Real Estate and Land Use Spring Forum 2016

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Real Estate & Land Use Section

Friday, April 29, 2016
8:45 a.m.–4:15 p.m.

6.5 General CLE credits
REAL ESTATE AND LAND USE SPRING FORUM 2016

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SCHEDULE

8:00    Registration

8:45    Insurance Coverage and Claims Related to Real Estate
        ♦ Environmental claims
        ♦ Recent case developments
        Christopher Ryczewicz, Miller Nash Graham & Dunn LLP, Portland

9:30    Severed Mineral Rights and Mining Claims: An Overview of Subsurface Property Rights and Transactions
        ♦ Creation and maintenance
        ♦ Sale and lease issues
        Eric Martin, Stoel Rives LLP, Portland

10:15   Break

10:30   HOA/Condominium Law Issues and Trends
        ♦ Role of the association’s governing documents
        ♦ CC&R amendments vs. board-adopted rules and regulations
        ♦ Lien and collections: special rights for associations
        ♦ Current trends in rental restrictions: short-term rentals and Airbnb
        Kathleen Profitt, Profitt Law PC, Clackamas

11:15   Negotiating Retail Leases from the Landlord and Tenant Perspective
        ♦ Premises/retail center
        ♦ Rent commencement
        ♦ Repairs and maintenance
        ♦ Assignments and subleases
        ♦ Defaults and remedies
        Randal Johnson, InSite Law LLC, Portland
        Bradley Miller, Brix Law LLP, Portland

12:00   Lunch

1:00    Effective Advocacy of Land Use Appeals: Perspectives from Both Sides of the Podium
        ♦ Tips and strategies for presenting an effective case before LUBA and the Oregon Court of Appeals
        The Honorable Timothy Sercombe, Oregon Court of Appeals, Salem
        Seth King, Perkins Coie LLP, Portland

1:45    A New Green Revolution: Marijuana’s Impacts on Oregon Land Use Planning
        ♦ How marijuana is being integrated as a farm crop into Oregon’s land use system
        ♦ The complexities surrounding marijuana legislation
        ♦ How local jurisdictions are regulating marijuana-related uses
        State Representative Kenneth Helm, Attorney at Law, Beaverton
        Corinne Celko, Emerge Law Group, Portland

2:30    Break
2:45  A Debate About Planning Tools Aimed at Affordable Housing
   ♦ Recent inclusionary zoning ruling from the California Supreme Court: *California Building Industry Association v. City of San Jose*
   ♦ Proposed Oregon bills to overturn the ban on inclusionary zoning
   ♦ Other tools that are available to ensure the provision of affordable housing
   ♦ Free market affordable housing vs. government funded affordable housing

   Jennifer Bragar, Garvey Schubert Barer, Portland
   Jon Chandler, Oregon Home Builders Association, Salem

3:30  Fair Housing Act and ADA—Issues in Transactional Residential Real Estate
   ♦ Comparison of the applications of the FHA and ADA to residential properties
   ♦ Due diligence issues in acquiring multifamily properties
   ♦ Leasing and reasonable accommodation—when is a dog not a pet?

   Andrew Hahs, Bittner & Hahs PC, Lake Oswego

4:15  Adjourn
Jennifer Bragar, Garvey Schubert Barer, Portland. Ms. Bragar focuses her practice on land use, environmental law, real estate transactions, and municipal law. She is president of Housing Land Advocates, a nonprofit organization that aims to ensure land use regulations are adopted that provide opportunity for the creation of equitable neighborhoods that include affordable housing.

Corinne Celko, Emerge Law Group, Portland. Ms. Celko practices land use and development law, obtaining permit and entitlement approvals for a wide variety for development projects, with an emphasis in the cannabis industry. She has experience advocating at local government hearings, moving through the local land use application process, and handling cases before the Oregon Land Use Board of Appeals. She has worked with various cities and counties throughout Oregon to adopt regulations specific to cannabis-related uses. Ms. Celko is the Private Sector Cochair for the International Council of Shopping Center Oregon Alliance Program.

Jon Chandler, Oregon Home Builders Association, Salem. Mr. Chandler is the CEO of the Oregon Home Builders Association, which represents 4,000 member firms involved in every aspect of the residential and light commercial development and construction industry. Mr. Chandler also is the lobbyist for the OHBA on such issues as land use planning, environmental and natural resource policy, transportation, and issues arising out of the Endangered Species Act. Prior to joining OHBA, Mr. Chandler was in private law practice. He is a nationally recognized speaker on growth management issues.

Andrew Hahs, Bittner & Hahs PC, Lake Oswego. Mr. Hahs focuses his practice on real estate issues, rental housing, and advising closely held businesses. He has experience representing buyers, sellers, lenders, and developers of real property. He represents a large share of the residential property management companies in the Portland metropolitan area, as well as numerous commercial landlords and tenants. He is past president of the Metro Multifamily Housing Association, which he helped establish and whose membership owns or manages more than 120,000 multifamily units. Mr. Hahs is a frequent speaker at seminars on landlord-tenant law and fair housing.

State Representative Kenneth Helm, Attorney at Law, Beaverton. Representative Helm represents House District 34, serving the City of Beaverton and the neighborhoods of West Haven, Cedar Hills, and Rock Creek. In the 2015 session, he served on the Rural Communities, Land Use, and Water, Energy, the Energy and Environment, and the Measure 91 Implementation (marijuana legalization) committees.

Randal Johnson, InSite Law LLC, Portland. Mr. Johnson’s real estate law experience includes acquisitions and sales, leasing, development, and financing of all real estate asset types. He has particular expertise representing national and regional retailers and shopping center landlords/developers in the acquisition, development, leasing, and management of retail properties. He also helps clients in acquiring and developing sustainable energy projects. He is well-versed in LEED, Green Globes, and other energy standards and assists clients in completing sustainable real estate projects and transactions. Mr. Johnson is a member of the International Conference of Shopping Centers and the Building Owners and Managers Association.

Seth King, Perkins Coie LLP, Portland. Mr. King practices land use and zoning law with an emphasis on obtaining permit and entitlement approvals for complex development projects. He has extensive experience advocating at local government hearings, preparing appellate briefs, and arguing cases before the Land Use Board of Appeals and Oregon appellate courts. He also negotiates development and tax-increment financing agreements with regulatory agencies. Mr. King is a member of the Oregon State Bar Real Estate & Land Use Section and has served on the National Association of Industrial and Office Properties board of directors.
Eric Martin, Stoel Rives LLP, Portland. Mr. Martin’s practice focuses on natural resource development with an emphasis on property issues and transactions in the oil and gas (upstream and midstream) and mining industries. He helps clients buy, lease, and sell natural resources; structure and negotiate joint ventures; obtain financing; permit projects on the local, state, and federal levels; and resolve associated issues. He has handled various transactions and agreements for major natural resource development projects, including various mines, natural gas storage facilities, natural gas pipelines, and oil and natural gas exploration and production projects.

Bradley Miller, Brix Law LLP, Portland. Mr. Miller’s primary areas of practice include real estate leasing, acquisitions, development, financing, and general business law. He has extensive experience representing clients in industrial, office, retail and multi-family purchases and sales transactions, development projects, leasing, and financing transactions. Mr. Miller is a member of the boards of the Commercial Association of Brokers and the National Association of Industrial and Office Properties. He has published numerous articles and frequently lectures at continuing education programs on leasing, purchase agreements, loan documentation, and other real estate topics. Mr. Miller is admitted to practice law in Oregon, California, and Washington.

Kathleen Profitt, Profitt Law PC, Clackamas. Ms. Profitt works exclusively in homeowner association and condominium law, particularly association general counsel, enforcement litigation, and collection services. She is an active member of the Oregon Chapter of Community Associations Institute board and the Oregon/Washington Community Association Managers. She is a frequent speaker on educational topics focused on condominium and homeowner association law. Ms. Profitt is admitted to practice in Oregon and Washington.

Christopher Rycewicz, Miller Nash Graham & Dunn LLP, Portland. Mr. Rycewicz’s practice emphasizes environmental and natural resources issues, pursuing insurance claims for policyholders, and complex civil litigation. He has represented businesses and individuals in federal and state trial and appellate courts and administrative tribunals throughout the country. Mr. Rycewicz is a frequent author and speaker to lawyers and trade groups on topics including environmental and natural resource issues, insurance recovery, and construction defect claims.

The Honorable Timothy Sercombe, Oregon Court of Appeals, Salem. Governor Ted Kulongoski appointed Judge Sercombe to the Oregon Court of Appeals in 2007. Prior to that, he was in private practice in Portland in the areas of municipal, land use, energy, utilities, appellate, and administrative law. Judge Sercombe writes and speaks frequently in the areas of appellate practice and municipal, land use, and constitutional law.
Chapter 1
Insurance Recovery

CHRISTOPHER RYCEWICZ
Miller Nash Graham & Dunn LLP
Portland, Oregon

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INTRODUCTION

This paper discusses key issues involved in litigating insurance claims for environmental losses. Representing policyholders and insurers in insurance coverage claims involving environmental contamination is a complex and specialized area of law. Since the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) was enacted in 1980, amended in 1986 by the Superfund Amendments and Reauthorization Act (SARA) and supplemented by analogous state laws (see, e.g., ORS 465.200–465.545), billions of dollars have been spent remediating environmental contamination. Thus, it is not surprising that policyholders turn to their insurance companies for coverage when subjected to claims arising from environmental contamination. It is equally unsurprising that the insurers vigorously resist when their insureds seek coverage.

Initially, and depending on the status of the underlying action, the policyholder involved in a coverage dispute will be interested in obtaining a defense and payment of defense costs incurred in the underlying action. Then, the policyholder will seek indemnity for payment of any liabilities that might be incurred as a result of judgments or settlements in the underlying action. Last, the policyholder will seek payment of the litigation expenses and fees incurred in the coverage action itself. Under Oregon law, under appropriate circumstances, a policyholder may recover attorney fees in a successful breach-of-contract claim against an insurer. See ORS 742.061.

Oregon Environmental Cleanup Assistance Act

A unique feature of Oregon law on insurance coverage for environmental claims is the Oregon Environmental Cleanup Assistance Act (OECAA), ORS 465.475–465.480, passed in 1999 and significantly amended in 2003, and 2013. The OECAA promotes the “fair and efficient resolution of environmental claims while encouraging voluntary compliance and regulatory cooperation.” ORS 465.478. The OECAA is generally policyholder-friendly and affects nearly all claims for environmental insurance coverage. In addition to legal requirements that must be followed, it also establishes presumptions that apply unless the contract of insurance provides otherwise. The most important aspects of the legislation are listed below. More detail will be provided in the relevant sections of this Chapter.

- The legislation applies very broadly to most claims for defense or indemnity under policies that provide coverage for bodily injury, property damage, or personal injuries to others. See ORS 465.475(1)-(2).
- “Suit” is defined broadly to clearly include administrative proceedings and actions taken under administrative oversight pursuant to written voluntary agreements, consent decrees, and consent orders. See ORS 465.480(1)(a). Unless defined otherwise in the policy, “suit” also includes any action or agreement by DEQ or EPA against or with an insured in which the agency in writing directs, request, or agrees that the insured take action with respect to contamination. See ORS 465.480(2)(b).
• Oregon law applies if the property is in Oregon unless the policy says otherwise. See ORS 465.480(2)(a).

• An insured with multiple policies and insurers may sue just one insurer, after providing notice of the claim to all insurers. The insurer must pay all defense and indemnity costs, up to policy limits, independently and unaffected by other insurance that may apply. The insurer may seek contribution from the other insurers. If the insured was uninsured for part of the time period of the claim, it will be considered an insurer for purposes of allocation between insurers. See ORS 465.480(3)-(4).

• There is a rebuttable presumption that the costs of preliminary assessments, remedial investigations, risk assessments or other necessary investigation are defense costs. There is a rebuttable presumption that the costs of removal actions and feasibility studies are indemnity costs. See ORS 465.480(5)-(6).

• Standards are set for the investigation and reconstruction of a “lost policy,” which is defined as a “any part or all of a general liability insurance policy that is alleged to be ruined, destroyed, misplaced or otherwise no longer possessed by the insured.” ORS 465.475(4).

• The cost of remedial action taken to prevent third-party property damage is recoverable even if the remedial action is taken as property of the insured.

• Anti-assignment language contained in many CGL policies only applies to pre-loss assignments.

