on

a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that "[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact" and thus protects defendants from being held liable for racial disparities they did not create. *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642, 653 (1989), superseded by statute on other grounds, 42 U. S. C. §2000e–2(k). Without adequate safeguards at the prima facie stage, disparate-impact liability might cause race to be used and considered in a pervasive way and "would almost inexorably lead" governmental or private entities to use "numerical quotas," and serious constitutional questions then could arise. 490 U. S., at 653.

The litigation at issue here provides an example. From the standpoint of determining advantage or disadvantage to racial minorities, it seems difficult to say as a general matter that a decision to build low-income housing in a blighted inner-city neighborhood instead of a suburb is discriminatory, or vice versa. If those sorts of judgments are subject to challenge without adequate safeguards, then there is a danger that potential defendants may adopt racial quotas—a circumstance that itself raises serious constitutional concerns.

Courts must therefore examine with care whether a plaintiff has made out a prima facie case of disparate impact and prompt resolution of these cases is important. A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact. For instance, a plaintiff challenging the decision of a private developer to construct a new building in one location rather than another will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all. It may also be difficult to establish causation because of the mul-

tiple factors that go into investment decisions about where to construct or renovate housing units. And as Judge Jones observed below, if the ICP cannot show a causal connection between the Department's policy and a disparate impact—for instance, because federal law substantially limits the Department's discretion—that should result in dismissal of this case. 747 F. 3d, at 283–284 (specially concurring opinion).

The FHA imposes a command with respect to disparate-impact liability. Here, that command goes to a state entity. In other cases, the command will go to a private person or entity. Governmental or private policies are not contrary to the disparate-impact requirement unless they are "artificial, arbitrary, and unnecessary barriers." *Griggs*, 401 U. S., at 431. Difficult questions might arise if disparate-impact liability under the FHA caused race to be used and considered in a pervasive and explicit manner to justify governmental or private actions that, in fact, tend to perpetuate race-based considerations rather than move beyond them. Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision.

The limitations on disparate-impact liability discussed here are also necessary to protect potential defendants against abusive disparate-impact claims. If the specter of disparate-impact litigation causes private developers to no longer construct or renovate housing units for low-income individuals, then the FHA would have undermined its own purpose as well as the free-market system. And as to governmental entities, they must not be prevented from achieving legitimate objectives, such as ensuring compliance with health and safety codes. The Department's *amici*, in addition to the well-stated principal dissenting opinion in this case, see *post*, at 1–2, 29–30 (opinion of ALITO, J.), call attention to the decision by the Court of Appeals for the Eighth Circuit in *Gallagher* v. *Magner*,

619 F. 3d 823 (2010). Although the Court is reluctant to approve or disapprove a case that is not pending, it should be noted that *Magner* was decided without the cautionary standards announced in this opinion and, in all events, the case was settled by the parties before an ultimate determination of disparate-impact liability.

Were standards for proceeding with disparate-impact suits not to incorporate at least the safeguards discussed here, then disparate-impact liability might displace valid governmental and private priorities, rather than solely "remov[ing] . . . artificial, arbitrary, and unnecessary barriers." *Griggs*, 401 U. S., at 431. And that, in turn, would set our Nation back in its quest to reduce the salience of race in our social and economic system.

It must be noted further that, even when courts do find liability under a disparate-impact theory, their remedial orders must be consistent with the Constitution. Remedial orders in disparate-impact cases should concentrate on the elimination of the offending practice that "arbitrar[ily] . . . operate[s] invidiously to discriminate on the basis of rac[e]." *Ibid.* If additional measures are adopted, courts should strive to design them to eliminate racial disparities through race-neutral means. See *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 510 (1989) ("[T]he city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races"). Remedial orders that impose racial targets or quotas might raise more difficult constitutional questions.

While the automatic or pervasive injection of race into public and private transactions covered by the FHA has special dangers, it is also true that race may be considered in certain circumstances and in a proper fashion. Cf. *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 789 (2007) (KENNEDY, J., concurring in part and concurring in judgment) ("School

boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; [and] drawing attendance zones with general recognition of the demographics of neighborhoods"). Just as this Court has not "question[ed] an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the [promotion] process," *Ricci*, 557 U. S., at 585, it likewise does not impugn housing authorities' race-neutral efforts to encourage revitalization of communities that have long suffered the harsh consequences of segregated housing patterns. When setting their larger goals, local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset.

The Court holds that disparate-impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language, the Court's interpretation of similar language in Title VII and the ADEA, Congress' ratification of disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose.

III

In light of the longstanding judicial interpretation of the FHA to encompass disparate-impact claims and congressional reaffirmation of that result, residents and policymakers have come to rely on the availability of disparate-impact claims. See Brief for Massachusetts et al. as *Amici Curiae* 2 ("Without disparate impact claims, States and others will be left with fewer crucial tools to combat the kinds of systemic discrimination that the FHA was intended to address"). Indeed, many of our Nation's largest cities—entities that are potential defendants in disparate-

impact suits—have submitted an *amicus* brief in this case supporting disparate-impact liability under the FHA. See Brief for City of San Francisco et al. as *Amici Curiae* 3–6. The existence of disparate-impact liability in the substantial majority of the Courts of Appeals for the last several decades "has not given rise to . . . dire consequences." *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. ___, ___ (2012) (slip op., at 21).

Much progress remains to be made in our Nation's continuing struggle against racial isolation. In striving to achieve our "historic commitment to creating an integrated society," *Parents Involved*, *supra*, at 797 (KENNEDY, J., concurring in part and concurring in judgment), we must remain wary of policies that reduce homeowners to nothing more than their race. But since the passage of the Fair Housing Act in 1968 and against the backdrop of disparate-impact liability in nearly every jurisdiction, many cities have become more diverse. The FHA must play an important part in avoiding the Kerner Commission's grim prophecy that "[o]ur Nation is moving toward two societies, one black, one white—separate and unequal." Kerner Commission Report 1. The Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society.

The judgment of the Court of Appeals for the Fifth Circuit is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 13–1371

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, ET AL., PETITIONERS *v.* THE INCLUSIVE COMMUNITIES PROJECT, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 25, 2015]

JUSTICE THOMAS, dissenting.

I join JUSTICE ALITO's dissent in full. I write separately to point out that the foundation on which the Court builds its latest disparate-impact regime—*Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971)—is made of sand. That decision, which concluded that Title VII of the Civil Rights Act of 1964 authorizes plaintiffs to bring disparate-impact claims, *id.*, at 429–431, represents the triumph of an agency's preferences over Congress' enactment and of assumption over fact. Whatever respect *Griggs* merits as a matter of *stare decisis*, I would not amplify its error by importing its disparate-impact scheme into yet another statute.

I

A

We should drop the pretense that *Griggs*' interpretation of Title VII was legitimate. "The Civil Rights Act of 1964 did not include an express prohibition on policies or practices that produce a disparate impact." *Ricci* v. *DeStefano*, 557 U. S. 557, 577 (2009). It did not include an implicit one either. Instead, Title VII's operative provision, 42 U. S. C. §2000e–2(a) (1964 ed.), addressed only employer decisions motivated by a protected characteristic. That

provision made it "an unlawful employment practice for an employer—

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's race, color, religion, sex, or national origin." §703, 78 Stat. 255 (emphasis added).[1]

Each paragraph in §2000e–2(a) is limited to actions taken "because of" a protected trait, and "the ordinary meaning of 'because of' is 'by reason of' or 'on account of,'" *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. ___, ___ (2013) (slip op., at 9) (some internal quotation marks omitted). Section 2000e–2(a) thus applies only when a protected characteristic "was the 'reason' that the employer decided to act." *Id.*, at ___ (slip op., at 10) (some internal quotation marks omitted).[2] In other words, "to

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[1] The current version of §2000e–2(a) is almost identical, except that §2000e–2(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." (Emphasis added.) This change, which does not impact my analysis, was made in 1972. 86 Stat. 109.

[2] In 1991, Congress added §2000e–2(m) to Title VII, which permits a plaintiff to establish that an employer acted "because of" a protected characteristic by showing that the characteristic was "a motivating factor" in the employer's decision. Civil Rights Act of 1991, §107(a), 105 Stat. 1075. That amended definition obviously does not legitimize disparate-impact liability, which is distinguished from disparate-

take action against an individual *because of*" a protected trait "plainly requires discriminatory intent." See *Smith* v. *City of Jackson*, 544 U. S. 228, 249 (2005) (O'Connor, J., joined by KENNEDY and THOMAS, JJ., concurring in judgment) (internal quotation marks omitted); accord, *e.g., Gross* v. *FBL Financial Services, Inc.*, 557 U. S. 167, 176 (2009).

No one disputes that understanding of §2000e–2(a)(1). We have repeatedly explained that a plaintiff bringing an action under this provision "must establish 'that the defendant had a discriminatory intent or motive' for taking a job-related action." *Ricci*, *supra,* at 577 (quoting *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 986 (1988)). The only dispute is whether the same language—"because of "—means something different in §2000e–2(a)(2) than it does in §2000e–2(a)(1).

The answer to that question *should* be obvious. We ordinarily presume that "identical words used in different parts of the same act are intended to have the same meaning," *Desert Palace, Inc.* v. *Costa*, 539 U. S. 90, 101 (2003) (internal quotation marks omitted), and §2000e–2(a)(2) contains nothing to warrant a departure from that presumption. That paragraph "uses the phrase 'because of . . . [a protected characteristic]' in precisely the same manner as does the preceding paragraph—to make plain that an employer is liable only if its adverse action against an individual is *motivated by* the individual's [protected characteristic]." *Smith*, *supra,* at 249 (opinion of O'Connor, J.) (interpreting nearly identical provision of the Age Discrimination in Employment Act of 1967 (ADEA)).

The only difference between §2000e–2(a)(1) and §2000e–2(a)(2) is the type of employment decisions they address.

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treatment liability precisely because the former does not require any discriminatory motive.

See *Smith*, *supra*, at 249 (opinion of O'Connor, J.). Section 2000e–2(a)(1) addresses hiring, firing, and setting the terms of employment, whereas §2000e–2(a)(2) generally addresses limiting, segregating, or classifying employees. But *no* decision is an unlawful employment practice under these paragraphs unless it occurs "*because of* such individual's race, color, religion, sex, or national origin." §§2000e–2(a)(1), (2) (emphasis added).

