THE 1996 OREGON REPORT

INTRODUCTORY COMMENT

I. Introduction

In 1992, the Real Estate and Land Use Section of the Oregon State Bar Committee on Opinion Letters (the "Committee") published *Lawyers' Opinions in Oregon Real Estate Transactions*[1] (the "1992 Oregon Report"), which contained a statement of policy, suggested form of Opinion Letter, and accompanying Commentary. Since 1992, almost all discussion concerning opinion letters, in the context of both a business transaction or a real estate secured transaction (REST), has centered on the *Third-Party Legal Opinion Report Including the Legal Opinion Accord of the Section of Business Law of the American Bar Association*[2] (boldfaced text consisting of Sections 1 through 22, the introductory paragraph to those Sections, and Glossary are defined herein as the "Accord").[3]

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[1] The 1992 Oregon Report was originally printed as a separate pamphlet by the Oregon State Bar Section on Real Property and Land Use and is reprinted above. For ease of reference, all citations herein are to the above 1992 Oregon Report.

[2] 47 BUS LAW 167 (1991), *reprinted in* 29 REAL PROP PROB & TR J 487 (1994).

[3] For ease of reference, all citations to the Accord are to the reprint in 29 REAL PROP PROB & TR J 487 (1994).

In the fall of 1994, the American Bar Association Section of Real Property, Probate, and Trust Law and the American College of Real Estate Lawyers published a report analyzing the Accord (the "ABA/ACREL Report").[4] As noted in the ABA/ACREL Report, the Accord left for future analysis legal opinion issues in a REST. A purpose of the ABA/ACREL Report was to provide modifications and additions to the Accord, as well as incorporating commentary, to allow an "Accord Type Opinion"[5] to be given in a REST.

Since publication of the 1992 Oregon Report, the Committee has met periodically and monitored the Accord, the ABA/ACREL Report, and other state bar opinion letter projects. After review of the Accord, the ABA/ACREL Report, and other state bar reports, the Committee recommends AGAINST the use of the Accord for an Opinion Letter in an Oregon REST, even with the modifications suggested in the ABA/ACREL Report. This recommendation is made with the explicit understanding that neither the Accord nor the ABA/ACREL Report is being criticized. Both the Accord and the ABA/ACREL Report attempted to address the need for "a national consensus as to the purpose, format and coverage of a third-party legal opinion, the precise meaning of its language and the recognition of certain guidelines for its negotiation."[6] In fact, as seen in this 1996 Oregon Report, concepts from both the Accord and the ABA/ACREL Report have been incorporated. This recommendation is, however, based on a conclusion that the required time, energy, and expense for the Borrower's lawyer providing the opinion (the "Opinion Giver"), the Lender and the lawyer for the Lender to whom the opinion is addressed (collectively the "Opinion Recipient")[7] to become sufficiently familiar with the Accord, the ABA/ACREL Report, and necessary additional modifications to apply

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[4] *Report on Adaptation of the Legal Opinion Accord of the Section of Business Law of the American Bar Association for Real Estate Secured Transactions of the Section of the Real Property, Probate and Trust Law of the American Bar Association and the American College of Real Estate Lawyers*, 29 REAL PROP PROB & TR J 569 (1994).

[5] The term *Accord Type Opinion* is used herein as meaning an opinion based on the Accord, modified as suggested in the ABA/ACREL Report, and further modified to deal with the appropriate state law modifications.

[6] *See* the Foreword to the Accord, 29 REAL PROP PROB & TR J at 488.

[7] The terms *Opinion Giver* and *Opinion Recipient* are similarly defined in the Accord, have become used generally in opinion letter practice, and shall be used herein with those meanings. *See* Accord Glossary, 29 REAL PROP PROB & TR J at 499–502.

these concepts to an Oregon REST does not warrant its use in most Oregon RESTs.

The above recommendation is general in nature and relates to most common RESTs. If the scope of the REST and the experience of the Opinion Giver and Opinion Recipient warrant its use, the Committee acknowledges that there are circumstances when an Accord Type Opinion may be required by the Opinion Recipient and provided by the Opinion Giver. Under these limited circumstances, when an Accord Type Opinion is given in an Oregon REST, both the Opinion Giver and the Opinion Recipient should carefully review the Accord and the ABA/ACREL Report. An Accord Type Opinion should include the suggested modifications to the Accord set forth in the ABA/ACREL Report (including the incorporation by reference of the ABA/ACREL Report[8]) and those portions of the 1992 Oregon Report and this 1996 Oregon Report that are relevant to the REST.[9]

In conjunction with reviewing the Accord, the ABA/ACREL Report, and other state bar reports, specifically the report of a joint committee of the Real Property Section of the State Bar of California and the Real Property Section of the Los Angeles County Bar Association[10] ("1995 California Real Property Opinion Report"), the Committee has determined not to make material changes in the positions set forth in the 1992 Oregon Report. The Committee has carefully reviewed the Enforceability Opinion as set forth in the 1992 Oregon Report and except as modified hereby, the Committee recommends its continued use.

The passage of time, however, does require refinements occasioned by changes in law and practice. Set forth below is the Committee's explanation of the changes to the 1992 Oregon Report suggested form Opinion Letter. This report is followed by the complete 1996 suggested

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[8] *See* ABA/ACREL Report ¶20, 29 REAL PROP PROB & TR J at 605.