• There is a rebuttable presumption that settlements between an insured and an insurer are good faith settlements, which cut off contribution rights against settling carriers by non-settling carriers.

• The statute sets out a list of unfair claim settlement practices and provides insureds with a private remedy for damages, cost and attorney fees for carrier violations.

• Where a carrier defends under a reservation of rights, or where an insured faces potential liability in excess of policy limits, the carrier must provide experienced independent counsel who must be paid the reasonable and customary rates for the type and complexity of the environmental claim in the community where the claim arose.

THE TERMS OF THE POLICY

A. Locating the Policy

The first step to any insurance coverage case involving environmental liabilities is to determine the extent of coverage. In some cases, contamination that began decades ago can trigger coverage under policies in effect for the entire time that contamination was present. Therefore, locating the policies is important to obtaining coverage. The actual policies, as well as evidence of lost policies, may exist in the insured’s or the insurer’s archives, or in a broker’s file. Consider searching the records of other parties who may have been named as...
an additional insured, including landlords, tenants, lenders, parties with whom the insurer contracted, or other security interest holders. Policies may also be found in government archives because companies with government contracts are sometimes required to submit proof of insurance to the agency purchasing its products or services. Policies can also sometimes be located in court records from earlier insurance disputes. Insurance archaeology firms can be hired to assist with policy searches.

B. Lost Policies

Due to record retention policies, many insureds and insurers no longer possess older policies. As noted above, the OECAA includes important provisions related to establishing the existence and terms of lost policies. Specifically, the OECAA establishes standards that insurers and insureds must follow and requires insurers to “investigate thoroughly and promptly” a notice of a lost policy. An insurer does not meet this standard if it fails to provide all facts known or discovered during the investigation concerning the issuance and terms of a policy, including copies of documents establishing the issuance and terms of a policy. Within 30 days of receipt of notice of a lost policy, an insurer must begin a search of its records to determine whether it issued the policy. If it determines it issued the policy, it must investigate the terms and conditions relevant to any environmental claim under the policy. The insurer and the insured must cooperate with each other in determining the terms of a lost policy.

If information is discovered tending to show the existence of a policy, the insurer must provide an accurate copy of the policy or a reconstruction. If a copy cannot be provided, the insurer must provide copies of all policy forms issued during that time period that may apply and state which is most likely to have been issued. See ORS 465.479(1)-(3). Following the standards for policy reconstruction does not create a presumption of coverage or constitute an admission that a policy was issued or an affirmation that if issued, it was necessarily in the form produced. See ORS 465.479(4)-(5). If the insured cannot produce evidence that tends to show the policy limits, it is presumed that the minimum limits of coverage, including any exclusions, were purchased by the insured. If the insured can produce evidence that tends to show the limits, the insurer has the burden to prove different limits. See ORS 465.479(6).

The insured has the burden of proving the terms and existence of coverage. Trans. Equip. Rentals v. Oregon Auto Ins., 257 Or 288, 478 P2d 620 (1970); Gibson v. Gibson, 216 Or 622, 340 P2d 190 (1959). An insured that has lost or destroyed the original policy may be able to introduce secondary evidence of coverage, such as certificates of insurance, canceled checks, or claim letters. If the actual policies cannot be located, an important question is the admissibility, and force and effect, of secondary evidence to prove the terms and existence of coverage. Under the “best evidence rule,” an original document need not be produced, and secondary evidence of the contents or writing is admissible if all originals have been lost or destroyed. OEC 1004; FRE 1004. The party offering secondary evidence must first make a proper showing that the originals are lost or destroyed through no fault of that party. Harmon v. Decker, 41 Or 587, 68 P 11 (1902). The proponent of secondary evidence must show due diligence in its attempt to find the lost instrument.
No Oregon appellate court has addressed the standard of proof required to establish the terms and existence of a lost insurance policy. The leading decision in Oregon is *Safeco Ins. Co. of America v. Great American Ins. Co.*, No. 87-664-JU (D Or Order, Findings, and Recommendations, Jan 16, 1990) (“Safeco”). In *Safeco*, the court held that Oregon applies the preponderance-of-the-evidence standard; that is, an insured must prove “more likely than not” the terms and existence of coverage.

The court in *Safeco*, *supra*, also held that the insured bears the burden of proving the existence of coverage for a particular risk, but the insurer bears the burden of proving any applicable exclusions. The court admitted specimen policies, linesheets (policy summaries prepared by the insurance agent), letters, and testimony to prove the terms and existence of the insurance policy at issue.

**COVERAGE UNDER COMPREHENSIVE GENERAL LIABILITY (CGL) POLICY**

**Background**

Coverage issues may arise under policies insuring specific risks, but most reported cases involve comprehensive general liability (CGL) policies. A typical CGL policy imposes two primary duties on an insurer: the duty to defend against suits seeking to impose potential liability on an insured; and the duty to indemnify an insured against such liability once it is established.

Before 1966, CGL policies provided coverage for “accidents.” The Oregon Supreme Court has ruled that an accident is an “incident or occurrence that happened by chance, without design and contrary to intention and expectation.” *St. Paul Fire v. McCormick & Baxter Creosoting*, 324 Or 184, 206, 923 P2d 1200 (1996). Policies issued after 1966 generally provide coverage for “occurrences,” which include accidents and damages caused by continuous or repeated exposure to conditions. For a thorough discussion of CGL policies, including discussion of the terms *accident* and *occurrence*, see 2 *INSURANCE* ch 24 (Oregon CLE 1996 & Supp 2003).

**Timely Notice**

Almost every insurance policy contains a provision requiring an insured to provide prompt notice of a loss. The safe rule of thumb is to notice early and notice often. It can be challenging to recover any defense costs incurred before notice is provided, and late notice that prejudices the insurer can leave the insured without coverage at all. The failure to provide prompt notice has been, and continues to be, the subject of litigation. For thorough discussions of notice and the effect of failure to provide timely notice, see 1 *INSURANCE* §§ 15.2–15.13 & 2 *INSURANCE* § 33.6 (Oregon CLE 1996 & Supp 2003).
Duty to Defend

Requirement of a Suit

Almost all CGL policies give the insurer the right and the duty to defend the insured against a “suit” seeking damages. Frequently, an insured becomes involved with various environmental regulatory agencies that do not institute a formal civil lawsuit against the insured. For example, the United States Environmental Protection Agency (EPA) or the Oregon Department of Environmental Quality (DEQ) may send an information request seeking information about the alleged contamination or a general notice letter (GNL) notifying the insured that it is a potentially responsible party (PRP) and seeking the insured’s voluntary compliance in cleaning up a site. Because no formal complaint or lawsuit has been filed, the question arises whether the insurer must “defend” its insured in these matters. The Ninth Circuit Court of Appeals affirmed a lower court’s finding that a GNL and an information request by EPA pursuant to section 104(e) CERCLA are "suits" under that definition in the OECAA and of which the insurers must defend. Anderson Bros., Inc. v. St. Paul Fire & Marine Ins. Co., Nos. 12-35346, —F.3d—, 2013 WL 4615055 (9th Cir Aug. 30, 2013); see also, Ash Grove Cement Co. v. Liberty Mut. Ins. Co., No. 09-239-KI, 2010 WL 3894119, at *4–6 (D Or Sept. 30, 2010) (holding that the 104(e) letter was “was equivalent to a “suit seeking damages” under Ash Grove’s liability policies, pursuant to the OECAA,” because it imposed on Ash Grove an obligation to investigate the contamination). Id. See also, Schnitzer Investment Corp. v. Certain Underwriters, 197 Or App 147, 157, 104 P3d 1162 (2005), aff’d, 341 Or 128 (2006) (correspondence from DEQ and consent order forwarded to insurer triggered duty to defend because “[w]hen read together, they described the factual basis on which DEQ sought to hold plaintiff liable for the cost of the environmental cleanup of its property”). The Schnitzer court did not consider the effect of the OECAA because Schnitzer demanded a defense in 1991, before the OECAA was enacted. See also Evraz Oregon Steel Mills, Inc. v. Continental Ins. Co., 2009 WL 789658, *6-7 (D Or 2009) (holding that allegations by NRD trustees, DEQ, and EPA that Evraz is a PRP are “lawsuits” triggering the duty to defend pursuant to the OECAA).

Triggering the Duty to Defend

Moving beyond the “suit” issue, an insurer’s duty to defend its insured against a lawsuit potentially arises when a complaint (or the administrative equivalent) is filed. The Ash Grove Cement court summarizes how Oregon courts analyze whether a duty to defend exists:

The interpretation of an insurance contract is a question of law for the court. Hoffman Const. Co. v. Fred S. James & Co., 313 Or. 464, 469, 836 P.2d 703 (1992). If a policy term has more than one plausible meaning, the court scrutinizes each meaning in light of the particular context in which the term is used in the policy and in the context of the policy as a whole. Hiebert v, Farmers Ins. Co. of Oregon, 172 Or.App. 13, 17, 18 P.3d 397 (2001). If, after scrutiny, both proposed interpretations seem reasonable, the court interprets the provision against the drafter. Id. at 17-18, 18 P.3d at 400.
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An insurer’s duty to defend its insured depends upon two documents: the complaint and the insurance policy. *Ledford v. Gutoski*, 319 Or. 397, 399, 877 P.2d 80 (1994); *Abrams v. General Star Indem. Co.*, 335 Or. 392, 396, 67 P.3d 931 (2003). An insurer has a duty to defend an action against its insured if the claim against the insured stated in the complaint could, without amendment, impose liability for conduct covered by the policy, *Ledford*, 319 Or. at 399-400. The insurer has a duty to defend if the complaint provides any basis for which the insurer provides coverage. *Id.* at 400 (emphasis in original); see also *Certain Underwriters at Lloyd’s London and Excess Ins. Co., Ltd. v. Massachusetts Bonding and Ins. Co.*, 235 Or. App, 99, 122, 230 P.3d 103, 117 (2010) (“ *Lloyd’s*”) (in considering the duty to defend, courts must determine whether there is a “possibility” that the allegations stated are covered under the policy; if a reasonable interpretation of the allegations would bring them within coverage, there is a duty to defend) (citing *Paxton Mitchell Co. v. Royal Indem. Co.*, 279 Or. 607, 611, 569 P.2d 581 (1977)).

*Ash Grove Cement Co.*, 2010 WL 3894119, at *3.

It should be noted, however, that courts have limited *Ledford’s* approach of relying on the complaint and the insurance policy to determining only whether the complaint could impose liability for conduct covered by the policy. For example, extrinsic evidence can be introduced to answer the preliminary question of whether a party is an insured within the meaning of the policy. *Fred Shearer & Sons, Inc. v. Gemini Ins. Co.*, 237 Or App 468, 476-478, 240 P3d 67, 72-74 (2010); see also *Evraz Oregon Steel Mills, Inc. v. Continental Ins. Co.*, 2009 WL 789658, *8-12 (D Or 2009) (staying insurer’s counterclaim, defenses, and third-party claims to the extent they raise indemnity issues putting the insured in a “conflictive” position in the underlying case, but noting a narrow exception to the Ledford approach when facts established in another proceeding show that the insurer has not duty do defend). The *Shearer* line of reasoning, while persuasive, can conflict with the general rule that the insured should not be put in the position of presenting evidence that can hurt it in the underlying case. This can occur when presenting facts to establish that a party is an insured means introducing facts into the record which could establish liability in the underlying case.

For example, forcing the party seeking insurance to go beyond the complaint and the policies could put the insured in a position where, in order to obtain a defense, it would need to submit facts that would result in the determination of liability in the underlying case.

For example, a named insured may no longer exist as a separate stand alone entity. It is not unusual for shareholders to sell all shares of a company's stock to another entity, which subsuses the operations of the predecessor. The stock purchase agreement may have provisions that address the successor of preexisting liabilities. Issues of fact may exist as to the disposition of such liabilities. If the succeeding entities had to prove actual liability in order to be entitled to a defense, arguments as to nonliability would be lost. Consequently, if the suit documents allege successor liability, a duty to defend exists. *Century Indemnity v. The Marine Group*. 

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Independent Counsel

The 2013 OECAA agency require a carrier to provide "independent counsel" if the defense is being provided under a reservation of rights or where the insured has potential liability in excess of the limits of liability of the applicable policy. ORS 465.983(1). "Independent Counsel" is not defined; however the statute provides that such counsel represents "only the insured and not the insurer." In addition "independent counsel" must be "experienced in handling this type of complexity of environmental claim at issue." ORS 465.983(2)(a)(A).