Contrary to the majority's assumption, see *ante,* at 10–13, the fact that §2000e–2(a)(2) uses the phrase "otherwise adversely affect" in defining the employment decisions targeted by that paragraph does not eliminate its mandate that the prohibited decision be made "because of" a protected characteristic. Section 2000e–2(a)(2) does not make unlawful all employment decisions that "limit, segregate, or classify . . . employees . . . in any way which would . . . otherwise adversely affect [an individual's] status as an employee," but those that "otherwise adversely affect [an individual's] status as an employee, *because of such individual's race, color, religion, sex, or national origin*." (Emphasis added); accord, 78 Stat. 255. Reading §2000e–2(a)(2) to sanction employers solely on the basis of the effects of their decisions would delete an entire clause of this provision, a result we generally try to avoid. Under any fair reading of the text, there can be no doubt that the Title VII enacted by Congress did not permit disparate-impact claims.[3]

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[3] Even "[f]ans . . . of *Griggs* [v. *Duke Power Co.*, 401 U. S. 424 (1971),] tend to agree that the decision is difficult to square with the available indications of congressional intent." Lemos, The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII, 63 Vand. L. Rev. 363, 399, n. 155 (2010). In the words of one of the decision's defenders, *Griggs* "was poorly reasoned and vulnerable to the charge that it represented a significant leap away from the expectations of the enacting Congress." W. Eskridge, Dynamic Statutory Interpretation 78 (1994).

B

The author of disparate-impact liability under Title VII was not Congress, but the Equal Employment Opportunity Commission (EEOC). EEOC's "own official history of these early years records with unusual candor the commission's fundamental disagreement with its founding charter, especially Title VII's literal requirement that the discrimination be intentional." H. Graham, The Civil Rights Era: Origins and Development of National Policy 1960–1972, p. 248 (1990). The Commissioners and their legal staff thought that "discrimination" had become "less often an individual act of disparate treatment flowing from an evil state of mind" and "more institutionalized." Jackson, EEOC vs. Discrimination, Inc., 75 The Crisis 16 (1968). They consequently decided they should target employment practices "which prove to have a demonstrable racial effect without a clear and convincing business motive." *Id.,* at 16–17 (emphasis deleted). EEOC's "legal staff was aware from the beginning that a normal, traditional, and literal interpretation of Title VII could blunt their efforts" to penalize employers for practices that had a disparate impact, yet chose "to defy Title VII's restrictions and attempt to build a body of case law that would justify [their] focus on effects and [their] disregard of intent." Graham, *supra*, at 248, 250.

The lack of legal authority for their agenda apparently did not trouble them much. For example, Alfred Blumrosen, one of the principal creators of disparate-impact liability at EEOC, rejected what he described as a "defeatist view of Title VII" that saw the statute as a "compromise" with a limited scope. A. Blumrosen, Black Employment and the Law 57–58 (1971). Blumrosen "felt that most of the problems confronting the EEOC could be solved by creative interpretation of Title VII which would be upheld by the courts, partly out of deference to the administrators." *Id.,* at 59.

EEOC's guidelines from those years are a case study in Blumrosen's "creative interpretation." Although EEOC lacked substantive rulemaking authority, see *Faragher* v. *Boca Raton*, 524 U. S. 775, 811, n. 1 (1998) (THOMAS, J., dissenting), it repeatedly issued guidelines on the subject of disparate impact. In 1966, for example, EEOC issued guidelines suggesting that the use of employment tests in hiring decisions could violate Title VII based on disparate impact, notwithstanding the statute's express statement that "it shall not be an unlawful employment practice . . . to give and to act upon the results of any professionally developed ability test provided that such test . . . is not *designed, intended, or used* to discriminate because of race, color, religion, sex, or national origin," §2000e–2(h) (emphasis added). See EEOC, Guidelines on Employment Testing Procedures 2–4 (Aug. 24, 1966). EEOC followed this up with a 1970 guideline that was even more explicit, declaring that, unless certain criteria were met, "[t]he use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by title VII constitutes discrimination." 35 Fed. Reg. 12334 (1970).

EEOC was initially hesitant to take its approach to this Court, but the *Griggs* plaintiffs forced its hand. After they lost on their disparate-impact argument in the Court of Appeals, EEOC's deputy general counsel urged the plaintiffs not to seek review because he believed "'that the record in the case present[ed] a most unappealing situation for finding tests unlawful,'" even though he found the lower court's adherence to an intent requirement to be "'tragic.'" Graham, *supra,* at 385. The plaintiffs ignored his advice. Perhaps realizing that a ruling on its disparate-impact theory was inevitable, EEOC filed an *amicus* brief in this Court seeking deference for its position.[4]

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[4] Efforts by Executive Branch officials to influence this Court's dis-

EEOC's strategy paid off. The Court embraced EEOC's theory of disparate impact, concluding that the agency's position was "entitled to great deference." See *Griggs*, 401 U. S., at 433–434. With only a brief nod to the text of §2000e–2(a)(2) in a footnote, *id.*, at 426, n. 1, the Court tied this novel theory of discrimination to "the statute's perceived *purpose*" and EEOC's view of the best way of effectuating it, *Smith*, 544 U. S., at 262 (opinion of O'Connor, J.); see *id.,* at 235 (plurality opinion). But statutory provisions—not purposes—go through the process of bicameralism and presentment mandated by our Constitution. We should not replace the former with the latter, see *Wyeth* v. *Levine*, 555 U. S. 555, 586 (2009) (THOMAS, J., concurring in judgment), nor should we transfer our responsibility for interpreting those provisions to administrative agencies, let alone ones lacking substantive rulemaking authority, see *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. ___, ___–___ (2015) (THOMAS, J., concurring in judgment) (slip op., at 8–13).

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parate-impact jurisprudence may not be a thing of the past. According to a joint congressional staff report, after we granted a writ of certiorari in *Magner* v. *Gallagher*, 564 U. S. ___ (2011), to address whether the Fair Housing Act created disparate-impact liability, then-Assistant Attorney General Thomas E. Perez—now Secretary of Labor—entered into a secret deal with the petitioners in that case, various officials of St. Paul, Minnesota, to prevent this Court from answering the question. Perez allegedly promised the officials that the Department of Justice would not intervene in two *qui tam* complaints then pending against St. Paul in exchange for the city's dismissal of the case. See House Committee on Oversight and Government Reform, Senate Committee on the Judiciary, and House Committee on the Judiciary, DOJ's *Quid Pro Quo* With St. Paul: How Assistant Attorney General Thomas Perez Manipulated Justice and Ignored the Rule of Law, Joint Staff Report, 113th Cong., 1st Sess., pp. 1–2 (2013). Additionally, just nine days after we granted a writ of certiorari in *Magner*, and before its dismissal, the Department of Housing and Urban Development proposed the disparate-impact regulation at issue in this case. See 76 Fed. Reg. 70921 (2011).

II

Griggs' disparate-impact doctrine defies not only the statutory text, but reality itself. In their quest to eradicate what they view as institutionalized discrimination, disparate-impact proponents doggedly assume that a given racial disparity at an institution is a product of that institution rather than a reflection of disparities that exist outside of it. See T. Sowell, Intellectuals and Race 132 (2013) (Sowell). That might be true, or it might not. Standing alone, the fact that a practice has a disparate impact is not conclusive evidence, as the *Griggs* Court appeared to believe, that a practice is "discriminatory," 401 U. S., at 431. "Although presently observed racial imbalance *might* result from past [discrimination], racial imbalance can also result from any number of innocent private decisions." *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 750 (2007) (THOMAS, J., concurring) (emphasis added).[5] We should not automatically presume that any institution with a neutral practice that happens to produce a racial disparity is guilty of discrimination until proved innocent.

As best I can tell, the reason for this wholesale inversion of our law's usual approach is the unstated—and unsubstantiated—assumption that, in the absence of discrimination, an institution's racial makeup would mirror that of society. But the absence of racial disparities in multi-

[5] It takes considerable audacity for today's majority to describe the origins of racial imbalances in housing, *ante,* at 5–6, without acknowledging this Court's role in the development of this phenomenon. In the past, we have admitted that the sweeping desegregation remedies of the federal courts contributed to "'white flight'" from our Nation's cities, see *Missouri* v. *Jenkins*, 515 U. S. 70, 95, n. 8 (1995); *id.,* at 114 (THOMAS, J., concurring), in turn causing the racial imbalances that make it difficult to avoid disparate impact from housing development decisions. Today's majority, however, apparently is as content to rewrite history as it is to rewrite statutes.

ethnic societies has been the exception, not the rule. When it comes to "proportiona[l] represent[ation]" of ethnic groups, "few, if any, societies have ever approximated this description." D. Horowitz, Ethnic Groups in Conflict 677 (1985). "All multi-ethnic societies exhibit a tendency for ethnic groups to engage in different occupations, have different levels (and, often, types) of education, receive different incomes, and occupy a different place in the social hierarchy." Weiner, The Pursuit of Ethnic Equality Through Preferential Policies: A Comparative Public Policy Perspective, in From Independence to Statehood 64 (R. Goldmann & A. Wilson eds. 1984).

Racial imbalances do not always disfavor minorities. At various times in history, "racial or ethnic minorities . . . have owned or directed more than half of whole industries in particular nations." Sowell 8. These minorities "have included the Chinese in Malaysia, the Lebanese in West Africa, Greeks in the Ottoman Empire, Britons in Argentina, Belgians in Russia, Jews in Poland, and Spaniards in Chile—among many others." *Ibid.* (footnotes omitted). "In the seventeenth century Ottoman Empire," this phenomenon was seen in the palace itself, where the "medical staff consisted of 41 Jews and 21 Muslims." *Ibid.* And in our own country, for roughly a quarter-century now, over 70 percent of National Basketball Association players have been black. R. Lapchick, D. Donovan, E. Loomer, & L. Martinez, Institute for Diversity and Ethics in Sport, U. of Central Fla., The 2014 Racial and Gender Report Card: National Basketball Association 21 (June 24, 2014). To presume that these and all other measurable disparities are products of racial discrimination is to ignore the complexities of human existence.