[9] For a general reference on opinion letter practice, both Opinion Givers and Opinion Recipients are referred to 29 REAL PROP PROB & TR J 487 (1994), which contains both the Accord and the ABA/ACREL Report, as well as three articles by authorities in this area.

[10] *Report of a Joint Committee of the Real Property Section of the State Bar of California and the Real Property Section of the Los Angeles County Bar Association on the Legal Opinion Reports of (I) the ABA Section of Business Law, and (II) the ABA Section of Real Property, Probate, and Trust Law and the American College of Real Estate Lawyers*, 13 CAL REAL PROP J No 3, Fall 1995.

form Opinion Letter, marked to show the changes from the 1992 Oregon Report suggested form. This report is then followed by the complete 1996 suggested form Opinion Letter. 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.

Finally, since its formation in 1988, the Committee has discussed the proposition that in an Oregon REST, where both the Borrower and Lender are represented by Oregon lawyers (either as general or local counsel), *no* Enforceability Opinion should be required of the Opinion Giver.[11] While the Committee recognizes that it cannot control commercial practice, the Committee recommends to Opinion Recipients that this position should be adopted.

II. Commentary on Form of Opinion Letter

A. Scope of Investigation

The 1992 Oregon Report set forth, in general terms, an Opinion Giver's due diligence requirements. The 1996 Committee determined that more attention to due diligence was required.

Before issuing an opinion, the Opinion Giver should conduct such due diligence as is necessary to substantiate the opinions given. While portions of this documentation consist of certificates from public officials,[12] most of the information will come directly from the Opinion Giver's own files or from the Borrower.

When appropriate, the Opinion Giver may have to conduct such due diligence as is necessary to substantiate the opinions given. Each Opinion Giver should establish procedures to be followed before the issuance of an opinion. These procedures should provide for sufficient information so that each requested opinion can be analyzed together with confirmation of the legal and factual basis for each such opinion. Additionally, these procedures should provide for the maintenance of a record of the due diligence steps followed.

A suggested form Borrower's Certificate and a suggested form Borrower's Borrowing Resolution follow the suggested form Opinion Letter. These forms can be tailored to the Borrower's type of legal entity, such as a corporation, partnership, or limited liability company.

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[11] *See* 1992 Oregon Report at 19-137, *infra*.

[12] *See* 1996 suggested form Opinion Letter at 19-120 and 19-121, *infra.*

Additionally, if there is a guarantor to the loan, a similar Certificate or Resolution could be used by the guarantor.

It is not the purpose of this section of the 1996 Oregon Report to provide a detailed analysis of relevant due diligence steps to be followed before the issuance of an opinion. It is the purpose of this section to alert Opinion Givers to the need for due diligence and provide a basis on which to document information provided by the Borrower.

B. Assumptions

The Commentary to the 1992 Oregon Report contained no discussion of the Assumptions contained in the suggested form of Opinion Letter. The suggested form Opinion Letter merely set forth 11 Assumptions.[13] The omission of Commentary concerning Assumptions in the 1992 Oregon Report should not be construed to minimize the importance of assumptions by the Opinion Giver as a basis for the opinions given.

In opinion letter practice, a number of factual assumptions have become commonplace and generally accepted by Opinion Recipients. As noted in the Commentary to the Accord, "[s]ome of these assumptions deal with facts that relate to other parties or are too difficult or time-consuming to verify" and "others relate to facts that are readily susceptible to verification and, in the vast majority of cases if investigation were made, would be confirmed as true."[14] In an Accord opinion, the Opinion Giver is relying on the assumptions set forth in Accord §4 without any investigation[15] to the extent the Opinion Giver does not have "Actual Knowledge," as defined in Accord §6.[16] This limitation is set forth in Accord §5, "Unwarranted Reliance."[17]

The Committee believes the appropriate standard for an assumption in an Oregon REST opinion letter is that if the Opinion Giver has no "actual knowledge"[18] of any contrary fact, the Opinion Giver does not

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[13] *See* pp. 19-122 and 19-123, *infra.*

[14] Accord §4.1, 29 REAL PROP PROB & TR J at 510.

[15] Accord §4 Commentary, 29 REAL PROP PROB & TR J at 510–513.

[16] Accord §6, 29 REAL PROP PROB & TR J at 514.

[17] Accord §5, 29 REAL PROP PROB & TR J at 513.

[18] See revised definition of *actual knowledge* for an Oregon REST at 19-115, *infra*.

need to undertake any further investigation as to the accuracy of the assumption.

In reviewing the 1992 Oregon Report, the Committee determined that the suggested Assumptions required restatement in light of the Accord, the ABA/ACREL Report, and current opinion letter practice. The following is such a restatement with cross-references to the 1992 Oregon Report, the Accord, the ABA/ACREL Report, and current practice.

This opinion assumes:

(i) that Lender has 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;

This is the 1992 Oregon Report Assumption (i) modified to incorporate language similar to Accord §4(c) and (d).

(ii) the legal capacity of all natural persons to enter into and perform their respective obligations under the Loan Documents;

This is the 1992 Oregon Report Assumption (ii) modified to incorporate language similar to Accord §4(a).