Those provisions were at issue in Schnitzer Steel v. Continental, USDC No. 10-cv-01174-MO, in which a jury determined that:

- Fees of defense counsel and consultants had to be paid within 90 days at which time interest began running; and

- It was reasonable for the insured, when facing a complex Portland Harbor claim, to insist on out of state counsel billing $600-$950 per hour, greatly in excess of the rates charged by the attorneys offered by the carrier.

Declaratory Judgments

When an insurer denies that it has a duty to defend or indemnify its insured, the insured must sue the insurer to establish coverage. Frequently, such an action will include claims both for breach of contract and for declaratory relief. Occasionally, an insurer will attempt to strike first and initiate a declaratory judgment action. In North Pacific Ins. Co. v. Wilson’s Distributing, 138 Or App 166, 90 P2d 827 (1995), however, the court held that the insurer could not avoid its defense obligation by filing a declaratory relief action to attempt to develop evidence disclaiming coverage because it would put the insured in a conflictive position. Essentially, the court concluded that the insured could not be forced to put into evidence in the coverage case facts that could prejudice the insured in the underlying proceeding.

Settlement in the Absence of a Defense

When an insurer denies its duty to defend, an insured must defend itself. Faced with this prospect, many insureds attempt to settle the underlying claim. When a settlement occurs, the insured’s liability is eliminated. Instead, it has paid money and achieved a negotiated resolution. If the insured believes the insurer wrongfully refused to defend or indemnify it, the insured may file a subsequent breach-of-contract action or declaratory relief action against the insurer, seeking the expenses incurred defending itself and the settlement money. See Northwest Pump v. American States Ins. Co., 144 Or App 222, 925 P2d 1241 (1996) (insurer that breaches duty to defend is not obligated to pay money paid by insured to
Duty to Indemnify

In Oregon, the duty to indemnify is independent of the duty to defend.

[T]he duty to defend is different from the duty to indemnify, and the breach of one does not, in and of itself, establish the breach of the other. See, e.g., Ledford v. Gutoski, 319 Or. 397, 403, 877 P.2d 80 (1994) (“[t]he duty to indemnify is independent of the duty to defend”). That only makes sense. The duty to defend is triggered by the bare allegations of a pleading. In contrast, the duty to indemnify is established by proof of actual facts demonstrating a right to coverage.


A court should stay its determination of the duty to indemnify until after the resolution of the underlying case when such a determination would force the insured into the “conflictive position of being required to abandon [its] denial of liability” to obtain coverage. North Pacific Ins. Co. v. Wilson’s Distributing, 138 Or App 166, 175, 908 P2d 827 (1995). However, when the facts on which the duty to indemnify rests do “not relate to the controverted issues in the underlying litigation,” the court may decide the duty-to-indemnify issue without awaiting the resolution of the underlying case. Am. States Ins. Co. v. Dastar Corp., 318 F.3d 881, 891 (9th Cir. 2003) (allowing insurer to litigate indemnity issue before court resolved insured’s liability in underlying case).


As noted in the introduction to the OECAA, the Oregon Legislature created a rebuttable presumption that the costs of preliminary assessments, remedial investigations, risk assessments or other necessary investigation are defense costs. There is a rebuttable presumption that the costs of removal actions and feasibility studies are indemnity costs. See ORS 465.480(5)-(6). Agency oversight costs can be considered either defense or indemnity costs depending on whether the work being overseen is defense or indemnity work. Siltronic Corp. v. Wausau. The duty to defend terminated upon payment of judgments or settlements and an agency order that includes language of finality is the equivalent of a judgment or settlement and can result in exhaustion of limits and extinguishment of the duty to defend prior to entry of a final court decree. Siltronic Corp. v. Wausau.

Triggers of Coverage

Coverage exists under standard CGL policy forms only for bodily injury or property damage occurring during the policy period. Because of the difficulty in determining exactly
when bodily injury or property damage occurs in cases involving exposure to toxic substances or discharges of environmental pollutants, courts across the country have adopted at least six differing views on when an insurer’s indemnity or defense obligation is triggered.

The Oregon Supreme Court resolved the trigger issue in favor of policyholders. In *St. Paul Fire v. McCormick & Baxter Creosoting*, 324 Or 184, 923 P2d 1200 (1996), the court rejected the insurers’ attempt to apply a manifestation trigger (triggering only policies at the time damage was first discovered) and adopted a continuous-trigger theory (also commonly known as the “injury-in-fact” trigger). Under the continuous trigger, the court reasoned that the “policies do not make coverage contingent on the time when property damage was discovered or on the time when the insured’s liability became fixed.” *McCormick & Baxter, supra*, 324 Or at 202. As long as third-party property is injured during an insurance policy period, there has been an “occurrence” and coverage under the policy is triggered, even if the insured only becomes legally obligated to pay for damages after the policy period. Id. See also *MW Builders, Inc. v. Safeco Ins. Co.*, 2009 WL 995050, *8-13* (citing *McCormick & Baxter* and holding that continuous trigger means each policy year counts as a separate occurrence, thereby increasing the limits available to the insured).

It follows from *McCormick & Baxter* that insurance coverage is triggered even when the initial release of a pollutant precedes the insurance policy, as long as the pollutant is actively causing harm during the policy period. *Am. States Ins. Co. v. Bercot*, 2004 US Dist LEXIS 13057 at **22–28**, 2004 WL 1490321 (D Or July 1, 2004) (although asbestos was initially released at site before insurance policy was in place, because underlying claim alleged that asbestos continued to be released into air and deposited on third-party property during insurance period, this was an “occurrence”).

**Property Damage**

A typical CGL policy form requires the insurer to pay all sums that the insured becomes legally obligated to pay as damages because of property damage. Policies typically define *property damage* as (1) physical injury to or destruction of tangible property that occurs during the policy period, including the loss of use of the property at any time resulting from the injury, or (2) loss of use of tangible property that has not been physically injured or destroyed, provided the loss of use is caused by an occurrence during the policy period.

Insurers have argued that cleanup costs do not constitute “damages” under CGL policy because they are in the nature of equitable relief rather than legal damages. The courts applying Oregon law have ruled that environmental cleanup costs indeed constitute “damages.” See *St. Paul Fire v. McCormick & Baxter Creosoting*, 126 Or App 689, 702, 870 P2d 260, modified, 128 Or App 234 (1994), aff’d in part, 324 Or 184 (1996). See also *Port of Portland v. Water Quality Ins. Syndicate*, 796 F2d 1188, 1193–1195 (9th Cir 1986) (oil pollution into Willamette River constituted physical injury to tangible property).
A related question is whether preventive measures constitute damages because of property damage. Oregon law on this point is not entirely resolved. In Baumann v. North Pacific Ins. Co., 152 Or App 181, 952 P2d 1052 (1998), the court rejected the insureds’ argument that the costs incurred to prevent the potential for third-party property damage should be covered. In that case, however, the soil contamination extended to 14 feet below the surface but groundwater was not encountered until 45.5 feet below the surface, thus there was no evidence of damage to third-party property.

Similarly, in 2006 the court held that an insured’s expenditures to clean up groundwater was not “property damage” Schnitzer Inv. Corp. v. Certain Underwriters at Lloyd’s of London, 341 Or. 128, 136, 137 P3d 1282 (2006). The insured’s CGL policy required the insurer to indemnify the insured if DEQ legally obligated the insured to remedy “property damage,” and “property damage” was defined as an injury that occurs during the policy period. Schnitzer Inv. Corp., supra, 341 Or at 136. The groundwater samples at issue in that case contained only low levels of contaminants that did not exceed maximum contaminant levels, and DEQ did not legally obligate the insured to remedy “property damage;” thus, the insurer did not have a duty to indemnify. Schnitzer Inv. Corp., supra, 341 Or at 136. In Oregon, groundwater is the property of the state. See also Precision Castparts Corp. v. Hartford Acc. and Indem. Co., Not Reported in F.Supp.2d, 2007 WL 2590438, D.Or., 2007 (citing Schnitzer and holding that insurer not required to indemnify for preventative measures because property damage must occur during policy period, not sometime in the future).

2013 amendments to the OECAA aptly recognize that, in many instances, remediation activities take place on property owned or occupied by an insured for the express purpose of preventing migration of contaminants to third-party property, like groundwater. Under recent OECAA amendments, the cost of such remediation activities is covered by CGL policies.

One rationale for this holding is that, once contamination has occurred and preventive measures are necessary, those preventive measures are incurred “because of” property damage. For example, in Oregon, preventive fire-suppression costs are reimbursable. See American Econ. Ins. v. Commons, 26 Or App 153, 156, 552 P2d 612 (1976).

Defense v. Indemnity Costs

The distinction between defense costs and indemnity costs is important because the duty to defend is broader than the duty to indemnify, and the duty to defend is not subject to the limits of coverage provided in most CGL policies. The OECAA creates a rebuttable presumption that the costs of preliminary assessments, remedial investigations, risk assessments or other necessary investigation are defense costs. , and the costs of removal actions and feasibility studies are indemnity costs. See ORS 465.480(5)-(6).

In Ash Grove Cement Co. v. Liberty Mutual Ins. Co., No. 3:09–cv–00239–KI, 2013 WL 4012708 (D Or Aug. 5, 2013), the court found the following as reasonable and necessary defense costs the following: fees and costs incurred in responding to information request by
EPA under section 104(e) of CERCLA; fees and costs incurred in participating in an alternative dispute resolution (ADR) process, including responding to information requests conducted under that process; and fees and costs responding to natural resources damages claims.

In *Siltronic v. Wausau*. Judge Stewart ruled that a primary carrier was not entitled to prematurely exhaust its indemnity limits in order to relieve itself of an ongoing obligation to defend. However, the court held that a policy's indemnity limits could be exhausted under an agency order containing language of finality even in the defense of a final consent decree. In addition, the court held that the characterization of agency costs depended upon the characterization of the work being supervised. If the work was defense, so were the agency oversight costs.

"Caused by an Occurrence"

Most CGL policies issued since 1966 define the word *occurrence* as “an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.” These policies are known in Oregon as “express fortuity” policies. The fact that the insured expected or intended the act that led to the injury or damage complained of does not necessarily preclude coverage. The result must have been either expected or intended for the insurer to deny coverage for lack of an occurrence. That is, the insurer can deny coverage by proving that the purpose of the insured’s act was to cause an injury. *See Allstate Ins. Co. v. Stone*, 319 Or 275, 876 P2d 313 (1994); *Nielsen v. St. Paul Companies*, 283 Or 277, 583 P2d 545 (1978); *Falkenstein’s Meat Co. v. Maryland Casualty Co.*, 91 Or App 276, 754 P2d 621 (1988).

The word *expected* is virtually meaningless in Oregon except that some acts are considered likely enough to cause harm that intent is inferred. *See Cunningham & Walsh, Inc. v. Atlantic Mutual Ins.*, 88 Or App 251, 255, 744 P2d 1317 (1987) (deceit); *Falkenstein’s Meat Co.*, *supra*, 91 Or App at 280 (retaliation against employee for reporting unsafe conditions); *Massey v. Knowles*, 2006 WL 2552797 at *6 (D Or Sept. 1, 2006) (deceit).

The purpose to cause harm must be assessed subjectively from the insured’s viewpoint. *See Aetna Casualty & Surety Co. v. Brathwaite*, 90 Or App 109, 118, 751 P2d 237 (1988) (applying Washington law but noting that under both Oregon and Washington law, the focus is on actor’s subjective intent); *Albertson’s Inc. v. Great Southwest Fire Ins. Co.*, 83 Or App 527, 732 P2d 916 (1987) (*occurrence* is to be assessed from standpoint of insured rather than from standpoint of one for whom insured may be vicariously liable); *Farris v. U.S. Fidelity & Guaranty Co.*, 273 Or 628, 542 P2d 1031 (1975) (coverage exists for servant’s intentional torts unless committed at master’s direction).