Yet, if disparate-impact liability is not based on this assumption and is instead simply a way to correct for imbalances that do not result from any unlawful conduct, it is even less justifiable. This Court has repeatedly reaf-

firmed that "'racial balancing'" by state actors is "'patently unconstitutional,'" even when it supposedly springs from good intentions. *Fisher* v. *University of Tex. at Austin*, 570 U. S. ___, ___ (2013) (slip op., at 9). And if that "racial balancing" is achieved through disparate-impact claims limited to only some groups—if, for instance, white basketball players cannot bring disparate-impact suits—then we as a Court have constructed a scheme that parcels out legal privileges to individuals on the basis of skin color. A problem with doing so should be obvious: "Government action that classifies individuals on the basis of race is inherently suspect." *Schuette* v. *BAMN*, 572 U. S. ___, ___ (2014) (plurality opinion) (slip op., at 12); accord, *id.,* at ___ (SCALIA, J., concurring in judgment) (slip op., at 9). That is no less true when judges are the ones doing the classifying. See *id.*, at ___ (plurality opinion) (slip op., at 12); *id.,* at ___ (SCALIA, J., concurring in judgment) (slip op., at 9). Disparate-impact liability is thus a rule without a reason, or at least without a legitimate one.

III

The decision in *Griggs* was bad enough, but this Court's subsequent decisions have allowed it to move to other areas of the law. In *Smith*, for example, a plurality of this Court relied on *Griggs* to include disparate-impact liability in the ADEA. See 544 U. S., at 236. As both I and the author of today's majority opinion recognized at the time, that decision was as incorrect as it was regrettable. See *id.,* at 248–249 (O'Connor, J., joined by KENNEDY and THOMAS, JJ., concurring in judgment). Because we knew that Congress did not create disparate-impact liability under Title VII, we explained that "there [wa]s no reason to suppose that Congress in 1967"—four years before *Griggs*—"could have foreseen the interpretation of Title VII that was to come." *Smith*, *supra*, at 260 (opinion of O'Connor, J.). It made little sense to repeat *Griggs*' error

in a new context.

My position remains the same. Whatever deference is due *Griggs* as a matter of *stare decisis*, we should at the very least confine it to Title VII. We should not incorporate it into statutes such as the Fair Housing Act and the ADEA, which were passed years before Congress had any reason to suppose that this Court would take the position it did in *Griggs*. See *Smith*, *supra*, at 260 (opinion of O'Connor, J.). And we should certainly not allow it to spread to statutes like the Fair Housing Act, whose operative text, unlike that of the ADEA's, does not even mirror Title VII's.

Today, however, the majority inexplicably declares that "the logic of *Smith* and *Griggs*" leads to the conclusion that "the FHA encompasses disparate-impact claims." *Ante,* at 11. JUSTICE ALITO ably dismantles this argument. *Post,* at 21–28 (dissenting opinion). But, even if the majority were correct, I would not join it in following that "logic" here. "[E]rroneous precedents need not be extended to their logical end, even when dealing with related provisions that normally would be interpreted in lockstep. Otherwise, *stare decisis*, designed to be a principle of stability and repose, would become a vehicle of change . . . distorting the law." *CBOCS West, Inc.* v. *Humphries*, 553 U. S. 442, 469–470 (2008) (THOMAS, J., dissenting) (footnote omitted). Making the same mistake in different areas of the law furthers neither certainty nor judicial economy. It furthers error.

That error will take its toll. The recent experience of the Houston Housing Authority (HHA) illustrates some of the many costs of disparate-impact liability. HHA, which provides affordable housing developments to low-income residents of Houston, has over 43,000 families on its waiting lists. The overwhelming majority of those families are black. Because Houston is a majority-minority city with minority concentrations in all but the more affluent areas,

any HHA developments built outside of those areas will increase the concentration of racial minorities. Unsurprisingly, the threat of disparate-impact suits based on those concentrations has hindered HHA's efforts to provide affordable housing. State and federal housing agencies have refused to approve all but two of HHA's eight proposed development projects over the past two years out of fears of disparate-impact liability. Brief for Houston Housing Authority as *Amicus Curiae* 8–12. That the majority believes that these are not "'dire consequences,'" see *ante,* at 24, is cold comfort for those who actually need a home.

* * *

I agree with the majority that *Griggs* "provide[s] essential background" in this case, *ante,* at 10: It shows that our disparate-impact jurisprudence was erroneous from its inception. Divorced from text and reality, driven by an agency with its own policy preferences, *Griggs* bears little relationship to the statutory interpretation we should expect from a court of law. Today, the majority repeats that error.

I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

No. 13–1371

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, ET AL., PETITIONERS *v.* THE INCLUSIVE COMMUNITIES PROJECT, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 25, 2015]

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

No one wants to live in a rat's nest. Yet in *Gallagher* v. *Magner*, 619 F. 3d 823 (2010), a case that we agreed to review several Terms ago, the Eighth Circuit held that the Fair Housing Act (or FHA), 42 U. S. C. §3601 *et seq.*, could be used to attack St. Paul, Minnesota's efforts to combat "rodent infestation" and other violations of the city's housing code. 619 F. 3d, at 830. The court agreed that there was no basis to "infer discriminatory intent" on the part of St. Paul. *Id.,* at 833. Even so, it concluded that the city's "aggressive enforcement of the Housing Code" was actionable because making landlords respond to "rodent infestation, missing dead-bolt locks, inadequate sanitation facilities, inadequate heat, inoperable smoke detectors, broken or missing doors," and the like increased the price of rent. *Id.,* at 830, 835. Since minorities were statistically more likely to fall into "the bottom bracket for household adjusted median family income," they were disproportionately affected by those rent increases, *i.e.,* there was a "disparate impact." *Id.,* at 834. The upshot was that even St. Paul's good-faith attempt to ensure minimally acceptable housing for its poorest residents could not ward off a disparate-impact lawsuit.

Today, the Court embraces the same theory that drove the decision in *Magner*.[1] This is a serious mistake. The Fair Housing Act does not create disparate-impact liability, nor do this Court's precedents. And today's decision will have unfortunate consequences for local government, private enterprise, and those living in poverty. Something has gone badly awry when a city can't even make slumlords kill rats without fear of a lawsuit. Because Congress did not authorize any of this, I respectfully dissent.

I

Everyone agrees that the FHA punishes intentional discrimination. Treating someone "less favorably than others because of a protected trait" is "'the most easily understood type of discrimination.'" *Ricci* v. *DeStefano*, 557 U. S. 557, 577 (2009) (quoting *Teamsters* v. *United States*, 431 U. S. 324, 335, n. 15 (1977); some internal quotation marks omitted). Indeed, this classic form of discrimination—called disparate treatment—is the only one prohibited by the Constitution itself. See, *e.g., Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 264–265 (1977). It is obvious that Congress intended the FHA to cover disparate treatment.

The question presented here, however, is whether the FHA also punishes "practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities." *Ricci*, *supra,* at 577. The answer is equally clear. The FHA does not authorize disparate-impact claims. No such liability was created when the law was enacted in 1968. And nothing has happened since then to change the law's meaning.

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[1] We granted certiorari in *Magner* v. *Gallagher,* 565 U. S. ___ (2011). Before oral argument, however, the parties settled. 565 U. S. ___ (2012). The same thing happened again in *Township of Mount Holly* v. *Mt. Holly Gardens Citizens in Action, Inc.,* 571 U. S. ___ (2013).

A

I begin with the text. Section 804(a) of the FHA makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person *because of* race, color, religion, sex, familial status, or national origin." 42 U. S. C. §3604(a) (emphasis added). Similarly, §805(a) prohibits any party "whose business includes engaging in residential real estate-related transactions" from "discriminat[ing] against any person in making available such a transaction, or in the terms or conditions of such a transaction, *because of* race, color, religion, sex, handicap, familial status, or national origin." §3605(a) (emphasis added).

In both sections, the key phrase is "because of." These provisions list covered actions ("refus[ing] to sell or rent . . . a dwelling," "refus[ing] to negotiate for the sale or rental of . . . a dwelling," "discriminat[ing]" in a residential real estate transaction, etc.) and protected characteristics ("race," "religion," etc.). The link between the actions and the protected characteristics is "because of."

What "because of" means is no mystery. Two Terms ago, we held that "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.'" *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. ___, ___ (2013) (slip op., at 9) (quoting *Gross* v. *FBL Financial Services, Inc.*, 557 U. S. 167, 176 (2009); some internal quotation marks omitted). A person acts "because of" something else, we explained, if that something else "'was the "reason" that the [person] decided to act.'" 570 U. S., at ___ (slip op., at 10).