(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;

This is the 1992 Oregon Report Assumption (ii) combined with 1992 Oregon Report Assumptions (v) and (vi).

(iv) that Borrower is duly organized and validly existing as a _____ under the laws of the State of _____, and is in good standing under such laws;

This is a new Assumption. This Assumption should be used only when acting as local counsel to an out-of-state Borrower. There is no similar Accord or ABA/ACREL Report assumption.

(v) the due execution and delivery of the Loan Documents;

This is the 1992 Oregon Report Assumption (vi). Some Opinion Recipients will require that the "due execution" portion of the Assumption be deleted. If so deleted, in order to give an Enforceability Opinion, either (1) the Opinion Giver must be physically present and witness borrower's execution of the Loan Documents or (2) the Loan Documents must be witnessed by a competent person such as an escrow officer based on appropriate instructions from the Opinion Giver.

The "due delivery" portion of this Assumption is appropriately used in a closing taking place in escrow, as opposed to a "table closing" when no escrow is used and the Loan Documents are exchanged between Borrower and Lender. In Oregon, even where Borrower and Lender are present at closing, an escrow is almost always used. As such, the Committee believes that in such circumstances a "due delivery" Assumption should be included because the Loan Documents are typically delivered, in whole or in part, to escrow and not to the Lender.

(vi) the vesting of fee title in Borrower at the time the Loan Documents are executed and recorded or filed;

This is the 1992 Oregon Report Assumption (x). This assumption is similar to Accord §4(b).

(vii) the accuracy and sufficiency of the description of the real and personal property to provide notice to third parties of the liens and security interests provided in the Loan Documents and to create an effective contractual obligation under the laws of the State of Oregon.

This is the 1992 Oregon Report Assumption (xi), modified to incorporate language suggested as an addition to the Accord assumptions in the ABA/ACREL Report ¶4.

(viii) that the trustee named in the Trust Deed is validly existing, and has full power and authority to act as trustee;

This is a new Assumption that should be included only if one of the Loan Documents is a trust deed.

(ix) the due recording of the Deed of Trust in the Official Records of _____ County, Oregon;

This is the 1992 Oregon Report Assumption (iii).

(x) the proper filing and indexing of a UCC-1 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-1A, the Security Agreement or the Deed of Trust, if it constitutes a fixture filing, in the Official Records of _____ County, Oregon, so as to give constructive notice of the security interests described therein;

This is the 1992 Oregon Report Assumption (x) modified to incorporate language suggested as an addition to Accord assumptions in the ABA/ACREL Report ¶4.

(xi) the funding of the Loan to Borrower;

This is the 1992 Oregon Report Assumption (viii). Accord §4(p) is similar in scope.

(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;

This is the 1992 Oregon Report Assumption (ix). Accord §4(h) and (i) are similar in scope.

(xiii) that Lender has no notice of any defense against the enforcement of the Loan Documents;

This is a new Assumption incorporating a part of Accord §4(i).

(xiv) that there has not been any mutual mistake of fact or misunderstanding, fraud, duress, or undue influence;

This is a new Assumption that is the same as Accord §4(g).

(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; and

This is a new Assumption. The 1992 Oregon Report Disclaimer 1 (now "Limitations 1")[19] is consistent with this Assumption.

(xvi) 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.

This is a new Assumption that is the same as Accord §4(j).

C. The Opinions

1. Enforceability

Since the publication of the 1992 Oregon Report, portions of enforceability opinions have been given commonly used labels. Phrases such as

> an Oregon court may not strictly 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[20]

have become known as a "Generic Qualification" or a "Generic Exception." Phrases such as

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[19] *See* p. 19-116, *infra.*

[20] *See* suggested form Opinion Letter at 19-124, *infra.*

> however, subject to the limitations expressed elsewhere in this opinion or incorporated by reference in this opinion, enforcement or acceleration against Borrower would be available if an event of default occured as a result of a material breach by Borrower of a material provision contained in the Loan Documents[21]

have become known as the "Assurance." An extensive discussion of various forms of Generic Qualifications with Assurance is set forth in the ABA/ACREL Report "Exposition" ¶11.[22]

(a) Limitations on Enforceability

The 1992 Oregon Report discussed the Committee's reasoning in adopting the "material breach of a material provision" form of Generic Qualification,[23] which limitation on the Enforceability Opinion was based on *Legal Opinions in California Real Estate Transactions* (the "1987 California Report").[24] The Committee has reviewed various forms of Assurance discussed in the ABA/ACREL Report Exposition ¶11,[25] and has determined that the Assurance suggested in the 1992 Oregon Report continues to be appropriate for an Oregon REST even if an Accord Type Opinion is being given in an Oregon REST.

(b) Exceptions to Enforceability

The 1992 Oregon Report detailed the reasoning of the Committee in suggesting the use of a "laundry list" of exceptions to the Enforceability Opinion.[26] The use of laundry lists continues to be criticized in opinion letter literature;[27] however, the Committee reaffirms its conclusion that such a list is the best method for an Opinion Recipient to be apprised of the issues described in the list. The Committee reviewed the 1992 Oregon Report list of exceptions and made the modifications and additions set forth below. The Committee believes the revised introduction to the laundry list set forth below provides additional emphasis and attention to the Opinion Recipient of

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[21] *See* suggested form Opinion Letter at 19-124, *infra.*

[22] 29 REAL PROP PROB & TR J at 585.