Some CGL policies, particularly those issued before 1966, had more expansive grants of coverage that did not include language limiting coverage to accidents or to when damage was neither expected nor intended. Despite the more expansive grant of coverage, Oregon
courts apply the “implied fortuity doctrine” which limits coverage under those policies to fortuitous losses. These policies are known in Oregon as “implied fortuity” policies. See ZRZ Realty Co. v. Beneficial Fire and Cas. Ins. Co., 349 Or 117, 241 P3d 710 (2010); ZRZ 1 at 474-75; A-1 Sandblasting & Steamcleaning Co., Inc. v. Baiden, 293 Or. 17, 643 P.2d 1260 (1982).

In ZRZ Realty Co. v. Beneficial Fire and Cas. Ins. Co., 349 Or 117, 241 P3d 710, the court addressed the question of which party bears the burden of proving that damage is neither expected nor intended under liability policies. The court held that the burden falls on the insured under express fortuity policies, id. at 132, and on the insurer under implied fortuity policies. Id. at 138.

Some insurance policies contain per-occurrence limits or deductibles. The larger the number of occurrences, the greater the insurer’s potential exposure. For discussion, see 2 INSURANCE §33.13. See also MW Builders, Inc. v. Safeco Ins. Co., 2009 WL 995050, *8-13 (holding that Oregon’s continuous trigger approach means that each policy year counts as a separate occurrence, thereby increasing the limits available to the insured).

Allocation

When more than one insurance policy is triggered, the relative coverage responsibilities between those policies must be allocated.

Some policyholders contend that each triggered policy is jointly and severally liable. The OECAA suggests that each insurer is independently liable for the entire costs:

"An insurer with a duty to pay defense or indemnity costs, or both, to an insured for an environmental claim under a general liability insurance policy that provides that the insurer has a duty to pay all sums arising out of a risk covered by the policy, must pay all defense or indemnity costs, or both, proximately arising out of the risk pursuant to the applicable terms of its policy, including its limit of liability, independent and unaffected by other insurance that may provide coverage for the same claim." ORS 465.480(3)(a) (emphasis added).

Additionally, the OECAA allows the paying insurer to pursue a contribution action against the non-paying insurers and establishes factors for courts are to consider in allocating liabilities among multiple insurers at ORS 465.480(4):

"(4) An insurer that has paid an environmental claim may seek contribution from any other insurer that is liable or potentially liable. If a court determines that the apportionment of recoverable costs between insurers is appropriate, the court shall allocate the covered damages between the insurers before the court, based on the following factors:
(a) The total period of time that each solvent insurer issued a general liability insurance policy to the insured applicable to the environmental claim;

(b) The policy limits, including any exclusions to coverage, of each of the general liability insurance policies that provide coverage or payment for the environmental claim for which the insured is liable or potentially liable;

(c) The policy that provides the most appropriate type of coverage for the type of environmental claim; and

(d) If the insured is an uninsured for any part of the time period included in the environmental claim, the insured shall be considered an insurer for purposes of allocation."

The US District Court for the District of Oregon held that respective policy limits must be considered a factor when allocating defense costs to each insurer. Northwest Pipe Co v. RLI Ins. Co., No. 3:09-CV-01126-PK, 2012 US Dist LEXIS 82573,14 (D Or June 14, 2012); see also Century Indemnity v. The Marine Group

Exclusions & Conditions


The Qualified Pollution Exclusion

Most CGL policies issued before about 1986 have some form of “qualified” pollution exclusion:

This insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Policyholders generally contend that the exclusion is ambiguous and that the phrase “sudden and accidental” should be equated with “unexpected and unintended.” After an exhaustive analysis, the Oregon Supreme Court sided with policyholders, noting that the focus of the analysis is on the “discharge, dispersal, release, or escape” and not the resulting property
damage. See St. Paul Fire & Marine Ins. Co., Inc. v. McCormick & Baxter Creosoting Co., 324 Or. 184, 212-16 (1996). Because McCormick & Baxter “presented evidence that the contamination that resulted from those events – the discharge, dispersal, release or escape of the contaminants – was unexpected and unintended,” the trial court erred when it granted summary judgment to the insurers. Id. at 216.

In contrast, where an insured intended to dispose of waste by washing it down the sewer, and the waste stayed in the sewer, discharge of contaminants into the sewer was “expected and intended and thus not sudden or accidental.” Precision Castparts Corp. v. Hartford Accident and Indem. Co., 2008 WL 2446124 (D Or June 12, 2008). The court distinguished the case from McCormick & Baxter:

The situation in McCormick & Baxter is very different from the one before me because the waste disposal described in the case differs from PCC's waste disposal methods. M & B intentionally put the waste water into the surface impoundments and expected it to stay there until it evaporated. M & B did not expect or intend for the waste water to leach into the subsurface soil and groundwater.

In contrast, PCC fully intended to put get rid of the thorium by washing it down the city sewer. PCC obtained permits to do so. Although PCC expected the thorium to disperse throughout the sewer system, and not to attach to the biofilms, the biofilms are within the sewer system. Thus, the thorium did not leave the sewer. The waste water in McCormick & Baxter left the surface impoundments and traveled into the subsurface soil and groundwater. The two situations are not alike. PCC's situation would only fit the facts in McCormick & Baxter if the thorium left the sewer system and entered the soil or groundwater, possibly through a crack in the sewer pipe. There is no evidence that occurred. PCC is trying to recover costs for cleaning the interior of the sewers.

Id. at *5. Despite the Precision Castparts decision, it is often possible to obtain coverage for property damage related to environmental conditions under pre-1986 policies with the qualified pollution exclusion.

The Absolute Pollution Exclusion

In approximately 1986, most liability insurers began replacing the qualified pollution exclusion with an “absolute pollution exclusion.” While the exclusion was completely rewritten, the key change is that it no longer includes an exception for sudden and accidental pollution, making it very difficult to obtain coverage for property damage related to environmental conditions under these policies. Most courts have concluded that the absolute pollution exclusion precludes coverage for liability stemming from environmental contamination. See, e.g., Park-Ohio Industries, Inc. v. Home Indem. Co., 975 F2d 1215 (6th Cir 1992).
Although no Oregon appellate court has addressed the absolute pollution exclusion, at least two federal cases applying state law have concluded that the absolute pollution exclusion bars coverage. See Great Northern Ins. v. Benjamin Franklin Fed. S&L, 793 F Supp 259 (D Or 1990), aff’d, 953 F2d 1387 (9th Cir 1992) (exclusion barred coverage for damage caused by asbestos); Larson Oil Co. v. Federated Service Ins. Co., 859 F Supp 434 (D Or 1994) (exclusion barred coverage for damage caused by discharge of oil), aff’d, 70 F3d 1279 (9th Cir 1995). Continuing with this trend, a federal court recently held that an insurer did not have a duty to defend or indemnify due to its policy’s absolute pollution exclusion. Northwest Pipe Co. v. RLI Ins. Co., 734 F Supp 2d 1122, 1129 (D Or 2010).

Other federal courts have concluded that the absolute pollution exclusion does not bar coverage, particularly in cases involving nontraditional sources of pollution. A leading case on this issue is Westchester Fire Ins. Co. v. Pittsburg, 768 F Supp 1463 (D Kan 1991), aff’d, 987 F2d 1516 (10th Cir 1993), in which the court held that the pollution exclusion did not apply to injuries allegedly caused by exposure to insecticide spray during normal municipal operations. The spraying was not a polluting activity such as wastewater treatment, smokestack emissions, or dumping at a landfill. Consequently, the exclusion did not apply. See also, e.g., American States Ins. Co. v. Kiger, 662 NE2d 945 (Ind 1990) (gasoline is not pollutant within meaning of exclusionary clause); Titan Holdings Syndicate v. City of Keene, N.H., 898 F2d 265 (1st Cir 1990) (light and noise are not pollutants); In re Hub Recycling, Inc., 106 BR 372 (DNJ 1989) (construction debris is not waste).

Interpreted literally, post-1986 pollution exclusions could exclude virtually all damages caused by any “irritant” or “contaminant.” To avoid absurd results, courts have interpreted these terms narrowly because “there is virtually no substance or chemical in existence that would not irritate or damage some person or property.” Westchester Fire Ins. Co., supra, 768 F Supp at 1470 (terms irritant and contaminate cannot be read in isolation “but must be construed as substances generally recognized as polluting the environment”); see also Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F2d 1037, 1043 (7th Cir 1992).


Care, Custody, or Control (or Owned Property) Exclusion

Most CGL policies contain a provision that excludes coverage for property damage to (1) property owned or occupied by or rented to the insured, (2) property used by the insured, (3) property in the care, custody, or control of the insured, or (4) property over which the insured is for any purpose exercising physical control. See Lane Electric Coop. v. Federated Electric, 114 Or App 156, 834 P2d 502 (1992) (clause did not bar coverage for costs incurred in cleaning up groundwater contamination because groundwater, and right to control it, belongs to public rather than property owner); North Pacific Ins. Co. v. United Chrome Products, 122
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Or App 77, 857 P2d 158 (1993) (coverage was not barred, given absence of evidence that insured appropriated or otherwise controlled groundwater). For further discussion, see 2 Insurance §33.17 (Oregon CLE 1996 & Supp 1999).

Courts in other jurisdictions have concluded that an owned-property exclusion does not apply and exclude the costs of remediating contamination on an insured’s property if the remediation would mitigate actual off-site third-party impact. See, e.g., Hakim v. Massachusetts Insurers’ Insolvency Fund, 675 NE2d 1161 (Mass 1997) (insurer liable under homeowners’ policy for costs to clean up insured’s property if cleanup is necessary to remediate, prevent, or abate further migration of contaminants to off-site property, notwithstanding owned-property exclusion).

The Oregon Supreme Court has rejected this approach. In Schnitzer Investment Corp. v. Certain Underwriters, 341 Or 128, 137 P3d 1282 (2006), the insured argued that the owned-property exclusion did not apply to the remedial work it performed on its own property because the work reduced the potential for contaminants to leach into the state-owned groundwater. The court disagreed with this argument, noting that the policy covered “an injury that occurs during the policy period, not an injury that may occur in the future.” Schnitzer Investment Corp., supra, 341 Or at 136. Because the insured’s remedial work was aimed at preventing potential future harm, and not alleviating a current injury, the insurer’s duty to indemnify was not triggered. The court suggested, however, that the insurer’s duty to indemnify might be triggered were the insured “legally obligated” to clean up the pollution on its own property. But, because the state agency’s record of decision did not impose such a legal obligation, the insurer had no duty to indemnify. Schnitzer Investment Corp., supra, 341 Or at 138–139.

Some courts have found that remediation of an insured’s own property is covered even without actual impact to off-site property, as long as there is an imminent threat to third-party property. See, e.g., Intel Corp. v. Hartford Acc. & Indem. Co., 952 F2d 1551, 1565–1566 (9th Cir 1991) (California law). Thus far, the Oregon courts have rejected this ruling. See Baumann v. North Pacific Ins. Co., 152 Or App 181, 952 P2d 1052 (1998) (owned-property exclusion in homeowners’ policy applied even when potential for third-party damage existed). See also Martin v. State Farm Fire & Casualty Co., 146 Or App 270, 932 P2d 1207 (1997).

The Oregon legislature has enacted a provision mandating coverage where remedial action on property of an insured is undertaken to prevent damage to third-party property.

Anti-Assignment Clauses

In Oregon, courts attempt to discern the intent of the parties when interpreting anti-assignment clauses by using a three-step approach. Groshong v. Mutual Enumclaw Ins. Co., 329 Or 303, 307–08, 985 P2d 1284 (1999). First, the court asks whether the phrase in question has a plain meaning. Groshong, supra, 329 Or at 308. If there is more than one plausible interpretation, the court next examines the phrase in light of the particular context.
in which that phrase is used in the policy and the broader context of the policy as a whole. *Hoffman Construction Co. v. Fred S. James & Co.*, 313 Or 464, 470, 836 P2d 703 (1992). Finally, if any ambiguity remains, then the term will be interpreted against the insurer. *Hoffman Construction Co.*, supra.