Indeed, just weeks ago, the Court made this same point in interpreting a provision of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e–2(m), that makes it unlawful for an employer to take a variety of adverse employment actions (such as failing or refusing to hire a job

applicant or discharging an employee) "because of" religion. See *EEOC* v. *Abercrombie & Fitch Stores, Inc.,* 575 U. S. ___, ___ (2015) (slip op., at 4). The Court wrote: "'Because of' in §2000e–2(a)(1) links the forbidden consideration to each of the verbs preceding it." *Ibid.*

Nor is this understanding of "because of" an arcane feature of legal usage. When English speakers say that someone did something "because of" a factor, what they mean is that the factor was a reason for what was done. For example, on the day this case was argued, January 21, 2015, Westlaw and Lexis searches reveal that the phrase "because of" appeared in 14 Washington Post print articles. In every single one, the phrase linked an action and a reason for the action.[2]

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[2] See al-Mujahed & Naylor, Rebels Assault Key Sites in Yemen, pp. A1, A12 ("A government official . . . spoke on the condition of anonymity because of concern for his safety"); Berman, Jury Selection Starts in Colo. Shooting Trial, p. A2 ("Jury selection is expected to last four to five months because of a massive pool of potential jurors"); Davidson, Some VA Whistleblowers Get Relief From Retaliation, p. A18 ("In April, they moved to fire her because of an alleged 'lack of collegiality'"); Hicks, Post Office Proposes Hikes in Postage Rates, p. A19 ("The Postal Service lost $5.5 billion in 2014, in large part because of continuing declines in first-class mail volume"); Editorial, Last Responders, p. A20 ("Metro's initial emergency call mentioned only smoke but no stuck train [in part] . . . because of the firefighters' uncertainty that power had been shut off to the third rail"); Letter to the Editor, Metro's Safety Flaws, p. A20 ("[A] circuit breaker automatically opened because of electrical arcing"); Bernstein, He Formed Swingle Singers and Made Bach Swing, p. B6 ("The group retained freshness because of the 'stunning musicianship of these singers'"); Schudel, TV Producer, Director Invented Instant Replay, p. B7 ("[The 1963 Army-Navy football game was] [d]elayed one week because of the assassination of President John F. Kennedy"); Contrera & Thompson, 50 Years On, Cheering a Civil Rights Matriarch, pp. C1, C5 ("[T]he first 1965 protest march from Selma to Montgomery . . . became known as 'Bloody Sunday' because of state troopers' violent assault on the marchers"); Pressley, 'Life Sucks': Aaron Posner's Latest Raging Riff on Chekhov, pp. C1, C9 ("'The Seagull' gave Posner ample license to experiment because of

Without torturing the English language, the meaning of these provisions of the FHA cannot be denied. They make it unlawful to engage in any of the covered actions "because of"—meaning "by reason of" or "on account of," *Nassar, supra*, at ___ (slip op., at 9)—race, religion, etc. Put another way, "the terms [after] the 'because of' clauses in the FHA supply the prohibited motivations for the intentional acts . . . that the Act makes unlawful." *American Ins. Assn.* v. *Department of Housing and Urban Development*, ___ F. Supp. 3d ___, ___, n. 20, 2014 WL 5802283, at *8, n. 20 (DC 2014). Congress accordingly outlawed the covered actions only when they are motivated by race or one of the other protected characteristics.

It follows that the FHA does not authorize disparate-impact suits. Under a statute like the FHA that prohibits actions taken "because of" protected characteristics, intent makes all the difference. Disparate impact, however, does not turn on "'subjective intent.'" *Raytheon Co.* v. *Hernandez*, 540 U. S. 44, 53 (2003). Instead, "'treat[ing] [a] particular person less favorably than others *because of*' a protected trait" is "'disparate treatment,'" *not disparate impact*. *Ricci*, 557 U. S., at 577 (emphasis added). See also, *e.g., Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 279 (1979) (explaining the difference between "because of" and "in spite of"); *Hernandez* v. *New York*,

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its writer and actress characters and its pronouncements on art"); A Rumpus on 'The Bachelor,' p. C2 ("Anderson has stood out from the pack . . . mostly because of that post-production censoring of her nether regions" (ellipsis in original)); Steinberg, KD2DC, Keeping Hype Alive, pp. D1, D4 (explaining that a commenter "asked that his name not be used because of his real job"); Boren, Former FSU Boss Bowden Wants 12 Wins to Be Restored, p. D2 ("[T]he NCAA restored the 111 victories that were taken from the late Joe Paterno because of the Jerry Sandusky child sex-abuse scandal"); Oklahoma City Finally Moves Past .500 Mark, p. D4 ("Trail Blazers all-star LaMarcus Aldridge won't play in Wednesday night's game against the Phoenix Suns because of a left thumb injury").

500 U. S. 352, 359–360 (1991) (plurality opinion) (same); *Alexander* v. *Sandoval*, 532 U. S. 275, 278, 280 (2001) (holding that it is "beyond dispute" that banning discrimination "'on the ground of race'" "prohibits only intentional discrimination").

This is precisely how Congress used the phrase "because of" elsewhere in the FHA. The FHA makes it a crime to willfully "interfere with . . . any person because of his race" (or other protected characteristic) who is engaging in a variety of real-estate-related activities, such as "selling, purchasing, [or] renting" a dwelling. 42 U. S. C. §3631(a). No one thinks a defendant could be convicted of this crime without proof that he acted "because of," *i.e.,* on account of or by reason of, one of the protected characteristics. But the critical language in this section—"because of"—is identical to the critical language in the sections at issue in this case. "One ordinarily assumes" Congress means the same words in the same statute to mean the same thing. *Utility Air Regulatory Group* v. *EPA*, 573 U. S. ___, ___ (2014) (slip op., at 15). There is no reason to doubt that ordinary assumption here.

Like the FHA, many other federal statutes use the phrase "because of" to signify what that phrase means in ordinary speech. For instance, the federal hate crime statute, 18 U. S. C. §249, authorizes enhanced sentences for defendants convicted of committing certain crimes "because of" race, color, religion, or other listed characteristics. Hate crimes require bad intent—indeed, that is the whole point of these laws. See, *e.g., Wisconsin* v. *Mitchell*, 508 U. S. 476, 484–485 (1993) ("[T]he same criminal conduct may be more heavily punished if the victim is selected because of his race or other protected status"). All of this confirms that "because of" in the FHA should be read to mean what it says.

B

In an effort to find at least a sliver of support for disparate-impact liability in the text of the FHA, the principal respondent, the Solicitor General, and the Court pounce on the phrase "make unavailable." Under §804(a), it is unlawful "[t]o . . . make unavailable . . . a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U. S. C. §3604(a). See also §3605(a) (barring "discriminat[ion] against any person in making available such a [housing] transaction . . . because of race, color, religion, sex, handicap, familial status, or national origin"). The Solicitor General argues that "[t]he plain meaning of the phrase 'make unavailable' includes actions that *have the result* of making housing or transactions unavailable, regardless of whether the actions were intended to have that result." Brief for United States as *Amicus Curiae* 18 (emphasis added). This argument is not consistent with ordinary English usage.

It is doubtful that the Solicitor General's argument accurately captures the "plain meaning" of the phrase "make unavailable" even when that phrase is not linked to the phrase "because of." "[M]ake unavailable" must be viewed together with the rest of the actions covered by §804(a), which applies when a party "*refuse[s]* to sell or rent" a dwelling, "*refuse[s]* to negotiate for the sale or rental" of a dwelling, "*den[ies]* a dwelling to any person," "or otherwise *make[s] unavailable*" a dwelling. §3604(a) (emphasis added). When a statute contains a list like this, we "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'" *Gustafson* v. *Alloyd Co.,* 513 U. S. 561, 575 (1995) (quoting *Jarecki* v. *G. D. Searle & Co.,* 367 U. S. 303, 307 (1961)). See also, *e.g., Yates* v. *United States*, 574 U. S. ___, ___ (2015) (plurality opinion) (slip op., at 14); *id*., at ___ (ALITO, J., concurring in judgment) (slip op., at 1). Here, the phrases

that precede "make unavailable" unmistakably describe *intentional* deprivations of equal treatment, not merely actions that happen to have a disparate effect. See *American Ins. Assn.*, ___ F. Supp. 3d, at ___, 2014 WL 5802283, at *8 (citing Webster's Third New International Dictionary 603, 848, 1363, 1910 (1966)). Section 804(a), moreover, prefaces "make unavailable" with "or otherwise," thus creating a catchall. Catchalls must be read "restrictively" to be "like" the listed terms. *Washington State Dept. of Social and Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U. S. 371, 384–385 (2003). The result of these ordinary rules of interpretation is that even without "because of," the phrase "make unavailable" likely would require intentionality.

The FHA's inclusion of "because of," however, removes any doubt. Sections 804(a) and 805(a) apply only when a party makes a dwelling or transaction unavailable "because of" race or another protected characteristic. In ordinary English usage, when a person makes something unavailable "because of" some factor, that factor must be a reason for the act.

Here is an example. Suppose that Congress increases the minimum wage. Some economists believe that such legislation reduces the number of jobs available for "unskilled workers," Fuller & Geide-Stevenson, Consensus Among Economists: Revisited, 34 J. Econ. Educ. 369, 378 (2003), and minorities tend to be disproportionately represented in this group, see, *e.g.,* Dept. of Commerce, Bureau of Census, Detailed Years of School Completed by People 25 Years and Over by Sex, Age Groups, Race and Hispanic Origin: 2014, online at http://www.census.gov/hhes/socdemo/education/data/cps/2014/tables.html (all Internet materials as visited June 23, 2015, and available in Clerk of Court's case file). Assuming for the sake of argument that these economists are correct, would it be fair to say that Congress made jobs unavailable to African-

Americans or Latinos "because of" their race or ethnicity?

A second example. Of the 32 college players selected by National Football League (NFL) teams in the first round of the 2015 draft, it appears that the overwhelming majority were members of racial minorities. See Draft 2015, http://www.nfl.com/draft/2015. See also Miller, Powerful Sports Agents Representing Color, Los Angeles Sentinel, Feb. 6, 2014, p. B3 (noting "there are 96 players (76 of whom are African-American) chosen in the first rounds of the 2009, 2010, and 2011 NFL drafts"). Teams presumably chose the players they think are most likely to help them win games. Would anyone say the NFL teams made draft slots unavailable to white players "because of" their race?

A third example. During the present Court Term, of the 21 attorneys from the Solicitor General's Office who argued cases in this Court, it appears that all but 5 (76%) were under the age of 45. Would the Solicitor General say he made argument opportunities unavailable to older attorneys "because of" their age?

The text of the FHA simply cannot be twisted to authorize disparate-impact claims. It is hard to imagine how Congress could have more clearly stated that the FHA prohibits only intentional discrimination than by forbidding acts done "because of race, color, religion, sex, familial status, or national origin."

II

The circumstances in which the FHA was enacted only confirm what the text says. In 1968, "the predominant focus of antidiscrimination law was on intentional discrimination." *Smith* v. *City of Jackson*, 544 U. S. 228, 258 (2005) (O'Connor, J., concurring in judgment). The very "concept of disparate impact liability, by contrast, was quite novel." *Ibid.* (collecting citations). See also Tr. of Oral Arg. 15 ("JUSTICE GINSBURG: . . . If we're going to

be realistic about this, . . . in 1968, when the Fair Housing Act passed, nobody knew anything about disparate impact"). It is anachronistic to think that Congress authorized disparate-impact claims in 1968 but packaged that striking innovation so imperceptibly in the FHA's text.