[23] 1992 Oregon Report at 19-149 and 19-150, *infra.*

[24] 42 BUS LAW 1139 (1987).

[25] 29 REAL PROP PROB & TR J at 585.

[26] 1992 Oregon Report at 19-150 to 19-153, *supra.*

[27] *See* ABA/ACREL Report, 29 REAL PROP PROB & TR J at 585.

the exceptions being enumerated. This new introduction also furthers the Committee's conclusion.

The Loan Documents are the legal, valid, and binding obligations of Borrower and are enforceable against Borrower in accordance with their terms except that the foregoing may be limited by: (a) bankruptcy, insolvency, reorganization, fraudulent transfer, moratorium, or similar laws, or (b) by equitable principles (regardless of whether such enforcement is considered in a proceeding in equity or at law) relating to or limiting the rights of creditors generally.

In giving this opinion number ___, we advise you that: (i) the use of the term "enforceable" shall not imply any opinion as to the availability of equitable remedies other than the foreclosure of the liens created by the Loan Documents in accordance with Oregon law;[28] *and (ii) an Oregon court may not strictly 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; however, subject to limitations expressed elsewhere in this opinion or incorporated by reference into this opinion,*[29] *enforcement or acceleration against Borrower would be available if an event of default occurs as a result of a material breach by borrower of a material provision contained in the Loan Documents;*

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 this opinion, we wish to specifically emphasize and advise you that we express no opinion as to the enforceability of:

(a) self-help, rights of setoff, or the right to possession of the real or personal property or collection of rental or other income without appointment of a receiver, or the rights, procedural requirements for, or powers of a receiver;

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[28] For editorial clarity, this provision was moved from the initial paragraph of this opinion to immediately preceding the General Qualification to the paragraph containing the Generic Qualification and Assurance.

[29] This phrase should be included in the Assurance where the Oregon Reports are incorporated by reference, such as in ¶2 of the Disclaimer (now "Limitations") section of the suggested form of Opinion Letter or when an Accord Type Opinion is given. See also the discussion of incorporation of such reports at 19-116, *infra.*

(b) provisions purporting to establish evidentiary standards;

(c) provisions relating to the waiver of rights, remedies, and defenses;

(d) to the extent such amounts exceed actual damages, provisions that permit Lender to collect a late charge, increased interest rate after default or maturity, or a prepayment premium;[30]

(e) any reservation of the right to pursue inconsistent or cumulative remedies;

(f) any "due on sale" clause to the extent 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 "one-action" or "anti-deficiency" provisions contained in applicable trust deed statutes, including any statutory restrictions on deficiency judgments or the maintaining of further actions after foreclosure, including, without limitation, ORS 86.770;[31]

(i) provisions for payment or 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;

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[30] The 1992 Oregon Report Commentary to this limitation on the Enforceability Opinion appearing on page 19-154, *supra*, should be deleted and the following inserted in lieu thereof:

Prepayment charges may be viewed either as liquidated damages under a UCC-type analysis, *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), depending on the language of the provision. If viewed as a liquidated damages provision, some courts have stricken prepayment charges that were determined not to be a reasonable estimate of the anticipated damages, *e.g., In re Skyler Ridge,* 80 BR 500 (Bankr CD Cal 1987). The same liquidated damages analysis could be applied to late charges and default interest rates.

[31] Editorial changes have been made to this exception to the Enforceability Opinion, which changes are without substantive effect.

(j) provisions pertaining to jurisdiction, venue, or choice of law;

(k) provisions purporting to appoint Lender or the trustee as attorney-in-fact for Borrower;

(l) limitations on the liability of Lender or the trustee, or for their indemnification for their own negligence or misconduct;

(m) provisions that purport to establish or maintain priority of the lien;

(n) provisions for charging interest on interest;

(o) provisions purporting to impose continued liability following foreclosure, such as environmental or building code indemnity[32] provisions;

(p) provisions in conflict with statutory provisions which permit Borrower to reinstate a trust deed during a nonjudicial proceeding;[33] and

(q) provisions purporting to allow Lender to determine the method or order of sale of property in a foreclosure action.[34]

2. Current Actual Knowledge

The 1992 Oregon Report discussed the opinions given based on the knowledge of the Opinion Giver.[35] The Committee wishes to emphasize that "knowledge opinions" and the suggested language set forth below are not found in opinion letters given in most RESTs. Knowledge opinions are usually requested in more complex RESTs and relate to opinions on specific factual matters,[36] such as pending litigation. When giving a knowledge opinion, the Opinion Giver is warranted in limiting

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[32] The addition of language dealing with building codes should be used when the Loan Documents contain such an indemnity which purports to survive foreclosure.

[33] There is no law in Oregon dealing with waivers of statutory rights and procedures in trust deed foreclosures.

[34] There is also no law in Oregon dealing with an attempt to modify the statutory method or order of sale on foreclosure as set forth in, e.g., ORS 86.755.