In *Holloway v. Republic Indem. Co. of America*, 341 Or 642, 652, 147 P3d 329 (2006), the court determined that an anti-assignment clause applied to both pre-loss and post-loss transfers and barred an insured’s assignment of its rights under its policy. The anti-assignment clause at issue stated “your rights or duties under the policy may not be transferred without written consent.” *Holloway*, supra, 341 Or at 331. The court determined that the clause was unambiguous and that the word “your” in the context of the policy meant the insured; thus, the clause swept broadly, meaning none of the insured’s rights or duties could be assigned without written consent. *Holloway* supra, 341 Or at 334–35. In *Alexander Mfg., Inc. Employee Stock Ownership Plan & Trust v. Ill Union Ins. Co.*, 560 F3d 984 (9th Cir 2009), however, the court held that *Holloway* does not control where a substantive rule of law concerning the interpretation of a specific clause in insurance contracts already exists. In *Alexander*, the anti-assignment clause in controversy stated “assignment of interest under this Policy shall not bind Insurer unless their consent is endorsed hereon.” *Alexander*, supra, 560 F3d at 985. The clause was almost identical to an anti-assignment clause interpreted in a previous case, which declared a substantive rule of law regarding the interpretation of that specific clause in insurance contracts. *Alexander*, supra, 560 F3d at 988. The court then determined that the clause in *Alexander* excludes post-loss assignments. *Alexander*, supra, 560 F3d at 989. The court noted, however, that its interpretation of the *Alexander* clause would be the same applying the three-step approach to interpretation because the term “interest,” which is ambiguous, could plausibly include both pre-loss and post-loss assignments. *Alexander*, supra, 560 F3d at 988–89. Construing the clause against the drafter, however, would require an interpretation that the clause excludes post-loss assignments. *Alexander*, supra, 560 F3d at 989. It should be noted that a court may refuse to uphold even unambiguous anti-assignment clauses if they run counter to public policy or statutes. *Holloway*, supra, 341 Or at 653.

The Oregon legislature enacted a provision in 2013 that provides that anti-assignment clauses in CGL policies do not prohibit an assignment without the consent of an insurer for payment under a policy for losses or damages that commenced before the assignment.

**Settlement with Insurers – Contribution between Insurers**

One federal district court in Oregon has ruled that a complete settlement between the insured and one of its insurers extinguishes the right of contribution that a defending insurer has against the settling insurer. *Fireman’s Fund Ins. Co. v. Ed Niemi Oil Co.*, 2006 US Dist LEXIS 42209 (D Or June 6, 2006) (opinion and order granting motion to dismiss). The United States Court of Appeals for the Ninth Circuit has since overruled this decision. In an unpublished opinion, the Ninth Circuit held that ORS 465.480(4) allows an insurer to seek contribution from “any other insurer that was liable at the time of the occurrence giving rise to the

Although *Oregon Auto Ins. Co.* is unpublished, one district court found its reasoning persuasive and stated that “it extinguishes any authority that the district court decision in that action otherwise may have had.” *Evraz Oregon Steel Mills, Inc. v. Continental Ins. Co.*, 2009 WL 789658, 14 (D Or 2009). It therefore held that a primary insurer’s settlement with the insured did not insulate it from contribution claims from the excess insurers. *Id.* at 15. The Oregon Court of Appeals agreed with this interpretation, holding that the status of an insurer’s liability to its insured does not affect the ability of other insurer’s to seek contribution from it under the OECAA. *Certain Underwriters at Lloyd’s London and Excess Ins. Co., Ltd. v. Massachusetts Bonding and Ins. Co.*, 235 Or App 99, 123–31, 230 P3d 103 (2010).

The Oregon legislature, however, enacted a provision in 2013 providing that where an insured enters into a good faith settlement with an insurer, a non-settling insurer's contribution claim is cut off against the settling carrier. ORS 465.480(4)(a-d).
Severed Mineral Rights and Mining Claims

An Overview of Subsurface Property Rights and Transactions

Eric L. Martin

April 29, 2016 • Oregon State Bar Center

Outline

• Severed Mineral Rights
  - Creation & Scope (including surface rights)
  - Maintenance
• Mining Claims
  - Creation & Scope
  - Maintenance
• Sale and Lease Issues
Severed Minerals

• Ownership of severed mineral rights in Oregon:

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<th>Millions of Acres</th>
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<td>Federal</td>
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Federal: Stock Raising Homestead Act of 1916
State: ORS 273.775 et seq.
County: Tax foreclosures
Private: ?

Preliminary Title Report

18. Reservation of minerals, coal, oils, gases, water rights and rights of way, and conditions regarding payment of timber or wood sold and selective logging, as contained in deeds from Columbia County, Oregon, including the terms and provisions thereof;
   Recording Date: May 17, 1944.
   Recording No.: Book 74, Pages 423, 424, 426 and 428.
   Affects: Sections 11, 12 and 14.

19. Reservations and Exceptions in deed from Frank Hasell to L.R. Smith and A.F. Smith for one half of the coal, oil, gas and mineral rights and rights in connection thereof for development of same, including the terms and provisions thereof;
   Recording Date: June 2, 1944.
   Recording No.: Book 74, Page 474.
   Affects: Section 11.
Severed Minerals - Creation

- Create by Deed
- Deed must be reviewed to assess scope:
  - What minerals were reserved?
  - What rights were expressly reserved?
  - Any express limitations on development?
### Severed Minerals - Scope

- **Federal:** Often question of statutory interpretation
  - Example: Stock Raising Homestead Act of 1916 reserved “all the coal and other minerals”
    - “underlying purpose [of SRHA]... to facilitate the concurrent development of both surface and subsurface resources”
    - Land grants construed favorably to the Government
    - Established multi-factor test for SRHA reservations
    - Held that SRHA reserved sand and gravel to fed. gov’t
  - Gas storage? Carbon sequestration?

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### Severed Minerals - Scope

- **Federal:** Not always about statutory interpretation
Severed Minerals - Scope

• State (ORS 273.775 et seq.):
  - Policy to retain “mineral and geothermal resource rights” when selling land
  - “Mineral” is broadly defined
  - Exceptions to state policy for “low-potential resource real property” (i.e., within UGB or small residential lots) unless DSL determines “significant” resource exists

Severed Minerals - Scope

• Private:
  - Whittle v. Wolff, 249 Or 217 (1968):
    • Court to ascertain intent of the grantor. If it cannot be determined, construe to conform to “the intent commonly prevalent among” similarly situated grantors. Reservation of “minerals” does not generally include ordinary sand and gravel.
  - But see Copeland Sand & Gravel, Inc. v. Estate of Dillard, 267 Or App 791 (2014), adh’d to on recons, 269 Or App 904 (2015):
    • Use Yogman three-step process: (i) examine the text and context of the disputed provision; (ii) if the text and context are ambiguous, consider whether extrinsic evidence resolves the ambiguity; and (iii) if the ambiguity cannot be resolved by extrinsic evidence, use established maxims of construction to determine the meaning of the disputed provision
    • Resolve ambiguities against grantor (i.e., construed in favor of the mineral estate owner in the context of a mineral reservation)
Severed Minerals - Scope

- Geothermal: Part of the surface estate “unless such rights have been otherwise reserved or conveyed” (ORS 522.035)

Severed Minerals - Surface Use

- Severed mineral estate owner’s right to use the surface?
  - “Unless the instrument conveying the interest expressly provides to the contrary, a mineral owner or lessee can make any use of the surface of the land which is reasonably necessary to develop the minerals.” Yaquina Bay Timber & Logging Co. v. Shiny Rock Mining Corp., 276 Or 779, 784 n3 (1976).

- Surface estate owner’s rights?
  - A “surface owner has the right to use the surface for all other purposes not inconsistent with or interfering with the mineral owner’s use.” Weathers v. M.C. Lininger & Sons, 68 Or App 30 (1984).
Severed Minerals - Surface Use

• But . . .
  - Accommodation Doctrine: “If the mineral owner has reasonable alternative uses of the surface, one of which permits the surface owner to continue to use the surface in the manner intended . . . and one of which would preclude that use by the surface owner, the mineral owner must use the alternative that allows continued use of the surface by the surface owner.” Tarrant County v. Haupt, Inc., 854 SW2d 909, 911 (Tex 1993).

Severed Minerals - Surface Use

• Various surface rights are “implied” by a mineral reservation even if not expressed in deed, such as:
  - Right of access
  - Right to use surface resources (trees)
  - Right to deposit waste material on the surface
  - Right to build necessary structures
• Courts can be skeptical about implied right to surface mine (and thereby “destroy” the surface) unless the reserved mineral can only be mined in that fashion
Severed Minerals - Surface Use

- Examples of other situation-specific limitations on surface uses:
  - ORS 517.790 requires “written approval” from all surface and minerals owners within the surface mining area before a DOGAMI operating permit can be issued for mining activities on the surface.
  - Stock Raising Homestead Act (43 USC § 299)

Severed Minerals - Scope

- Cross-utilization with other property (e.g., using one mineral reservation to access another mineral reservation):
  - Generally not allowed unless expressly authorized.
  - May be allowed under federal/state unitization laws for oil and gas. See, e.g., Entek GRB, LLC v. Stull Ranches, LLC, 763 F3d 1252 (10th Cir 2014).
Severed Minerals - Scope

Granter reserves from the above described lands one half of all mineral rights not previously reserved, except sand, gravel and cinders.

- Fractional mineral interest
  - A cotenant can mine jointly owned property but cannot exclude the other cotenant(s). Suitter v. Thompson, 225 Or 614 (1960).
  - Account to the other cotenant for the other cotenant's share of the rents and profits obtained from mining. ORS 105.820.

Severed Minerals - Maintenance

- Private Severed Mineral Rights
  - Dormant Minerals Statute (ORS 517.170 et seq.)
  - Allows surface owners to extinguish private “dormant” severed mineral rights
  - Severed mineral interest considered dormant unless mineral interest owner
    - Recorded a “statement of claim” within the previous 30 years or
    - Acquired the interest within the previous 30 years
  - Not self-executing: Surface owner must publish notice and mail notice to mineral owner, who then has 60 days from last publication date to record statement of claim
Severed Minerals - Maintenance

- State Severed Mineral Rights
  - Upon application from the surface owner, State will release mineral interest it reserved before June 4, 2013 on “low-potential resource real property” unless mineral resource is “significant” (ORS 273.787)

Mining Claims

US gov’t owns over 30 million acres + 1.5 million acres of severed mineral rights in Oregon.
Mining Claims

• Minerals developed on federal land under:
  - General Mining Law of 1872 (30 USC §§ 22-54)
  - Mineral Leasing Act of 1920 (30 USC §§ 181-263)
  - Mineral Leasing Act for Acquired Lands of 1947 (30 USC §§ 351-360)
  - Geothermal Steam Act of 1970 (30 USC §§ 1001-1025)
  - Materials Act of 1947 (30 USC §§ 601-604)

Mining Claims

• General Mining Law of 1872: Mining claimant has possessory interest in the federal land subject to the claim for the purpose of hardrock mineral development (originally led to opportunity for claimant to obtain fee simple title through the patent process)

• Types of unpatented mining claims:
  - Lode Claims (30 USC § 23)
    - “Veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits”
    - Up to 1,500 feet long and 300 feet on either side of the vein
Mining Claims

- Types of unpatented mining claims (cont.):
  - Placer Claims (30 USC §§ 35-36)
    - Hardrock minerals not within scope of lode claims (i.e., “all forms of deposit, excepting veins of quartz, or other rock in place”)
    - Up to 20 acres or up to 160 acres for association placers
    - Regular subdivisions of government survey
  - Mill Site, Tunnel Site
  - Claimant has legal estate in real property
    (ORS 517.080)

Mining Claims - Creation

- Public domain lands
- Must be open for entry
- Senior claims?
- Citizenship
- Discovery of “valuable mineral deposit”
- Location requirements
  - Federal (43 USC § 1744(b) and 43 CFR pt. 3833)
  - State (ORS ch. 517)
Mining Claims - Creation

• Lode Claims:
  - Post location notice on claim;
  - Mark claim’s corners within 30 days after location;
  - Record location notice in county within 60 days after location; and
  - File recorded notice with BLM in Portland within 90 days after location and pay fee

Mining Claims - Creation

• Placer Claims:
  - Post location notice on claim;
  - No need to mark claim’s corners within 30 days after location unless not located by legal subdivisions;
  - Record location notice in county within 60 days after location; and
  - File recorded notice with BLM in Portland within 90 days after location and pay fee
Mining Claims - Maintenance

• Historically, perform $100 of annual assessment work
• Since 1993:
  – Pay annual maintenance fee in lieu of annual assessment-work (30 USC § 28f)
  – Must be paid on or before Sept. 1
  – Claim automatically void if annual maintenance fee not timely paid (30 USC § 28i)
• Record affidavit of compliance within 30 days (ORS 517.210)