Eradicating intentional discrimination was and is the FHA's strategy for providing fair housing opportunities for all. The Court recalls the country's shameful history of segregation and *de jure* housing discrimination and then jumps to the conclusion that the FHA authorized disparate-impact claims as a method of combatting that evil. *Ante*, at 5–7. But the fact that the 1968 Congress sought to end housing discrimination says nothing about the means it devised to achieve that end. The FHA's text plainly identifies the weapon Congress chose—outlawing disparate treatment "because of race" or another protected characteristic. 42 U. S. C. §§3604(a), 3605(a). Accordingly, in any FHA claim, "[p]roof of discriminatory motive is critical." *Teamsters*, 431 U. S., at 335, n. 15.

III

Congress has done nothing since 1968 to change the meaning of the FHA prohibitions at issue in this case. In 1968, those prohibitions forbade certain housing practices if they were done "because of" protected characteristics. Today, they still forbid certain housing practices if done "because of" protected characteristics. The meaning of the unaltered language adopted in 1968 has not evolved.

Rather than confronting the plain text of §§804(a) and 805(a), the Solicitor General and the Court place heavy reliance on certain amendments enacted in 1988, but those amendments did not modify the meaning of the provisions now before us. In the Fair Housing Amendments Act of 1988, 102 Stat. 1619, Congress expanded the list of protected characteristics. See 42 U. S. C. §§3604(a), (f)(1). Congress also gave the Department of Housing and

Urban Development (HUD) rulemaking authority and the power to adjudicate certain housing claims. See §§3612, 3614a. And, what is most relevant for present purposes, Congress added three safe-harbor provisions, specifying that "[n]othing in [the FHA]" prohibits (a) certain actions taken by real property appraisers, (b) certain occupancy requirements, and (c) the treatment of persons convicted of manufacturing or distributing illegal drugs.[3]

According to the Solicitor General and the Court, these amendments show that the FHA authorizes disparate-impact claims. Indeed, the Court says that they are "of crucial importance." *Ante*, at 13. This "crucial" argument, however, cannot stand.

A

The Solicitor General and the Court contend that the 1988 Congress implicitly authorized disparate-impact liability by adopting the amendments just noted while leaving the operative provisions of the FHA untouched. Congress knew at that time, they maintain, that the Courts of Appeals had held that the FHA sanctions disparate-impact claims, but Congress failed to enact bills that would have rejected that theory of liability. Based on this, they submit that Congress silently ratified those

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[3] These new provisions state:

"Nothing in this subchapter prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status." §3605(c).

"Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this subchapter regarding familial status apply with respect to housing for older persons." §3607(b)(1).

"Nothing in this subchapter prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance as defined in section 802 of title 21." §3607(b)(4).

decisions. See *ante*, at 13–14; Brief for United States as *Amicus Curiae* 23–24. This argument is deeply flawed.

Not the greatest of its defects is its assessment of what Congress must have known about the judiciary's interpretation of the FHA. The Court writes that by 1988, "all nine *Courts of Appeals* to have addressed the question had concluded the Fair Housing Act encompassed disparate-impact claims." *Ante*, at 13 (emphasis added). See also Brief for United States as *Amicus Curiae* 12. But *this Court* had not addressed that question. While we always give respectful consideration to interpretations of statutes that garner wide acceptance in other courts, this Court has "no warrant to ignore clear statutory language on the ground that other courts have done so," even if they have "'consistently'" done so for "'30 years.'" *Milner* v. *Department of Navy*, 562 U. S. 562, 575–576 (2011). See also, *e.g., CSX Transp., Inc.* v. *McBride*, 564 U. S. ___, ___ (2011) (ROBERTS, C. J., dissenting) (slip op., at 11) (explaining that this Court does not interpret statutes by asking for "a show of hands" (citing *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health and Human Resources*, 532 U. S. 598 (2001); *McNally* v. *United States*, 483 U. S. 350 (1987))).

In any event, there is no need to ponder whether it would have been reasonable for the 1988 Congress, without considering the clear meaning of §§804(a) and 805(a), to assume that the decisions of the lower courts effectively settled the matter. While the Court highlights the decisions of the Courts of Appeals, it fails to mention something that is of at least equal importance: The official view of the United States in 1988.

Shortly *before* the 1988 amendments were adopted, the United States formally argued in this Court that the FHA prohibits only intentional discrimination. See Brief for United States as *Amicus Curiae* in *Huntington* v. *Huntington Branch, NAACP*, O. T. 1988, No. 87–1961, p. 15

("An action taken because of some factor other than race, *i.e.,* financial means, even if it causes a discriminatory effect, is not an example of the intentional discrimination outlawed by the statute"); *id.,* at 14 ("The words 'because of' plainly connote a causal connection between the housing-related action and the person's race or color").[4] This was the same position that the United States had taken in lower courts for years. See, *e.g.*, *United States* v. *Birmingham*, 538 F. Supp. 819, 827, n. 9 (ED Mich. 1982) (noting positional change), aff'd, 727 F. 2d 560, 565–566 (CA6 1984) (adopting United States' "concession" that there must be a "'discriminatory motive'"). It is implausible that the 1988 Congress was aware of certain lower court decisions but oblivious to the United States' considered and public view that those decisions were wrong.

This fact is fatal to any notion that Congress implicitly ratified disparate impact in 1988. The canon of interpretation on which the Court and the Solicitor General purport to rely—the so-called "prior-construction canon"—does not apply where lawyers cannot "justifiably regard the point as settled" or when "other sound rules of interpretation" are implicated. A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 324, 325 (2012). That was the case here. Especially after the United States began repudiating disparate impact, no one could have reasonably thought that the question was settled.

Nor can such a faulty argument be salvaged by pointing to Congress' failure in 1988 to enact language that would have made it clear that the FHA does not authorize disparate-impact suits based on zoning decisions. See *ante*,

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[4] In response to the United States' argument, we reserved decision on the question. See *Huntington* v. *Huntington Branch, NAACP*, 488 U. S. 15, 18 (1988) (*per curiam*) ("Since appellants conceded the applicability of the disparate-impact test . . . we do not reach the question whether that test is the appropriate one").

at 13–14.[5] To change the meaning of language in an already enacted law, Congress must pass a new law amending that language. See, *e.g., West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83, 100, 101, and n. 7 (1991). Intent that finds no expression in a statute is irrelevant. See, *e.g., New York Telephone Co.* v. *New York State Dept. of Labor*, 440 U. S. 519, 544–545 (1979); Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 538–540 (1983). Hence, "we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." *Helvering* v. *Hallock*, 309 U. S. 106, 121 (1940).

Unsurprisingly, we have rejected *identical* arguments about implicit ratification in other cases. For example, in *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.,* 511 U. S. 164 (1994), a party argued that §10(b) of the Securities Exchange Act of 1934 imposes liability on aiders and abettors because "Congress ha[d] amended the securities laws on various occasions since 1966, when courts first began to interpret §10(b) to cover aiding and abetting, but ha[d] done so without providing that aiding and abetting liability is not available under §10(b)." *Id.,* at 186. "From that," a party asked the Court

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[5] In any event, the Court overstates the importance of that failed amendment. The amendment's sponsor disavowed that it had anything to do with the broader question whether the FHA authorizes disparate-impact suits. Rather, it "left to caselaw and eventual Supreme Court resolution whether a discriminatory intent or discriminatory effects standard is appropriate . . . [in] all situations but zoning." H. R. Rep. No. 100–711, p. 89 (1988). Some in Congress, moreover, supported the amendment *and* the House bill. Compare *ibid.* with 134 Cong. Rec. 16511 (1988). It is hard to believe they thought the bill—which was silent on disparate impact—nonetheless decided the broader question. It is for such reasons that failed amendments tell us "little" about what a statute means. *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 187 (1994). Footnotes in House Reports and law professor testimony tell us even less. *Ante*, at 13–14.

to "infer that these Congresses, by silence, ha[d] acquiesced in the judicial interpretation of §10(b)." *Ibid.* The Court dismissed this argument in words that apply almost verbatim here:

> "'It does not follow that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it. It is "impossible to assert with any degree of assurance that congressional failure to act represents" affirmative congressional approval of the courts' statutory interpretation. Congress may legislate, moreover, only through the passage of a bill which is approved by both Houses and signed by the President. See U. S. Const., Art. I, §7, cl. 2. Congressional inaction cannot amend a duly enacted statute.' *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 175, n. 1 (1989) (quoting *Johnson* v. *Transportation Agency, Santa Clara Cty.*, 480 U. S. 616, 672 (1987) (SCALIA, J., dissenting))." *Ibid.* (alterations omitted).

We made the same point again in *Sandoval*, 532 U. S. 275. There it was argued that amendments to Title VI of the Civil Rights Act of 1964 implicitly ratified lower court decisions upholding a private right of action. We rejected that argument out of hand. See *id.*, at 292–293.

Without explanation, the Court ignores these cases.

B

The Court contends that the 1988 amendments provide "convincing confirmation of Congress' understanding that disparate-impact liability exists under the FHA" because the three safe-harbor provisions included in those amendments "would be superfluous if Congress had assumed that disparate-impact liability did not exist under the FHA." *Ante*, at 14, 15. As just explained, however, what matters is what Congress *did*, not what it might have "assumed." And although the Court characterizes

these provisions as "exemptions," that characterization is inaccurate. They make no reference to §804(a) or §805(a) or any other provision of the FHA; nor do they state that they apply to conduct that would otherwise be prohibited. Instead, they simply make clear that certain conduct is not forbidden by the Act. *E.g.,* 42 U. S. C. §3607(b)(4) ("Nothing in this subchapter prohibits . . ."). The Court should read these amendments to mean what they say.