[35] 1992 Oregon Report at 19-161 and 19-162, *supra.*

[36] For a general discussion on factual opinions in an Oregon REST, see 1992 Oregon Report at 19-141 and 19-142, *supra.*

the scope of the opinion.[37] The Committee has reviewed the definition of "knowledge" set forth in the 1992 Oregon Report and has replaced the suggested language with that set forth below. This newly suggested language is based in part on Accord §6-A[38] and incorporates the concept that the knowledge is only that of the lawyer or lawyers who have direct responsibility for the client.

The following replaces the suggested language concerning knowledge opinions in the 1992 Oregon Report:

Whenever the phrase "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.

D. Limitations

The suggested form of Opinion Letter set forth in the 1992 Oregon Report suggests a section titled "Disclaimer." While not a substantive change, the Committee suggests that this section of an Opinion Letter be titled "Limitations."

Paragraph 2 of the Limitations section of the sample Opinion Letter recites that the Opinion Letter should be interpreted in accordance with the 1992 Report. While some out-of-state Lenders object to the inclusion of this limitation, the Committee recommends the inclusion of this provision as modified below. Since there are no reported Oregon cases on liability of an Opinion Giver, it is probable that the standard of care of the Opinion Giver will be measured and the language of the opinion interpreted based on the 1992 Oregon Report and this 1996 Oregon Report whether or not this paragraph is included in the Opinion

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[37] The "knowledge" limitation is not appropriate for the opinions set forth in the 1996 suggested form Opinion Letter.

[38] 29 REAL PROP PROB & TR J at 514.

Letter. It remains a decision for the Opinion Giver, when faced with a request from the Opinion Recipient to delete this paragraph, to determine, based on the specific REST, whether or not to agree to such a deletion.

2. This opinion is to be interpreted in accordance with the Oregon Lawyers' Opinions in Oregon Real Estate Transactions and the 1996 Supplement to Lawyers' Opinions in Oregon Real Estate Secured Transactions prepared by the Real Estate and Land Use Section of the Oregon State Bar, Committee on Opinion Letters.

As an additional editorial change, the section of the 1992 suggested form Opinion Letter titled "Miscellaneous" has been incorporated and is now a part of the Limitations section of the Opinion Letter.

E. Ethical Considerations

The 1992 Oregon Report raises the ethical question of whether or not the attorney-client privilege between the Opinion Giver and the Borrower is waived in part or entirely in an Opinion Letter.[39] ORS 9.460(3) provides that an attorney shall "[m]aintain the confidences and secrets of the attorney's clients consistent with the rules of professional conduct established pursuant to ORS 9.490." The applicable disciplinary rule promulgated pursuant to ORS 9.490 is DR 4-101(B), which provides: "Except when permitted under DR 4-101(C), a lawyer shall not knowingly: (1) Reveal a confidence or secret of the lawyer's client." DR 4-101(C) provides that "A lawyer may reveal: (1) Confidences or secrets with the consent of the client or clients affected, but only after full disclosure to the client or clients."[40]

At the time of publication of this 1996 Oregon Report, the process has commenced to adopt an Oregon disciplinary rule, based on the ABA Model Rule 2.3, that would eliminate a portion of the ethical concern of an Opinion Giver in providing an opinion. ABA Model Rule 2.3 provides:

> (a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

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[39] 1992 Oregon Report at 19-169 and 19-170, *supra.*

[40] For a detailed discussion of the attorney-client privilege, as well as the differences between a confidence and a secret, see THE ETHICAL OREGON LAWYER ch 7 (Oregon CLE 1991 & Supp 1998).

> (1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and
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> (2) the client consents after Full Disclosure.[41]
>
> (b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by DR 4-101.[42]

While the adoption of such a disciplinary rule would answer the question of the ethical propriety of giving an opinion, such a rule does not fully address the extent of the waiver of the attorney-client privilege. The adoption of such a disciplinary rule will generally allow the giving of an opinion to a third party; however, this rule requires, as does DR 4-101(C)(1), full disclosure and the consent of the client.

Because an Opinion is given at the request of the Borrower, the ethical question remains whether the Borrower has consented to a waiver of the attorney-client privilege. The request itself to give the opinion could be argued to be a waiver of the attorney-client privilege; however, a careful Opinion Giver should not take comfort in this position. The due diligence process of the Opinion Giver in conjunction with the Borrower should generally alert and disclose to the client the extent to which confidential information will be disclosed.

It should be noted that there is no requirement in DR 4-101(B)(1), DR 4-101(C)(1), or ABA Model Rule 2.3 that the consent, full disclosure, or consultation be in writing. While it may not be the current general practice in a REST, the Committee recommends that Opinion Givers obtain a written informed consent to a waiver of the attorney-client privilege after making full disclosure, confirmed in writing, of both the nature of the waiver of the attorney-client privilege and the information to be disclosed.

Even with the adoption of an Oregon disciplinary rule similar to ABA Model Rule 2.3 and the consent of a client following full disclosure, there remains the unanswered question of the extent the attorney-client privilege is waived by the giving of an opinion. To limit the effect of a waiver of the attorney-client privilege in the manner expected by the Borrower and Opinion Giver, the Committee

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[41] The proposed Oregon rule changes the word *consultation* in ABA Model Rule 2.3 to *Full Disclosure* to conform to Oregon DR 10-101(B).