Mining Claims - Maintenance

• Alternative - “small miner exemption”
  – Gives claimant owning no more than 10 claims (including ownership through “related parties”) the option of performing annual assessment work rather than paying the annual maintenance fees (30 USC § 28f(d))
  – Compliance is complicated and commonly leads to loss of claims
Sale Issues

- Title insurance unavailable
  - Typical seller wants no title warranties
  - Buyer may obtain title opinion from attorney
- Mining claims
  - Heightened title warranty concerns for seller
  - BLM filing
  - Association placers

Lease Issues

- Term (habendum clause)
- Bonus, rentals, royalties, and advance minimum royalties
  - Proportionate reduction
  - Audit rights
- Pooling
- Reclamation
Other Resources

- American Law of Mining, Rocky Mountain Mineral Law Foundation
- Williams & Meyers, Oil and Gas Law

Thank You

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Represents the owners and developers of natural resources with an emphasis on property issues and transactions in the oil and gas (upstream and midstream) and mining industries.
Chapter 3

HOA and Condominium Law: Issues and Trends—Presentation Slides

Kathleen Profitt
Profitt Law PC
Clackamas, Oregon
Overview

- Role of the Association’s Governing Documents
- CC&R Amendments vs. Rules and Regulations
- Liens and Collections—Special Rights for Associations
- Current Trends in Rental Restrictions
  - Short-term Rentals and Airbnb
HOAs and Condos– Creatures of Statute

- Condominium Act (ORS 100.005-100.990)
- Planned Community Act (ORS 94.550-94.783)
- Nonprofit Corporations Act (ORS 65.001-65.990)

Governing Documents

- Articles of Incorporation
- Declaration
- Bylaws
- Plat
- Rules and Regulations
- Board Resolutions and Policies
Governing Documents

- Articles of Incorporation
  - Typically recorded by declarant/developer
  - Sets out purpose of nonprofit association, members, initial board members, voting provisions, term of duration, and amendment provisions

Governing Documents

- Declaration- Covenants, Conditions, and Restrictions ("CC&Rs")
  - Recorded in conjunction with plat
  - Binds deed
**Governing Documents**

- Planned Unit Development (HOAs) Declaration
  - Must include certain provisions (ORS 94.580)
- Use Restrictions
  - Residential Use
  - Architectural Review
  - Association vs. Owner Maintenance
  - Rental Restrictions
  - Specific Community Standards
  - Rulemaking Authority

---

**Governing Documents**

- Condominium Declaration
  - Must include certain provisions (ORS 100.105)
  - Defines units, common elements and limited common elements
  - Allocation of common expenses
  - Use restrictions and maintenance obligations, typically left for Bylaws
**Governing Documents**

- **Bylaws**
  - Sets out how the Association will operate
  - Meetings/Quorum Provisions
  - Board of Directors/Officers
  - Owner Notice and Vote Requirements
- **Condominium Bylaws (ORS 100.415)**
  - Adoption of Budget
  - Manner of Collecting Assessments
  - Insurance
  - Occupancy and Use Restrictions
    - Rental Restrictions

**Hierarchy**

- Condo Act and Planned Community Act control in some areas
- Statutes defer to Governing Documents in other areas
  - Articles, Declaration, Bylaws, reign in that order when inconsistencies exist.
Governing Documents

- Association Rules and Regulations
- Subject to provision of Declaration and Bylaws, and whether or not the association is incorporated, an association may adopt reasonable rules and regulations
- May exercise any powers deemed necessary and proper for governance
- ORS 100.405(4)(a), (r), ORS 94.630(1)(a), (r)

Rule Making Authority

- Statutes allow reasonable rules
- Typically established by majority vote of Board
- May fill in the gaps of the Governing Documents
- Quiet hours
- Appearance of Lot
  - Landscaping and maintenance standards
  - Trash cans, etc.
Rule Making Authority

- May regulate use of lot/unit to degree authority to do so is granted in CC&Rs
  - Appearance of Lot
    - Back yards? Depends.
  - Rental and Pet Restrictions require 75% owner vote
    - CC&Rs may give authority to draft additional reasonable rules on those topics

Rule Making Authority

- Federal and State laws are still important
  - Satellite dishes (OTARD)
  - Fair housing laws
    - Do not try to regulate children, parenting, or target renters
    - Focus on the objective conduct restricted
Rule Making Authority- Drawing the Line

- Example—Cigarette and Marijuana Smoke
  - Smoking bans within units generally require an owner vote
  - However, the Association may make rules about smoke not traveling outside unit into common elements, or other units
  - Competing compelling owner interests—reasonable efforts to mitigate and cooperate with both owners

- Nuisance theories
  - Oregon Appellate Court rules smoking not a per se nuisance (State v. Lang, 273 Or App 113 (Or. App., 2015).
  - Intensity, duration, frequency are important

Oregon Association Collection Rights

- Dual Liability: personal liability as well as lien
- Lien Rights
  - Condominium Super Priority
  - Personal Obligation
Oregon Association Collection Rights

- “Assessments”
  Term describing financial amount of money a homeowner must pay the association; sometimes mistakenly referred to as “dues”. Can include monthly assessments for common expenses and reserves, special assessments and fine assessments for violation of an association’s CC&Rs, including attorney fees
  - Planned Community Act definition ORS 94.550
  - Condominium Act definition ORS 100.005

Assessment Collection Rights: Lien

- A lien automatically exists against the property for any unpaid assessments. (ORS 94.709; ORS 100.450)
  - Lien includes interest, late charges, attorney fees, costs, or other amounts imposed under the CC&Rs
  - Association need not record lien; recorded Declaration perfects lien
  - Lien is prior to homestead exemption
  - Generally, first mortgage and tax assessment liens have priority (condominium caveat)
  - Liens may continue in force for up to six years from date assessment is due
**Condo Caveat: Lien Priority**

- ORS 100.450(7) – Lien may obtain priority of first mortgage or trust deed if:
  - Association provides 90 days prior written notice to lender under a mortgage or trust deed that owner is in default of paying assessments
  - If lender has not initiated foreclosure under trust deed or accepted a deed in lieu of foreclosure prior to expiration of 90 days following notice by Association
  - Association complies with lender’s requests for information under the statute
  - Borrower is in default under the terms of the trust deed as to principal and interest
  - Affidavit of Notice is recorded (lien index)

**Lien Foreclosure**

- Association may foreclose its lien
  - Not often a practical solution given other encumbrances
- If Lender forecloses, Association lien is likely extinguished (ORS 94.719; ORS 100.465)
**Condo Caveat: Deeds in Lieu**

- Condominiums and Deeds in Lieu (ORS 100.465)
- Unless CC&Rs provide otherwise, deed in lieu will extinguish Association lien ONLY if:
  - Written notice to Association provided in manner complying with statute
  - Deed in lieu is recorded not later than 30 days after the date the notice
  - Bank remains on the hook for the lien if the notice is not provided as required or deed is recorded late.

**Personal Obligation: Judgment**

- Lot owner is personally liable for assessment. (ORS 94.712; ORS 100.475)
- Joint liability of grantor and grantee following conveyance for all unpaid assessments against the grantor to the time of the grant
- Without prejudice to grantee’s rights to recover from the grantor amounts paid by grantee
Current Trends -- Rentals

- Rental Restrictions -- currently in an upswing
  - Rental Caps (no more than x% allowed to rent)
    - Should provide cushion for non-owner occupancy unrelated to rentals.
  - Secondary mortgage market limits non-owner occupancy
    - Fannie Mae: no more than 50%
  - Condominiums should be mindful of FHA Certification Requirements
    - No seasoning restrictions (requiring certain term of ownership)
    - Cannot prohibit renting entirely
    - Terms and numbers can be limited, but otherwise may be deemed restriction upon alienation

Current Trends—Short Term Rentals

- Short Term Rentals = Less than 30 days
- Different local jurisdictions have different approaches to short term renting/airbnb
  - City of Portland’s take= $$ through tax (PCC 6.04.010, 6.04.040, and 6.04.170)
  - Portland’s 2015 amended ordinance on short term rentals does not overwrite CC&Rs
Airbnb from Association Perspective

- Many concerns
  - Sharing space with a revolving door of strangers
    - Safety and security
    - Heightened wear and tear on recreational facilities or other property
      - Temporary guests do not share the same community interests as owners
    - Reduced desirability/property value
Sample HOA Provision

6.25 **Leasing and Rental of Living Units.** No Owner of a Residential Lot may lease or rent his or her Living Unit for a period of less than thirty (30) days. All leases or rentals shall be by written lease agreement, which shall provide that the terms of the lease shall be subject in all respects to the provisions of this Declaration and the Rules and Regulations, Articles of Incorporation and Bylaws of the Association, and that any failure by the lessee or tenant to comply with the terms of such documents shall be a default under the lease. If the Board of Directors finds that a lessee or tenant has violated any provision of such documents or the Rules and Regulations, the Board may require the Owner to terminate such lease or rental agreement. Other than the foregoing, there is no restriction on the right of any Owner to lease or rent his Living Unit. These provisions shall not apply to Community Housing.

Purpose of Residential Use Limitations

- Developers include residential use limitations largely to increase project marketability
- Federal housing law prohibits transient and hotel-like rentals use for properties with government insured mortgages
  - Federal government wants housing built/purchased with the aid of mortgages it insures “to be used principally for residential use; and that . . . excludes housing for transient or hotel purposes.”
- 12. U.S. Code §1731b
Association Action Items

• If short-term rentals are not expressly prohibited, consider whether such a limitation is in the best interest of the Association.
  • If so, and sufficient community support, consider amendments to your Governing Documents
    • You will need at least a 75% owner vote to approve

Closing Thoughts on Rental Restrictions

• Rental issues are often highly controversial
• Restricting an owner’s right to rent can have huge financial impact on owners
• Thus, owners are more likely to get legal counsel and challenge the Association’s actions regarding rental restrictions
• Wise Associations will solidify their legal rights on short-term rentals sooner rather than later
# Chapter 4

## Negotiating Retail Leases

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I. Premises/Retail Center.

A. Definition.

1. Description of Premises.
2. Description of Retail Center.

B. Condition of Delivery.

1. Landlord’s objective.
   a. Premises delivered “as is, where is”, subject to Landlord’s Work, if any.
   b. No Landlord obligations regarding the condition of the Retail Center outside of the Premises.

2. Tenant’s objective.
   a. Premises must be suitable for Tenant’s intended use.
   b. Building systems serving the Premises must be in good working order.
   c. Premises is delivered in compliance with applicable laws, including ADA.
   d. Retail Center sufficiently complete for conduct of Tenant’s business.

C. Construction Issues.

1. Landlord’s objectives.

One of Landlord's principal motivations is to collect rent as soon as possible. Where Landlord is responsible for constructing the tenant improvements, Landlord can: (i) control the process, (ii) complete construction as soon as possible, and (iii) often earn a fee (which Landlord will argue is compensation for bearing the construction risk). Landlord's goal in negotiating a build out provision is to:

   a. Fix the rent commencement date on the date the improvements are substantially complete, notwithstanding the requirement to correct punch list items.
   b. Include a definition of "Tenant Delay" to protect Landlord from delays in completing construction due to the failure of Tenant to timely perform.
Chapter 4—Negotiating Retail Leases

c. Treat Tenant's acceptance of the Premises as Tenant's acknowledgment that the Premises are in good condition subject only to latent defects and punch list items, with a specific limitation on the period within which Tenant can ask that such latent defects and/or punch list items be corrected.

2. Tenant’s objectives.

Tenant wants high quality improvement at low costs. Tenant does not want to pay rent before the tenant improvements are completed. Tenant’s goal in negotiating a build out provision is to:

a. Establish specific standards for the quality of Landlord's work.

b. Eliminate or limit Landlord's fee for construction administration.

c. Require competitive bids from subcontractors in each trade.

d. Require that Landlord present Tenant with a detailed estimated cost breakdown. To the extent Landlord is providing a tenant improvement allowance with respect to only a portion of the tenant improvements (with Tenant paying all amounts in excess of the allowance), the cost breakdown should be reviewed to determine if any already completed improvements are included.

e. Define "Tenant Delay" narrowly. Tenant must be sure the construction schedule is realistic, and that Tenant is given advance notice of a potential Tenant Delay and a period to cure such potential delay. Further, Tenant should only allow Landlord to exercise its remedies to the extent a Tenant Delay actually causes a delay in construction.

f. Obtain the right to enforce warranties and guaranties directly.