In 1988, policymakers were not of one mind about disparate-impact housing suits. Some favored the theory and presumably would have been happy to have it enshrined in the FHA. See *ante*, at 13–14; 134 Cong. Rec. 23711 (1988) (statement of Sen. Kennedy). Others worried about disparate-impact liability and recognized that this Court had not decided whether disparate-impact claims were authorized under the 1968 Act. See H. R. Rep. No. 100–711, pp. 89–93 (1988). Still others disapproved of disparate-impact liability and believed that the 1968 Act did not authorize it. That was the view of President Reagan when he signed the amendments. See Remarks on Signing the Fair Housing Amendments Act of 1988, 24 Weekly Comp. of Pres. Doc. 1140, 1141 (1988) (explaining that the amendments did "not represent any congressional or executive branch endorsement of the notion, expressed in some judicial opinions, that [FHA] violations may be established by a showing of disparate impact" because the FHA "speaks only to intentional discrimination").[6]

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[6] At the same hearings to which the Court refers, *ante*, at 13, Senator Hatch stated that if the "intent test versus the effects test" were to "becom[e] an issue," a "fair housing law" might not be enacted at all, and he noted that failed legislation in the past had gotten "bogged down" because of that "battle." Fair Housing Amendments Act of 1987: Hearings on S. 558 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 100th Cong., 1st Sess., 5 (1987). He also noted that the bill under consideration did "not really go one way or the other" on disparate impact since the sponsors were content to "rely" on the lower court opinions. *Ibid.* And he emphasized that

The 1988 safe-harbor provisions have all the hallmarks of a compromise among these factions. These provisions neither authorize nor bar disparate-impact claims, but they do provide additional protection for persons and entities engaging in certain practices that Congress especially wished to shield. We "must respect and give effect to these sorts of compromises." *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U. S. 81, 93–94 (2002).

It is not hard to see why such a compromise was attractive. For Members of Congress who supported disparate impact, the safe harbors left the favorable lower court decisions in place. And for those who hoped that this Court would ultimately agree with the position being urged by the United States, those provisions were not surplusage. In the Circuits in which disparate-impact FHA liability had been accepted, the safe-harbor provisions furnished a measure of interim protection until the question was resolved by this Court. They also provided partial protection in the event that this Court ultimately rejected the United States' argument. Neither the Court, the principal respondent, nor the Solicitor General has cited any case in which the canon against surplusage has been applied in circumstances like these.[7]

"the issue of intent versus effect—I am afraid that is going to have to be decided by the Supreme Court." *Ibid.* See also *id.*, at 10 ("It is not always a violation to refuse to sell, but only to refuse to sell 'because of' another's race. This language made clear that the 90th Congress meant only to outlaw acts taken with the intent to discriminate . . . . To use any standard other than discriminatory intent . . . would jeopardize many kinds of beneficial zoning and local ordinances" (statement of Sen. Hatch)).

[7] In any event, even in disparate-treatment suits, the safe harbors are not superfluous. For instance, they affect "the burden-shifting framework" in disparate-treatment cases. *American Ins. Assn.* v. *Department of Housing and Urban Development*, ___ Supp. 3d ___, 2014 WL 5802283, *10 (DC 2014). Under the second step of the burden-shifting scheme from *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973),

On the contrary, we have previously refused to interpret enactments like the 1988 safe-harbor provisions in such a way. Our decision in *O'Gilvie* v. *United States*, 519 U. S. 79 (1996)—also ignored by the Court today—is instructive. In that case, the question was whether a provision of the Internal Revenue Code excluding a recovery for personal injury from gross income applied to punitive damages. Well after the critical provision was enacted, Congress adopted an amendment providing that punitive damages for nonphysical injuries were not excluded. Pointing to this amendment, a taxpayer argued: "Why . . . would Congress have enacted this amendment removing punitive damages (in nonphysical injury cases) unless Congress believed that, in the amendment's absence, punitive damages did fall within the provision's coverage?" *Id.*, at 89. This argument, of course, is precisely the same as the argument made in this case. To paraphrase *O'Gilvie*, the Court today asks: Why would Congress have enacted the 1988 amendments, providing safe harbors from three types of disparate-impact claims, unless Congress believed

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which some courts have applied in disparate-treatment housing cases, see, *e.g., 2922 Sherman Avenue Tenants' Assn.* v. *District of Columbia*, 444 F. 3d 673, 682 (CADC 2006) (collecting cases), a defendant must proffer a legitimate reason for the challenged conduct, and the safe-harbor provisions set out reasons that are necessarily legitimate. Moreover, while a factfinder in a disparate-treatment case can sometimes infer bad intent based on facially neutral conduct, these safe harbors protect against such inferences. Without more, conduct within a safe harbor is insufficient to support such an inference as a matter of law. And finally, even if there is additional evidence, these safe harbors make it harder to show pretext. See *Fair Housing Advocates Assn., Inc.* v. *Richmond Heights*, 209 F. 3d 626, 636–637, and n. 7 (CA6 2000).

Even if they were superfluous, moreover, our "preference for avoiding surplusage constructions is not absolute." *Lamie* v. *United States Trustee*, 540 U. S. 526, 536 (2004). We "presume that a legislature says in a statute what it means," notwithstanding "[r]edundanc[y]." *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254 (1992).

that, in the amendments' absence, disparate-impact claims did fall within the FHA's coverage?

The Court rejected the argument in *O'Gilvie*. "The short answer," the Court wrote, is that Congress might have simply wanted to "clarify the matter in respect to non-physical injuries" while otherwise "leav[ing] the law where it found it." *Ibid.* Although other aspects of *O'Gilvie* triggered a dissent, see *id.,* at 94–101 (opinion of SCALIA, J.), no one quarreled with this self-evident piece of the Court's analysis. Nor was the *O'Gilvie* Court troubled that Congress' amendment regarding nonphysical injuries turned out to have been unnecessary because punitive damages for any injuries were not excluded all along.

The Court saw the flaw in the argument in *O'Gilvie*, and the same argument is no better here. It is true that *O'Gilvie* involved a dry question of tax law while this case involves a controversial civil rights issue. But how we read statutes should not turn on such distinctions.

In sum, as the principal respondent's attorney candidly admitted, the 1988 amendments did not create disparate-impact liability. See Tr. of Oral Arg. 36 ("[D]id the things that [Congress] actually did in 1988 expand the coverage of the Act? MR. DANIEL: No, Justice").

C

The principal respondent and the Solicitor General—but not the Court—have one final argument regarding the text of the FHA. They maintain that even if the FHA does not unequivocally authorize disparate-impact suits, it is at least ambiguous enough to permit HUD to adopt that interpretation. Even if the FHA were ambiguous, however, we do not defer "when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.'" *Christopher* v. *SmithKline Beecham Corp.*, 567 U. S. ___, ___ (2012) (slip op., at 10).

Here, 43 years after the FHA was enacted and nine days after the Court granted certiorari in *Magner* (the "rodent infestation" case), HUD proposed "to prohibit housing practices with a discriminatory effect, even where there has been no intent to discriminate." Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70921 (2011). After *Magner* settled, the Court called for the views of the Solicitor General in *Township of Mount Holly* v. *Mt. Holly Gardens Citizens in Action, Inc.,* 568 U. S. ___ (2012), another case raising the same question. Before the Solicitor General filed his brief, however, HUD adopted disparate-impact regulations. See Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (2013). The Solicitor General then urged HUD's rule as a reason to deny certiorari. We granted certiorari anyway, 570 U. S. ___ (2013), and shortly thereafter *Mount Holly* also unexpectedly settled. Given this unusual pattern, there is an argument that deference may be unwarranted. Cf. *Young* v. *United Parcel Service, Inc.*, 575 U. S. ___, ___ (2015) (slip op., at 16–17) (refusing to defer where "[t]he EEOC promulgated its 2014 guidelines only recently, after this Court had granted certiorari" (discussing *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944))).[8]

There is no need to dwell on these circumstances, however, because deference is inapt for a more familiar reason: The FHA is not ambiguous. The FHA prohibits only disparate treatment, not disparate impact. It is a bedrock rule that an agency can never "rewrite clear statutory terms to suit its own sense of how the statute should

[8] At argument, the Government assured the Court that HUD did not promulgate its proposed rule because of *Magner*. See Tr. of Oral Arg. 46 ("[I]t overestimates the efficiency of the government to think that you could get, you know, a supposed rule-making on an issue like this out within seven days"). The Government also argued that HUD had recognized disparate-impact liability in adjudications for years. *Ibid.*

operate." *Utility Air Regulatory Group*, 573 U. S., at ___ (slip op., at 23). This rule makes even more sense where the agency's view would open up a deeply disruptive avenue of liability that Congress never contemplated.

IV

Not only does disparate-impact liability run headlong into the text of the FHA, it also is irreconcilable with our precedents. The Court's decision today reads far too much into *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), and far too little into *Smith* v. *City of Jackson*, 544 U. S. 228 (2005). In *Smith*, the Court explained that the statutory justification for the decision in *Griggs* depends on language that has no parallel in the FHA. And when the *Smith* Court addressed a provision that does have such a parallel in the FHA, the Court concluded—*unanimously*—that it does not authorize disparate-impact liability. The same result should apply here.

A

Rather than focusing on the text of the FHA, much of the Court's reasoning today turns on *Griggs*. In *Griggs*, the Court held that black employees who sued their employer under §703(a)(2) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e–2(a)(2), could recover without proving that the employer's conduct—requiring a high school diploma or a qualifying grade on a standardized test as a condition for certain jobs—was motivated by a discriminatory intent. Instead, the Court held that, unless it was proved that the requirements were "job related," the plaintiffs could recover by showing that the requirements "operated to render ineligible a markedly disproportionate number of Negroes." 401 U. S., at 429.

Griggs was a case in which an intent to discriminate might well have been inferred. The company had "openly discriminated on the basis of race" prior to the date on

which the 1964 Civil Rights Act took effect. *Id.*, at 427. Once that date arrived, the company imposed new educational requirements for those wishing to transfer into jobs that were then being performed by white workers who did not meet those requirements. *Id.*, at 427–428. These new hurdles disproportionately burdened African-Americans, who had "long received inferior education in segregated schools." *Id.*, at 430. Despite all this, the lower courts found that the company lacked discriminatory intent. See *id.*, at 428. By convention, we do not overturn a finding of fact accepted by two lower courts, see, *e.g., Rogers* v. *Lodge*, 458 U. S. 613, 623 (1982); *Blau* v. *Lehman*, 368 U. S. 403, 408–409 (1962); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275 (1949), so the Court was confronted with the question whether Title VII always demands intentional discrimination.