[42] ABA Model Rule contains a cross-reference to ABA Model Rule 1.6, which is similar in scope to Oregon DR 4-101.

recommends the following be included in the Limitations section of an Opinion Letter:

Nothing contained in this opinion shall be deemed to constitute a waiver of the attorney-client privilege between this firm and Borrower except as to the matters specifically set forth herein.[43]

III. Conclusion

Since the 1992 Oregon Report, the Accord, the ABA/ACREL Report, and various state bar reports have been published. All of this work has been an effort to create certainty and uniformity in the issuance and acceptance of opinion letters. Despite these efforts, this goal has not yet been fully obtained; however, the time, effort, and expense in the issuance and receipt of opinion letters has decreased. This 1996 Oregon Report is the Committee's effort to further this goal and bring further certainty and uniformity to opinion letter practice as it relates to an Oregon REST.

At the direction of the Executive Committee of the Oregon Real Estate and Land Use Section of the Oregon State Bar, the Committee will continue to monitor efforts to obtain these goals and, when necessary, publish additional supplements to the 1992 Oregon Report and this 1996 Oregon Report.[44]

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[43] The waiver of the attorney-client privilege is a matter of substantive evidence law. The inclusion of the above limitation may be of assistance if the issue becomes contested.

[44] This 1996 Oregon Report has been approved by the Executive Committee of the Real Estate and Land Use Section of the Oregon State Bar.

FORM OF OPINION LETTER

The following form of opinion letter of borrower's lawyer is presented only as an illustration and is marked to show changes from the form attached to the 1992 Oregon Report.

[Date]

[Addressee and address]

Re: _____

Dear _____:

INTRODUCTION

We have acted as Oregon counsel to _____ ("Borrower") in connection with that certain Loan Agreement ("Loan Agreement") dated _____, ___, between _____ ("Lender") and Borrower. (See 1992 Oregon Report at 19-137.)

[Alternate clause: We are not Borrower's general counsel, we have not previously represented Borrower, and we have made no investigation of Borrower's legal affairs except as expressly set forth in this letter. (See 1992 Oregon Report at 19-137.)]

[Alternate clause: Although we represent Borrower from time to time in connection with specific transactions, we are not general counsel to Borrower, and we did not participate in the formation or organization of Borrower. This opinion is delivered to you pursuant to Section _____ of the Loan Agreement.]

DOCUMENTS REVIEWED

In rendering our opinion, we have examined originals [drafts], copies identified to our satisfaction as true copies of the originals [drafts], or copies certified to us as being execution copies [or drafts] of the following documents:

1. The Loan Agreement [where necessary];

2. Promissory Note ("Note") to be executed by Borrower as maker and payable to the order of Lender in the sum of $_____, [draft] dated _____;

3. Deed of Trust ("Trust Deed") to be executed by Borrower as grantor, in favor of Lender as beneficiary, securing the Note, [draft] dated _____;

4. Security Agreement ("Security Agreement") to be executed by Borrower as debtor and naming Lender as secured party, [draft] dated _____;

5. UCC-1 Financing Statement ("Financing Statement") to be executed by Borrower in favor of Lender, [draft];

6. UCC-1A Financing Statement ("Fixture Filing") to be executed by Borrower in favor of Lender, [draft];

7. Assignment of Rents and Leases ("Lease Assignment") to be executed by Borrower as assignor to Lender as assignee, [draft] dated _____;

8. Guaranty ("Guaranty") to be executed by _____ ("Guarantor") as Guarantor in favor of Lender, [draft] dated _____;

The documents listed in Items 1 through 8 above are collectively referred to herein as the "Loan Documents." (See 1992 Oregon Report at 19-138.)

In addition to the Loan Documents, we have also been furnished with and have examined: (i) certificates of officers and representatives of Borrower; (ii) certificates of public officials; and (iii) other documents and instruments described in these certificates. (See 1992 Oregon Report at 19-138 to 19-139.)

The certificates of Borrower and public officials upon which we have relied are described as follows: [List specifically the certificates relied upon.]

1. A Certificate of Borrower's President, dated _____, ___;

2. A Certificate ~~of Existence~~ issued by the State of Oregon, Office of the Secretary of State, Corporation Division, with respect to Borrower, dated _____, ___. (See 1992 Oregon Report at 19-139.)

Copies of these certificates are enclosed. We disclaim any responsibility for any changes that may have occurred with respect to the status of Borrower from and after the respective dates of the certificates mentioned above. (See 1992 Oregon Report at 19-139.) We also assume that the certificates and the public records upon which they are based are accurate and complete. (See 1992 Oregon Report at 19-139.)

SCOPE OF INVESTIGATION

As to questions of fact material to this opinion, we have relied upon statements or certificates of Borrower and public officials. We have made no independent investigation of the warranties and representations made by Borrower 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 may be a party or by which Borrower or any property owned by Borrower may be bound, or (2) any order of any governmental or public body or authority to which Borrower may be subject. (See 1992 Oregon Report at 19-138 to 19-139.)