3. Description of Improvements.

Ideally, final plans and specifications will be attached to the lease. If this isn’t possible, the parties should attach some description of the improvements and establish a procedure for approval.

4. Payment Responsibility.

a. Typical improvement construction scenarios.

   (1) Turnkey -- Landlord constructs shell and all interior improvements required by tenant at Landlord’s sole cost.
(2) Landlord builds shell, building standard improvements and tenant improvements, with tenant receiving a construction allowance and reimbursing landlord for the difference, if any.

(3) Landlord builds shell and tenant, at its cost, constructs interior improvements.

(4) Tenant constructs building and interior improvements at tenant’s sole cost and expense (typical ground lease).

b. TI Allowance Reimbursement procedures.

(1) Lump sum payment or “construction” draws.

(2) Preconditions for disbursements.

   (a) Issuance of certificate of occupancy.

   (b) Receipt of all lien waivers.

   (c) Architect’s certificate that work completed in accordance with plans and specifications.

   (d) Tenant opened and paying rent.

II. Rent Commencement.

A. Scheduled Rent Commencement Date.

B. Rent Commencement Date.

   1. Landlord’s delivery of Premises.

   2. Landlord’s substantial completion of Landlord’s Work.

   3. Tenant opens for business.

   4. A specified number of days after Tenant obtains building permits.

C. Expiration date.

   1. Tie to Rent Commencement Date.

   2. Extend expiration date to a convenient time of the year.

D. Tenant’s due diligence termination rights.

   1. Building permit approval/sign permit approval.
2. Title review.

3. Environmental review.

Landlord practice pointer – Tenant termination rights should have a “use it or lose it” provision.

E. Extension/Renewal Options.

1. Exercise window – Landlord re-leasing time.

2. Void if Tenant defaults/assigns/subleases.

3. Rental rate.
   a. Fixed at lease execution.
   b. Greater of fair market rent or rent charged prior to exercise.
   c. Discount for no transaction fees?
   d. Arbitration – baseball vs. split the baby.

III. Rent.

A. Base Rent.

B. Operating Expenses/Common Area Maintenance Expenses.

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D. Gross Sales Reports.

IV. Use Clauses – Allowed Uses/Prohibited Uses/Exclusive Uses.

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C. Prohibited Uses.

D. Operating Covenant/Opening Covenant/Go Dark Rights/Recapture

E. Opening Co-Tenancy/Operating Co-Tenancy/Suitable Replacements

F. Hazardous Substances.

   1. Landlord’s objective -- Landlord only responsible for the presence of Hazardous Substances on the Premises prior to the date possession of
the Premises is delivered to Tenant to extent remediation required by applicable laws.

2. Tenant’s objective.

a. Tenant only responsible for the presence of Hazardous Substances on the Premises as a result of an act of Tenant.

b. Remedies, including abatement of rent and termination rights, for closure due to Hazardous Substance not caused by Tenant.

V. Assignments and Subleases.

A. Landlord’s perspective.

Landlord wants to be able to control who occupies the Retail Center and for what uses. Occupants must be creditworthy, not adversely affect the reputation of the building, not increase Landlord’s ownership risks or adversely affect other tenants of the building or the Retail Center.

B. Tenant’s perspective.

Tenant’s obligations will continue even though Tenant’s circumstances change, such as the death of an individual, a downturn in Tenant’s business, a change in the retail tenant’s concept or a merger or consolidation of a corporate tenant resulting in the space becoming unnecessary. Tenant wants the flexibility to find other users to occupy all or a portion of the space and assume some or all of Tenant’s remaining obligations under the lease. In addition, the other provisions of the lease (such as the lease’s use clause and its restrictions on alterations) must be flexible.

C. Distinction Between Assignment and Sublease.

D. Restrictions on Assignments and Subleases (sole discretion vs reasonable).

E. Circumstances in which it is reasonable for the landlord to withhold the landlord’s consent.

1. The transferee’s financial condition is inadequate.

2. The transferee’s proposed use is different than the tenant’s use.

3. The nature of the proposed use may result in: (i) an increase in insurance premiums, (ii) an increased risk with respect to the use or release of hazardous materials in the building or the Retail Center, (iii) increased likelihood of damage or destruction, (iv) increased density or pedestrian traffic through the building or the Retail Center, or (v) the installation of new tenant improvements which are incompatible with existing building system components.
4. The expected percentage rent for the transferee’s business is less than that of Tenant.

5. The transferee is a labor union, foreign or domestic governmental entity, public utility or tax-exempt organization.

6. The transferee is an existing occupant of the building or the Retail Center, or a person or entity Landlord has dealt with previously with respect to leasing space in the building or the Retail Center.

7. In the case of a sublease, the monthly rental and other economic concessions result in the effective rent being less than the monthly rent Landlord is asking for similar space in the building or the Retail Center.

8. In the case of a sublease, the proposed subletting would result in more than a specified number of subleases of portions of the premises being in effect at any one time or more than a specified number of subleases during the term of the lease.

F. Landlord Recapture Rights.

1. Landlord’s perspective -- Because of the importance of controlling the Retail Center, Landlord will often include a “recapture” clause in the lease. If Tenant seeks Landlord’s consent to an assignment or sublease under a recapture clause, Landlord has the option to “recapture” the space, terminating the lease. By recapturing the space, Landlord will release Tenant from any further liability under the lease. Landlord will presumably exercise this option (and forego having Tenant remain liable on the lease) if Landlord wants control of the space or if Landlord can relet the space at a higher rent.

2. Tenant’s perspective -- Tenant is in a difficult position of having to market the space subject to Landlord’s ability to kill the deal at the last minute. Tenant can minimize this problem by requiring Landlord to decide whether to exercise Landlord’s recapture option earlier in the process.

   a. Lease to have a clear (and short) time period within which Landlord must exercise its recapture option.

   b. Ability of Tenant to withdraw its request to assign or sublet if Landlord notifies Tenant that Landlord intends to terminate the lease.

   c. In the case of a proposed sublease, Landlord’s recapture right only applies to the sublet space and the lease will be amended to reflect the reduced size of the leased premises, with the rental rate and Tenant’s share of taxes and insurance adjusted accordingly.
Chapter 4—Negotiating Retail Leases

G. Exceptions from Restrictions on Assignment or Subletting.

1. Transfers by an individual tenant to an entity controlled by tenant.

2. Transfers by Tenant to an affiliated entity.

3. Transfers by way of merger, consolidation or the acquisition of assets or capital stock (however, if the lease is a retail lease, landlord will want to condition the approval of such transfer on, among other things, the proposed transferee having sufficient retail experience and there being no change in the use of the Premises).

H. Bonus Rent.

1. A “bonus” rent clause entitles Landlord to receive some or all of the rent or other consideration payable by a transferee as a result of the lease transfer to the extent the new rent exceeds the existing rent.

2. This additional rent may be in the form of a lump sum payment in the case of a lease assignment or higher subrent in the case of a sublease.

3. Landlord will justify their “right” to bonus rent on the theory that Landlord, not Tenant, is in the real estate business, and only Landlord is entitled to increases in rents due to increases in the value of the real estate.

4. Tenant will want deducted from bonus rent all of Tenant’s leasing costs.

I. Continuing Liability of Tenant.

Where Tenant assigns its interest in the lease, Tenant will remain liable for all of the obligations of the lessee under the lease unless Landlord specifically releases Tenant from Tenant’s obligations under the lease.

VI. Repairs and Maintenance.

A. Typical Landlord obligations, but varies with type of tenancy.

1. Structure, foundations, roof and common areas.

2. No Landlord obligation until given notice of need for repair.

3. Can cost of Landlord’s repair and maintenance work be passed through to Tenant as Operating Expenses?

B. Typical Tenant obligations, but varies with type of tenancy.

1. Maintain interior of Premises in good condition and repair (HVAC and building systems solely serving the Premises).
2. Responsible for any of Landlord’s obligations to extent due to act or omission of Tenant or Tenant’s agents, employees or contractors.

C. Emergency repairs – can Tenant perform (and repair and deduct from rent)?

D. Compliance with laws issues.

1. Landlord’s perspective – Tenant responsible for complying with all laws applicable to the Premises.

2. Tenant’s perspective – Tenant only responsible for complying with laws applicable to Tenant’s specific use of the Premises (as opposed to general office/retail use of the Premises). If Landlord accepts this approach, Tenant should also be responsible for any other alterations required due to any action of Tenant or Tenant’s agents, employees or contractors.

3. Can cost of Landlord’s compliance with laws costs be passed through to Tenant as Operating Expenses?

VII. Damage and Destruction.

A. Landlord’s perspective.

1. No Tenant termination right.

2. Maximum flexibility regarding Landlord termination rights (for example, damage to the Retail Center but not the Premises).

3. Preserve lender’s right to take insurance proceeds to pay down debt.

4. Limit repair obligations to extent of available insurance proceeds.

5. No interruption of rental income stream (typically Tenant will be entitled to whole or partial rent abatement, but Landlord’s income stream will be protected by rental income insurance paid for by Tenant as part of Operating Expenses).

B. Tenant’s perspective.

1. Terminate lease if repairs are not expected to be completed within specified time.

2. Abatement of rent (and all other periodic charges).

3. No obligation to commence payment of rent until sufficient move in period.

4. Greater termination rights for damage at end of term of lease.
5. Require Landlord to exercise termination rights non-discriminatorily.

6. Termination rights if significant portions of the Retail Center (but not Premises) destroyed.

VIII. Defaults.

A. Tenant Defaults.

1. Monetary Defaults.
   a. Landlord’s perspective -- Tenant should be in default if Tenant fails to pay rent when due or if Tenant fails to pay any other monetary obligation within five (5) or ten (10) days after receipt of written notice.
   b. Tenant’s perspective -- Notice required even for the failure to pay rent on time.
   c. Compromise -- The first two (2) times rent is not paid when due in a consecutive twelve (12) month period Tenant will not be in default if Tenant pays such overdue rent within ten (10) days of notice that rent is overdue. The one exception to this is if Tenant occupies a significant portion of the building since the failure of such a large tenant to pay rent when due may be the difference between whether Landlord can pay the mortgage when due.

2. Non-Monetary Defaults.
   a. Landlord’s perspective -- Tenant will be in default if Tenant fails to cure a non-monetary breach within a specified period (usually thirty (30) days) after receipt of notice of such breach.
   b. Tenant’s perspective -- If the breach cannot be cured within the thirty (30) day period, the lease should provide that so long as Tenant has commenced the cure within the thirty (30) day period and thereafter diligently pursues the cure, Tenant should not be in default of the lease.

B. Landlord Defaults.

1. Failure to deliver space when promised or failure to complete the tenant improvements or defects in Landlord’s Work.

2. Failure to repair/maintain the building, the building systems or the common areas.

3. Failure to timely reconstruct the Premises upon a casualty.
4. Breach the covenant of quiet enjoyment.

5. Failure to consent to a proposed assignment or sublease, or a proposed change of use or alteration of the premises.

6. Failure to perform any other Landlord covenant (including, an expansion option, an extension option, an exclusive use clause or other similar rights).

IX. Remedies.

A. Landlord Remedies.

1. Keep lease in place and collect rent month.

2. Terminate lease and accelerate rent (subject to Landlord’s mitigation obligations.

3. Perform Tenant’s obligations at Tenant’s cost.

4. Enter Premises by self-help means.

B. Tenant Remedies.

1. Self Help.

   a. Tenant’s perspective.

      (1) Tenant wants self-help remedies because Tenant fears that without such rights it may be difficult to force Landlord to perform Landlord’s obligations under the lease.

      (2) Broad self-help rights enable Tenant to remedy a problem where Landlord does not believe a problem exists.

      (3) Self-help remedies are especially important with respect to repairs. For example, a roof leak may cause significant disruption to a tenant's business. By obtaining broad self-help remedies, Tenant will be able to quickly repair the roof on Landlord's behalf without incurring significant business losses.

      (4) A request for self-help remedies typically is accompanied with a request for rent offset rights. Tenant will seek offset rights to obtain a sure method of reimbursement for any self-help costs incurred by Tenant.
b. Landlord’s perspective – Landlord will object due to:

(1) By granting self-help remedies, Tenant will exercise Tenant’s self-help remedy in circumstances where Landlord believes no Landlord obligation exists.