Although *Griggs* involved a question of statutory interpretation, the body of the Court's opinion—quite remarkably—does not even cite the provision of Title VII on which the plaintiffs' claims were based. The only reference to §703(a)(2) of the 1964 Civil Rights Act appears in a single footnote that reproduces the statutory text but makes no effort to explain how it encompasses a disparate-impact claim. See 401 U. S., at 426, n. 1. Instead, the Court based its decision on the "objective" of Title VII, which the Court described as "achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id.*, at 429–430.

That text-free reasoning caused confusion, see, *e.g., Smith, supra*, at 261–262 (O'Connor, J., concurring in judgment), and undoubtedly led to the pattern of Court of Appeals decisions in FHA cases upon which the majority now relies. Those lower courts, like the *Griggs* Court, often made little effort to ground their decisions in the statutory text. For example, in one of the earliest cases in

this line, *United States* v. *Black Jack*, 508 F. 2d 1179 (CA8 1974), the heart of the court's analysis was this: "Just as Congress requires 'the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification,' such barriers must also give way in the field of housing." *Id.,* at 1184 (quoting *Griggs*, *supra*, at 430–431; citation omitted).

Unlike these lower courts, however, this Court has never interpreted *Griggs* as imposing a rule that applies to all antidiscrimination statutes. See, *e.g., Guardians Assn.* v. *Civil Serv. Comm'n of New York City*, 463 U. S. 582, 607, n. 27 (1983) (holding that Title VI, 42 U. S. C. §2000d *et seq*., does "not allow compensatory relief in the absence of proof of discriminatory intent"); *Sandoval*, 532 U. S., at 280 (similar). Indeed, we have never held that *Griggs* even establishes a rule for all *employment* discrimination statutes. In *Teamsters*, the Court rejected "the *Griggs* rationale" in evaluating a company's seniority rules. 431 U. S., at 349–350. And because *Griggs* was focused on a particular problem, the Court had held that its rule does not apply where, as here, the context is different. In *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702 (1978), for instance, the Court refused to apply *Griggs* to pensions under the Equal Pay Act of 1963, 29 U. S. C. §206(d) or Title VII, even if a plan has a "disproportionately heavy impact on male employees." 435 U. S. at 711, n. 20. We explained that "[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences." *Ibid.*

B

Although the opinion in *Griggs* did not grapple with the text of the provision at issue, the Court was finally re-

quired to face that task in *Smith*, 544 U. S. 228, which addressed whether the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. §621 *et seq.*, authorizes disparate-impact suits. The Court considered two provisions of the ADEA, §§4(a)(1) and 4(a)(2), 29 U. S. C. §§623(a)(1) and (a)(2).

The Court unanimously agreed that the first of these provisions, §4(a)(1), does not authorize disparate-impact claims. See 544 U. S., at 236, n. 6 (plurality opinion); *id.*, at 243 (SCALIA, J., concurring in part and concurring in judgment) (agreeing with the plurality's reasoning); *id.*, at 249 (O'Connor, J., concurring in judgment) (reasoning that this provision "obvious[ly]" does not allow disparate-impact claims).

By contrast, a majority of the Justices found that the terms of §4(a)(2) either clearly authorize disparate-impact claims (the position of the plurality) or at least are ambiguous enough to provide a basis for deferring to such an interpretation by the Equal Employment Opportunity Commission (the position of JUSTICE SCALIA). See 544 U. S., at 233–240 (plurality opinion); *id.*, at 243–247 (opinion of SCALIA, J.).

In reaching this conclusion, these Justices reasoned that §4(a)(2) of the ADEA was modeled on and is virtually identical to the provision in *Griggs*, 42 U. S. C. §2000e–2(a)(2). Section 4(a)(2) provides as follows:

> "It shall be unlawful for an employer—
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> . . . . . .
>
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's *age*." 29 U. S. C. §623(a) (emphasis added).

The provision of Title VII at issue in *Griggs* says this:

> "It shall be an unlawful employment practice for an employer—
>
> . . . . . .
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's *race, color, religion, sex, or national origin*." 42 U. S. C. §2000e–2(a)(2) (emphasis added).

For purposes here, the only relevant difference between these provisions is that the ADEA provision refers to "age" and the Title VII provision refers to "race, color, religion, or national origin." Because identical language in two statutes having similar purposes should generally be presumed to have the same meaning, the plurality in *Smith*, echoed by JUSTICE SCALIA, saw *Griggs* as "compelling" support for the conclusion that §4(a)(2) of the ADEA authorizes disparate-impact claims. 544 U. S., at 233–234 (plurality opinion) (citing *Northcross* v. *Board of Ed. of Memphis City Schools*, 412 U. S. 427, 428 (1973) (*per curiam*)).

When it came to the other ADEA provision addressed in *Smith*, namely, §4(a)(1), the Court unanimously reached the opposite conclusion. Section 4(a)(1) states:

> "It shall be unlawful for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's age*." 29 U. S. C. §623(a)(1) (emphasis added).

The plurality opinion's reasoning, with which JUSTICE SCALIA agreed, can be summarized as follows. Under §4(a)(1), *the employer* must act because of age, and thus

must have discriminatory intent. See 544 U. S., at 236, n. 6.[9] Under §4(a)(2), on the other hand, it is enough if the *employer's actions* "adversely affect" an individual "because of . . . age." 29 U. S. C. §623(a).

This analysis of §§4(a)(1) and (a)(2) of the ADEA confirms that the FHA does not allow disparate-impact claims. Sections 804(a) and 805(a) of the FHA resemble §4(a)(1) of the ADEA, which the *Smith* Court unanimously agreed does not encompass disparate-impact liability. Under these provisions of the FHA, like §4(a)(1) of the ADEA, a defendant must act "because of" race or one of the other prohibited grounds. That is, it is unlawful for a person or entity to "[t]o refuse to sell or rent," "refuse to negotiate," "otherwise make unavailable," etc. for a forbidden reason. These provisions of the FHA, unlike the Title VII provision in *Griggs* or §4(a)(2) of the ADEA, do not make it unlawful to take an action that happens to adversely affect a person because of race, religion, etc.

The *Smith* plurality's analysis, moreover, also depended on other language, unique to the ADEA, declaring that "it shall not be unlawful for an employer 'to take any action *otherwise prohibited* . . . where the differentiation is based

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[9] The plurality stated:

"Paragraph (a)(1) makes it unlawful for an employer 'to fail or refuse to hire . . . *any individual* . . . because of *such individual*'s age.' (Emphasis added.) The focus of the paragraph is on the employer's actions with respect to the targeted individual. Paragraph (a)(2), however, makes it unlawful for an employer 'to limit . . . his *employees* in any way which would deprive or tend to deprive *any individual* of employment opportunities or otherwise adversely affect his status as an employee, because of *such individual*'s age.' (Emphasis added.) Unlike in paragraph (a)(1), there is thus an incongruity between the employer's actions—which are focused on his employees generally—and the individual employee who adversely suffers because of those actions. Thus, an employer who classifies his employees without respect to age may still be liable under the terms of this paragraph if such classification adversely affects the employee because of that employee's age—the very definition of disparate impact." 544 U. S., at 236, n. 6.

on reasonable factors other than age.'" 544 U. S., at 238 (quoting 81 Stat. 603; emphasis added). This "otherwise prohibited" language was key to the plurality opinion's reading of the statute because it arguably suggested disparate-impact liability. See 544 U. S., at 238. This language, moreover, was *essential* to JUSTICE SCALIA's controlling opinion. Without it, JUSTICE SCALIA would have agreed with Justices O'Connor, KENNEDY, and THOMAS that *nothing* in the ADEA authorizes disparate-impact suits. See *id.,* at 245–246. In fact, even with this "otherwise prohibited" language, JUSTICE SCALIA merely concluded that §4(a)(2) was ambiguous—*not* that disparate-impacts suits are required. *Id.*, at 243.

The FHA does not contain any phrase like "otherwise prohibited." Such language certainly is nowhere to be found in §§804(a) and 805(a). And for all the reasons already explained, the 1988 amendments do not presuppose disparate-impact liability. To the contrary, legislative enactments declaring only that certain actions are *not* grounds for liability do not implicitly create a new theory of liability that all other facets of the statute foreclose.

C

This discussion of our cases refutes any notion that "[t]ogether, *Griggs* holds[10] and the plurality in *Smith* instructs that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is con-

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[10] *Griggs*, of course, "holds" nothing of the sort. Indeed, even the plurality opinion in *Smith* (to say nothing of JUSTICE SCALIA's controlling opinion or Justice O'Connor's opinion concurring in the judgment) did not understand *Griggs* to create such a rule. See 544 U. S., at 240 (plurality opinion) (relying on multiple considerations). If *Griggs* already answered the question for all statutes (even those that do not use effects language), *Smith* is inexplicable.

sistent with statutory purpose." *Ante,* at 10. The Court stumbles in concluding that §804(a) of the FHA is more like §4(a)(2) of the ADEA than §4(a)(1). The operative language in §4(a)(1) of the ADEA—which, per *Smith*, does not authorize disparate-impact claims—is materially indistinguishable from the operative language in §804(a) of the FHA.

Even more baffling, neither alone nor in combination do *Griggs* and *Smith* support the Court's conclusion that §805(a) of the FHA allows disparate-impact suits. The action forbidden by that provision is "*discriminat[ion]* . . . because of" race, religion, etc. 42 U. S. C. §3605(a) (emphasis added). This is precisely the formulation used in §4(a)(1) of the ADEA, which prohibits "*discriminat[ion]* . . . because of such individual's age," 29 U. S. C. §623(a)(1) (emphasis added), and which *Smith* holds *does not* authorize disparate-impact claims.

In an effort to explain why §805(a)'s reference to "discrimination" allows disparate-impact suits, the Court argues that in *Board of Ed. of City School Dist. of New York* v. *Harris*, 444 U. S. 130 (1979), "statutory language similar to §805(a) [was construed] to include disparate-impact liability." *Ante*, at 11. In fact, the statutory language in *Harris* was quite different. The law there was §706(d)(1)(B) of the 1972 Emergency School Aid Act, which barred assisting education agencies that "'had in effect any practice, policy, or procedure which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregation . . . *or* otherwise engaged in discrimination based upon race, color, or national origin in the hiring, promotion, or assignment of employees.'" 444 U. S., at 132–133, 142 (emphasis added).