ASSUMPTIONS

This opinion assumes:

(i) that Lender has satisfied all necessary legal ~~and~~ requirements applicable to it and that Lender has all necessary corporate authority to enter into the Loan Documents and consummate the Loan ~~transaction~~; (See 1996 Oregon Report at 19-108.)

(ii) ~~the authenticity and completeness of all documents submitted to us as originals,~~ the legal ~~competence~~ capacity of all natural persons ~~who are signatories thereto, and the conformity to original documents of all documents submitted to us as copies~~ to enter into and perform their respective obligations under the Loan Documents; (See 1996 Oregon Report at 19-108.)

(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; (See 1996 Oregon Report at 19-108 to 19-109.)

(iv) that Borrower is duly organized and validly existing as a _____ under the laws of the State of _____, and is in good standing under such laws; [Alternative Assumption] (See 1996 Oregon Report at 19-108 to 19-109.)

(v) the due execution and delivery of the Loan Documents; (See 1996 Oregon Report at 19-109.)

(vi) the vesting of fee title in Borrower at the time the Loan Documents are executed and recorded or filed; (See 1996 Oregon Report at 19-109.)

(vii) the accuracy and sufficiency of the description of the real and personal property ~~to enable its identification by a subsequent purchaser, mortgagee, secured party, or other person~~ to provide notice to third parties of the liens and security interests provided in the Loan Documents and to create an effective contractual obligation under the laws of the State of Oregon; (See 1996 Oregon Report at 19-109.)

(viii) that the trustee named in the Trust Deed is validly existing, and has full power and authority to act as trustee; (See 1996 Oregon Report at 19-109.)

(ix) the due recording of the Deed of Trust in the Official Records of _____ County, Oregon; (See 1996 Oregon Report at 19-109.)

(x) the proper filing and indexing of a UCC-1 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-1A or the Security Agreement in the Official Records of _____ County, Oregon so as to give constructive notice of the security interests described therein; (See 1996 Oregon Report at 19-109.)

(xi) the funding of the Loan to Borrower; (See 1996 Oregon Report at 19-109.)

(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; (See 1996 Oregon Report at 19-110.)

(xiii) that Lender has no notice of any defense against the enforcement of the Loan Documents; (See 1996 Oregon Report at 19-110.)

(xiv) that there has not been any mutual mistake of fact or misunderstanding, fraud, duress, or undue influence; (See 1996 Oregon Report at 19-110.)

(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; and (See 1996 Oregon Report at 19-110.)

(xvi) 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. (See 1996 Oregon Report at 19-110.)

~~(v) the genuineness of all signatures on all documents submitted to us;~~

~~(vi) the genuineness of all documents submitted to us as true and complete copies of the originals;~~

OPINIONS

Subject to the qualifications stated herein, we are of the opinion that:

1. Borrower is a corporation [or other applicable entity] duly incorporated [or other appropriate formality] and validly existing under the laws of the state of Oregon. (See 1992 Oregon Report at 19-141 to 19-144.)

2. Borrower has all requisite corporate [~~partnership~~ or other applicable entity] authority to (i) own [, lease,] [operate] the property and (ii) undertake and perform the obligations of Borrower under the Loan Documents. (See 1992 Oregon Report at 19.141 to 19.144.)

3. 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 ~~(a)~~ the foregoing ~~terms~~ may be limited by: (a) bankruptcy, insolvency, reorganization, fraudulent transfer, moratorium, or similar laws, or (b) by equitable principles (regardless of whether such enforcement is considered in a proceeding in equity or at law) relating to or limiting the rights of creditors generally~~; and (b) the use of the term "enforceable" does not imply any opinion as to the availability of equitable remedies other than the foreclosure of the liens created by the Loan Documents in accordance with Oregon law~~. (See 1992 Oregon Report at 19-145 to 19-147, and 1996 Oregon Report at 19-110 to 19-111.)

In giving this opinion number 3, we advise you that: (i) the use of the term "enforceable" shall not imply any opinion as to the availability of equitable remedies other than the foreclosure of the liens created by the Loan Documents; and (ii) an Oregon court may not strictly 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 ~~then existing. We do believe,~~; however, ~~that~~ subject to limitations expressed elsewhere in this opinion or incorporated by reference into this opinion, enforcement or acceleration against

Borrower [or Guarantor] would be available if an event of default ~~occurred~~ occurs as a result of a material breach by Borrower [or Guarantor] of a material provision contained in the Loan Documents. (See 1992 Oregon Report at 19-148, and 1996 Oregon Report at 19-111 to 19-112.)

~~The~~ 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, ~~but~~ we wish to specifically emphasize ~~specifically~~ and advise you that we express no opinion as to the enforceability of:

(a) self-help, rights of setoff, or the right to possession of the real or personal property or collection of rental or other income without appointment of a receiver, or the rights, procedural requirements for, or powers of a receiver;

(b) provisions purporting to establish evidentiary standards;

(c) provisions relating to the waiver of rights, remedies, and defenses;

(d) to the extent such amounts exceed actual damages, provisions that permit Lender to collect a late charge, increased interest rate after default or maturity, or a prepayment premium; (See 1996 Oregon Report at 19-113.)

(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 ~~laws similar to~~ "one-action" ~~and~~ or "anti-deficiency" ~~rules under~~ provisions contained in applicable trust deed statutes, ~~and of~~ including any statutory restrictions on ~~obtaining a~~ deficiency judgments after foreclosure, including, without limitation, ORS 86.770; (See 1996 Oregon Report at 19-113.)

(i) provisions for payment or 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;

(j) provisions pertaining to jurisdiction, venue, or choice of law;

(k) provisions purporting to appoint Lender or the trustee as attorney-in-fact for Borrower;

(l) limitations on the liability of Lender or the trustee, or for their indemnification for their own negligence or misconduct;

(m) provisions that purport to establish or maintain priority of the lien;

(n) provisions for charging interest on interest; and

(o) provisions purporting to impose continued liability following foreclosure, such as environmental or building code indemnity provisions.; (See 1992 Oregon Report at 19-149, and 1996 Oregon Report at 19-114.)

(p) provisions in conflict with statutory provisions which permit Borrower to reinstate a trust deed during a nonjudicial proceeding; and (See 1996 Oregon Report at 19-114.)

(q) provisions purporting to allow Lender to determine the method or order of sale of property in a foreclosure action. (See 1996 Oregon Report at 19-114.)

4. [OPTIONAL PARAGRAPH] We have no current actual knowledge of any pending or threatened lawsuits or claims against Borrower or the property (except as set forth herein or in the Loan Documents).

~~[If an opinion is rendered based on current actual knowledge, the following language should be included.] Whenever our opinion herein is based on our current actual knowledge, it is intended to signify that during the course of our representation of Borrower, no information has come to our attention that could give us actual present knowledge of the existence or absence of the fact. Current actual knowledge does not include constructive or inquiry knowledge. Except to the extent otherwise set forth herein, we have not examined Borrower's or our internal files, we do not imply that we have conducted or are required to conduct legal research, and we have made no special inquiry of Borrower.~~

Whenever the phrase "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. (See 1996 Oregon Report at 19-114 to 19-115.)

~~DISCLAIMER~~ LIMITATIONS (See 1996 Oregon Report at 19-115 to 19-116.)

The opinions herein expressed 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 to be interpreted in accordance with ~~the Report of the Committee on~~ Lawyers' Opinions in Oregon Real Estate Loan Transactions and the 1996 Supplement to Lawyers' Opinions in Oregon Real Estate Secured Transactions prepared by ~~of~~ the Real Estate and Land Use Section of the Oregon State Bar Committee on Opinion Letters. (See 1996 Oregon Report at19-115 to 19-116.)

3. This opinion is provided to you as a legal opinion only, 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.

4. 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 of Borrower [or Guarantor];

(f) the ability of Borrower [or Guarantor] to meet [its] [their] obligations under the Loan Documents;

(g) 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) the adequacy or accuracy of descriptions of real or personal property;

(i) compliance with zoning, land use, building, health and safety, or environmental rules, regulations, laws, ordinances, or directives, or

(j) whether the Lender is doing business in the state of Oregon.

5. Nothing contained in this opinion shall be deemed to constitute a waiver of the attorney-client privilege between this firm and Borrower except as to the matters specifically set forth herein. (See 1996 Oregon Report at 19-116 to 19-118.)

~~MISCELLANEOUS~~ (See 1996 Oregon Report at 19-116.)

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, or relied upon by any person or entity other than you, your legal counsel, and your successors and assigns.

Very truly yours,

_____ CERTIFICATE

Re: $_____ (Loan from _____ ("Lender") to _____ ("Borrower"))

The undersigned _____ being the _____ [person from whom the Certificate is obtained, e.g., members 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 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 and accurate and complete copy of the _____ [organizational documents, e.g., Articles of Incorporation and Bylaws or Articles of Organization and Operating Agreement] of Borrower. The _____ [organizational document, e.g., Articles of Incorporation and Bylaws or Articles of Organization and Operating Agreement] is in full force and effect and has not been modified or amended. No action has been filed or threatened to dissolve Borrower. [No member has sought to withdraw from the limited liability company and the undersigned are all of the members of the limited liability company.]

2. Borrower has the legal capacity to own 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.

3. 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 paragraph 1 above, nor does the execution and delivery by Borrower of the Loan Documents conflict with the 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.

4. 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.

5. 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.

6. 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 the Certificate, before and after giving effect to the Closing of the Loan as though made on and as of the date of the Loan Closing.

7. 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 elapsed, 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.

8. 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.

9. Attached hereto is a copy of the _____ [e.g., Action by Directors] of Borrower authorizing the execution, delivery, and performance of the Loan Documents. 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.

10. By executing the 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 the Certificate and the opinion. The undersigned and Borrower have been advised by Counsel not to execute this Certificate and the potential waiver of the attorney-client privilege without Full Disclosure. Oregon DR 10-101(b) provides:

"Full disclosure" means an explanation sufficient to apprise the recipient of the potential adverse impact on the recipient, of the matter to which the recipient is asked to consent. Full disclosure shall also include a recommendation that recipient seek independent legal counsel to determine if such consent should be given. Full disclosure shall be contemporaneously confirmed in writing.

Borrower acknowledges that the execution of this Certificate is based on "Full Disclosure."

DATED: _____, ____.

_____

_____

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 Loan Documents 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, 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: _____, ____.

_____

_____

_____