After stating that the first clause in that unusual statute referred to a "disparate-impact test," the *Harris* Court concluded that "a similar standard" should apply to the

textually "closely connected" second clause. *Id.,* at 143. This was so, the Court thought, even though the second clause, standing alone, may very well have required discriminatory "intent." *Id.,* at 139. The Court explained that the Act's "less than careful draftsmanship" regarding the relationship between the clauses made the "wording of the statute . . . ambiguous" about teacher assignments, thus forcing the Court to "look closely at the structure and context of the statute and to review its legislative history." *Id.,* at 138–140. It was the combined force of all those markers that persuaded the Court that disparate impact applied to the second clause too.

Harris, in other words, has nothing to do with §805(a) of the FHA. The "wording" is different; the "structure" is different; the "context" is different; and the "legislative history" is different. *Id.,* at 140. Rather than digging up a 36-year-old case that Justices of this Court have cited all of twice, and never once for the proposition offered today, the Court would do well to recall our many cases explaining what the phase "because of" means.

V

Not only is the decision of the Court inconsistent with what the FHA says and our precedents, it will have unfortunate consequences. Disparate-impact liability has very different implications in housing and employment cases.

Disparate impact puts housing authorities in a very difficult position because programs that are designed and implemented to help the poor can provide the grounds for a disparate-impact claim. As *Magner* shows, when disparate impact is on the table, even a city's good-faith attempt to remedy deplorable housing conditions can be branded "discriminatory." 619 F. 3d, at 834. Disparate-impact claims thus threaten "a whole range of tax, welfare, public service, regulatory, and licensing statutes." *Washington* v. *Davis*, 426 U. S. 229, 248 (1976).

This case illustrates the point. The Texas Department of Housing and Community Affairs (the Department) has only so many tax credits to distribute. If it gives credits for housing in lower income areas, many families—including many minority families—will obtain better housing. That is a good thing. But if the Department gives credits for housing in higher income areas, some of those families will be able to afford to move into more desirable neighborhoods. That is also a good thing. Either path, however, might trigger a disparate-impact suit.[11]

This is not mere speculation. Here, one respondent has sued the Department for not allocating enough credits to higher income areas. See Brief for Respondent Inclusive Communities Project, Inc., 23. But *another* respondent argues that giving credits to wealthy neighborhoods violates "the moral imperative to improve the substandard and inadequate affordable housing in many of our inner cities." Reply Brief for Respondent Frazier Revitalization Inc. 1. This latter argument has special force because a city can build more housing where property is least expensive, thus benefiting more people. In fact, federal law often favors projects that revitalize low-income communities. See *ante,* at 2.

No matter what the Department decides, one of these respondents will be able to bring a disparate-impact case. And if the Department opts to compromise by dividing the credits, both respondents might be able to sue. Congress surely did not mean to put local governments in such a position.

The Solicitor General's answer to such problems is that HUD will come to the rescue. In particular, HUD regula-

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[11] Tr. of Oral Arg. 44–45 ("Community A wants the development to be in the suburbs. And the next state, the community wants it to be in the poor neighborhood. Is it your position . . . that in either case, step one has been satisfied[?] GENERAL VERRILLI: That may be right").

tions provide a defense against disparate-impact liability if a defendant can show that its actions serve "substantial, legitimate, nondiscriminatory interests" that "necessar[ily]" cannot be met by "another practice that has a less discriminatory effect." 24 CFR §100.500(b) (2014). (There is, of course, no hint of anything like this defense in the text of the FHA. But then, there is no hint of disparate-impact liability in the text of the FHA either.)

The effect of these regulations, not surprisingly, is to confer enormous discretion on HUD—without actually solving the problem. What is a "substantial" interest? Is there a difference between a "legitimate" interest and a "nondiscriminatory" interest? To what degree must an interest be met for a practice to be "necessary"? How are parties and courts to measure "discriminatory effect"?

These questions are not answered by the Court's assurance that the FHA's disparate-impact "analysis 'is analogous to the Title VII requirement that an employer's interest in an employment practice with a disparate impact be job related.'" *Ante,* at 4 (quoting 78 Fed. Reg. 11470). See also *ante,* at 18 (likening the defense to "the business necessity standard"). The business-necessity defense is complicated enough in employment cases; what it means when plopped into the housing context is anybody's guess. What is the FHA analogue of "job related"? Is it "housing related"? But a vast array of municipal decisions affect property values and thus relate (at least indirectly) to housing. And what is the FHA analogue of "business necessity"? "Housing-policy necessity"? What does that mean?

Compounding the problem, the Court proclaims that "governmental entities . . . must not be prevented from achieving legitimate objectives, such as ensuring compliance with health and safety codes." *Ante*, at 21. But what does the Court mean by a "legitimate" objective? And does the Court mean to say that there can be no disparate-

impact lawsuit if the objective is "legitimate"? That is certainly not the view of the Government, which takes the position that a disparate-impact claim may be brought to challenge actions taken with such worthy objectives as improving housing in poor neighborhoods and making financially sound lending decisions. See Brief for United States as *Amicus Curiae* 30, n. 7.

Because HUD's regulations and the Court's pronouncements are so "hazy," *Central Bank*, 511 U. S., at 188–189, courts—lacking expertise in the field of housing policy—may inadvertently harm the very people that the FHA is meant to help. Local governments make countless decisions that may have some disparate impact related to housing. See *ante,* at 19–20. Certainly Congress did not intend to "engage the federal courts in an endless exercise of second-guessing" local programs. *Canton* v. *Harris*, 489 U. S. 378, 392 (1989).

Even if a city or private entity named in a disparate-impact suit believes that it is likely to prevail if a disparate-impact suit is fully litigated, the costs of litigation, including the expense of discovery and experts, may "push cost-conscious defendants to settle even anemic cases." *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544, 559 (2007). Defendants may feel compelled to "abandon substantial defenses and . . . pay settlements in order to avoid the expense and risk of going to trial." *Central Bank, supra,* at 189. And parties fearful of disparate-impact claims may let race drive their decisionmaking in hopes of avoiding litigation altogether. Cf. *Ricci*, 557 U. S., at 563. All the while, similar dynamics may drive litigation against private actors. *Ante,* at 19.

This is not the Fair Housing Act that Congress enacted.

VI

Against all of this, the Court offers several additional counterarguments. None is persuasive.

A

The Court is understandably worried about pretext. No one thinks that those who harm others because of protected characteristics should escape liability by conjuring up neutral excuses. Disparate-treatment liability, however, is attuned to this difficulty. Disparate impact can be *evidence* of disparate treatment. *E.g., Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 541–542 (1993) (opinion of KENNEDY, J.); *Hunter* v. *Underwood*, 471 U. S. 222, 233 (1985). As noted, the facially neutral requirements in *Griggs* created a strong inference of discriminatory intent. Nearly a half century later, federal judges have decades of experience sniffing out pretext.

B

The Court also stresses that "many of our Nation's largest cities—entities that are potential defendants in disparate-impact suits—have submitted an *amicus* brief in this case supporting disparate-impact liability under the FHA." *Ante,* at 23–24.

This nod to federalism is puzzling. Only a minority of the States and only a small fraction of the Nation's municipalities have urged us to hold that the FHA allows disparate-impact suits. And even if a majority supported the Court's position, that would not be a relevant consideration for a court. In any event, nothing prevents States and local government from enacting their own fair housing laws, including laws creating disparate-impact liability. See 42 U. S. C. §3615 (recognizing local authority).

The Court also claims that "[t]he existence of disparate-impact liability in the substantial majority of the Courts of Appeals for the last several decades" has not created "'dire consequences.'" *Ante,* at 24. But the Court concedes that disparate impact can be dangerous. See *ante,* at 18–22. Compare *Magner*, 619 F. 3d, at 833–838 (holding that efforts to prevent violations of the housing code may vio-

late the FHA), with 114 Cong. Rec. 2528 (1968) (remarks of Sen. Tydings) (urging enactment of the FHA to help combat violations of the housing code, including "rat problem[s]"). In the Court's words, it is "paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing." *Ante,* at 19. Our say-so, however, will not stop such costly cases from being filed—or from getting past a motion to dismiss (and so into settlement).

C

At last I come to the "purpose" driving the Court's analysis: The desire to eliminate the "vestiges" of "residential segregation by race." *Ante,* at 5, 23. We agree that all Americans should be able "to buy decent houses without discrimination . . . *because of* the color of their skin." 114 Cong. Rec. 2533 (remarks of Sen. Tydings) (emphasis added). See 42 U. S. C. §§3604(a), 3605(a) ("because of race"). But this Court has no license to expand the scope of the FHA to beyond what Congress enacted.

When interpreting statutes, "'[w]hat the legislative intention was, can be derived only from the words . . . used; and we cannot speculate beyond the reasonable import of these words.'" *Nassar*, 570 U. S., at ___ (slip op., at 13) (quoting *Gardner* v. *Collins*, 2 Pet. 58, 93 (1829)). "[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U. S. 522, 526 (1987) (*per curiam*). See also, *e.g., Board of Governors, FRS* v. *Dimension Financial Corp.*, 474 U. S. 361, 373–374 (1986) (explaining that "'broad purposes'" arguments "ignor[e] the complexity of the problems Congress is called upon to address").

Here, privileging purpose over text also creates constitutional uncertainty. The Court acknowledges the risk that disparate impact may be used to "perpetuate race-based

considerations rather than move beyond them." *Ante*, at 21. And it agrees that "racial quotas . . . rais[e] serious constitutional concerns." *Ante*, at 20. Yet it still reads the FHA to authorize disparate-impact claims. We should avoid, rather than invite, such "difficult constitutional questions." *Ante*, at 22. By any measure, the Court today makes a serious mistake.

* * *

I would interpret the Fair Housing Act as written and so would reverse the judgment of the Court of Appeals.