(2) Landlord wants to control repairs.

(3) Landlord wants an opportunity to cure any Landlord default.

(4) Tenant will not pursue cost-effective remedies.

(5) Landlord will not want to allow Tenant offset rights since it will adversely affect Landlord's cash flow and offset rights may also violate the terms of Landlord's financing documents.
Chapter 5A

Effective Advocacy of Land Use Appeals
Before the Oregon Court of Appeals

The Honorable Timothy Sercombe
Oregon Court of Appeals
Salem, Oregon

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I. INTRODUCTION

A. You will be more successful in winning land use cases before the Oregon Court of Appeals if you understand:

1. The nature of your audience—how the court decides cases, and the amount of time and resources that can be devoted to deciding a land use case;

2. The administrative law framework and special considerations that influence how the court categorizes and processes land use cases; and,


B. The number of land uses cases before the Court of Appeals varies with no obvious trend. In 2008, there were 34 LUBA review proceedings. Between 2003 and 2007, there were between 21 and 43 review proceedings each year from LUBA opinions and orders.

II. KNOWING YOUR AUDIENCE—HOW THE COURT OF APPEALS IS ORGANIZED

A. The Court of Appeals was created by the Legislative Assembly in 1969 as a five-judge court.

B. The Court of Appeals expanded to six judges in 1973, to 10 judges in 1977, and to the current 13 judges in 2013.

C. The Court of Appeals has jurisdiction over all appeals except cases that go directly to the Oregon Supreme Court (death penalty, ballot title, attorney discipline, and Tax Court appeals)

D. The court is organized into four departments. Each department has three judges. A judge, usually the most senior, is designated as the presiding judge for the department. The presiding judge has responsibility to preside at oral arguments, assign cases, and manage the caseload of the department. The Chief Judge can substitute on all three panels. There is a separate two-judge motions panel, and an appellate commissioner who decides many procedural issues.

E. Each department hears cases, with two to three "sittings" each month.

F. Each of the presiding judges has an assigned law clerk and a staff attorney. There is an additional staff attorney assigned to the department who works with all three judges. Each junior judge gets two law clerks.
G. Most of the work of the individual judges is reading briefs, hearing oral arguments, and writing opinions. As just noted, a judge usually has three days of oral arguments each month. It takes around two days to prepare for a day of arguments. If you add in the conferences of a judge's department and the full court, and reading the opinions of other panels of the court, close to two-third of a judge's time is spent reading briefs and opinions, and preparing for and attending oral arguments and conferences.

H. The remaining one-third of a judge's time is devoted to writing and editing opinions and participation in lawyer and judge organizations and court outreach. The work demands for a judge on the Court of Appeals are as great as those for a lawyer in private practice at a large firm.


III. KNOWING YOUR AUDIENCE—WORKLOAD OF THE COURT

A. Any conversation about the workings of the Court of Appeals begins with its huge workload. Whether measured by a ratio of appeals/population or number of appeals/judge, the Court of Appeals is one of the top two or three busiest courts in the country.

B. The workload is substantial:

1. Between 2,500 and 3,500 appeals are filed each year. In 2014, there were 2,566 appeals or petitions for review filed. About 30% of those appeals are resolved or abandoned prior to decision.

2. About 60% to 65% of the cases are criminal. Most are direct appeals from convictions and sentencings. The remainder is post-conviction relief, habeas corpus, and parole review cases.

3. The remaining cases are:
   a. Administrative law: around 200 agency review cases, 100 workers compensation review cases, and 30 to 50 land use review cases;
   b. Juvenile law: somewhere in the neighborhood of 170 juvenile dependency and termination of parental rights cases;
   c. Mental commitment appeals: About 100 per year; and
Chapter 5A—Effective Advocacy of Land Use Appeals Before the Oregon Court of Appeals

d. Civil cases: around 650 or so civil case appeal filings, of which 150-200 are domestic relations filings. There are fewer civil case appeals because fewer cases are being tried.

C. Each year, there are about 1500 to 2000 dispositions (cases that result in an opinion or order of the court). By necessity, about 65% of the cases are affirmed without an opinion.

D. This results in around 500 to 600 opinions each year. This is as much as can be done with 13 judges.

E. In 2014, there were 47 dispositions of land use cases, 34 opinions and 13 AWOPs. There are fewer LUBA filings in 2015 than in 2014.

F. This amount of workload suggests that you should be strategic in selecting the number of issues to raise in an appeal and in determining the length of your briefs. The court has adopted rules that further limit the length of briefs and that facilitate the submission of cases without oral argument.

IV. SPECIAL CONSIDERATIONS IN REVIEW OF LUBA ORDERS

A. A petitioner starts off behind in the score. LUBA is a unique agency, composed of attorneys who are highly experienced in land use law. It usually takes a very good case to convince a reviewing court that LUBA erred. Members of the court have a great respect for the board's expertise.

B. The Court of Appeals reviews the LUBA opinion and order, not the decision of the local government or state agency. You should not ask the court to review the legal or factual sufficiency of a local government decision. Instead, the issue is whether LUBA erred in its review of the local government decision (i.e., made a decision that is "unlawful in substance" or "unconstitutional"). Review of whether the LUBA order is supported by substantial evidence pertains only to findings made by LUBA based upon a record created before that board. ORS 197.850(9)(c); ORS 197.835(2). The briefs should identify and quote the portion of the LUBA order that sets out the disputed ruling.

C. It is important to make sure that your issue is preserved before LUBA. ORAP 5.45(2) states the general rule that "[n]o matter claimed as error will be considered on appeal unless the claim of error was preserved in the lower court and is assigned as error in the opening brief in accordance with this rule, provided that the appellate court may consider an error of law apparent on the face of the record."
1. An issue must be presented to LUBA in order for the board to make a ruling, and a LUBA ruling is the only matter that the Court reviews under ORS 197.850.

2. The Court will nearly always require that the same legal argument be presented to LUBA by a party that is presented to the Court on review. The Court's application of preservation rules is not always consistent. However, it is fair to conclude that the Court will always want an argument vetted before LUBA before deciding that contention in a review proceeding. The subject-matter is technical and LUBA possesses much expertise in that area of law. The advantage of that expertise is particularly important given the statutory deadlines within which to decide the appeal. ORS 197.955.

D. Pay attention to the statutory standards of review in ORS 197.850(9) in framing your assignments of error. The "unlawful in substance" standard of review is for "a mistaken interpretation of the applicable law." See Mountain W. Inv. Corp. v. City of Silverton, 175 Or App 556, 559, 30 P3d 420 (2001).

E. Much of land use litigation involves the interpretation and application of land use regulations. The Court normally uses statutory construction principles set out in ORS 174.020 as augmented by the principles announced in PGE v. Bureau of Labor and Industries, 317 Or 606, 611, 859 P2d 1143 (1993), and State v. Gaines, 346 Or 160, 170-71, 206 P3d 1042 (2009), to interpret statutes and ordinances. ORS 197.829, however, requires LUBA to give deference to a local government's interpretation of its comprehensive plan and land use regulations unless that interpretation does not meet the statutory standards for that deference. Those deference standards are similar to, but different from, the statutory construction criteria in PGE/Gaines. When LUBA applies a local government ordinance in many cases, it determines whether deference is owed, not the "correct" meaning of the ordinance. The Court of Appeals, in turn, reviews whether LUBA's application of ORS 197.829 was "unlawful in substance" under ORS 197.850(9)(a). See Western Land & Cattle, Inc. v. Umatilla County, 230 Or App 202, 214 P3d 68 (2009).

F. Conversely, when LUBA reviews a local government decision for whether the findings are supported by substantial evidence under ORS 197.835(9)(a)(C), the Court's review of LUBA's ruling is whether that determination is "unlawful in substance." What that means is that the Court will not reweigh the local government evidence for substantiality, but that it will determine whether LUBA correctly stated and applied the

G. Make sure that the Court has copies of the relevant local planning laws as part of an appendix or the excerpt of record. Your brief should also reference any online copy of the applicable land use code. You should indicate in your brief whether any online version of the local planning code is the ordinance that applied when the local government decision was made.

H. It is often helpful to include a map in the statement of facts portion of the brief.

I. You should include a copy of the local government or agency decision that was appealed to LUBA in an appendix to the brief.

J. The Court is required to issue an opinion on LUBA reviews within 91 days after oral argument. ORS 197.855(1).

V. JUDICIAL EXPERTISE IN LAND USE CASES

A. There is very limited expertise in land use law on the appellate bench. Some of the longer-serving judges have developed a good understanding of the law in this area. Only a few of the newer judges have any background in land use.

B. The Court no longer has a dedicated staff attorney for land use matters that it had in the past.

C. Land use cases consume an enormous amount of judicial resources--of clerk, staff attorney, and judge time. A LUBA review can take two to three times the work of an uncomplicated agency or civil court case. A complicated LCDC case (e.g., legislative UGB change, urban reserves decision) can easily bankrupt the system.

D. Given the limited resources and expertise of the Court, you must explain your case in plain terms and distill and simplify the legal issues on review. It is often helpful for the parties to set out the history and purpose of the relevant statutory provisions. You would be wise to avoid jargon and reduce the number of acronyms.
VI. BRIEFING THE CASE.

A. Keep it short. You will not hold the same attention of a reviewing judge with a 50-page brief as you will with a 30-page one. If you "shotgun" assignments of error, raising every conceivable claim rather than just the meritorious ones, you run the risk of a quick conclusion that all the claims lack merit.

B. Make it self-contained. As noted above, include the LUBA opinion as required by the rules, and the relevant code provisions and local government decision in an appendix.

C. The summary of argument is an important opportunity in the brief. Use it to tell the Court in a few short paragraphs why you should win.

D. Set the appropriate context by laying out the history of the local government proceedings, the briefing before LUBA, and nature of the order under review.

E. Don't make jury arguments. The Court will not be impressed and it will detract from any worthwhile points you have to make.

F. It is absolutely critical to identify the LUBA ruling at issue in the assignment of error, how the issue was preserved before LUBA, and what the appropriate standard of review is.

G. Put yourself in our place. Envision the rule of law that you wish the Court to adopt. What are its implications in other cases? How, from a judge's perspective, would you deal with your opponent's strongest arguments?

H. Lead from strength. Put your strongest arguments first when the judge is the most engaged in the brief.

I. You can run, but you can't hide. You have to directly take on LUBA's decision if you are the petitioner, and directly respond to petitioner's analysis if you are respondent.

J. Have someone else proofread the brief. Do not make obvious grammatical mistakes (it's/its, effect/affect, principal/principle, err/error). If you or your legal assistant cannot proofread, hire someone who can.

K. Format the brief with the understanding that the judges will be reading it on an iPad. As you may know, an electronic reader physically reads text differently than a
reader of text on a paper medium. Electronic readers are more likely to skim text (reading the first paragraph of a section and skimming the rest or the first sentence of a paragraph more thoroughly than the remaining sentences). Electronic readers are attracted to headings and summaries of content and structural clues to the content. You may want to consider formatting your brief in ways than enable skimming, using headings, lead-in topic sentences, bullet points, numbered lists and "chunks" of information. Focus on the readability of your brief and limiting the density of the information being presented.

VII. ORAL ARGUMENT

A. The Court is well prepared for oral argument. All of the judges have read the briefs and discussed the case in a pre-argument conference. You should expect that the judges will ask questions and that the questioning will take up much of the oral argument time. Be prepared to address your opponent's strongest points and the weaknesses in your case.

B. Because the panel is typically "hot bench," your oral argument should be distilled to communicate the core arguments to the Court. Do not feel as if you have to mention every assignment of error or response to those assignments. You will not have time.

C. Hit it hard and fast. State your core contentions in the first minute of your presentation. Let us know what you want and why you should get it.

D. Answer the questions that are asked. Except for a lack of credibility or disrespect to the Court or opposing counsel, nothing sets us off more quickly than dodging questions. If a question can be answered with a "yes" or "no," give that answer and then explain.

E. Use the Court's questions to buttress your themes. Listen to the questions that are asked of your opponent and be prepared to use them as "springboards" in any responding argument. The questions let you know what is on our minds collectively and individually.

F. Never waive oral argument in a land use case. Oral advocacy in land use cases nearly always increases the Court's understanding of the legal issues involved.

G. Do not rely on authority that is not in the written briefing. If you have additional authority, you should submit it well before argument.
H. Be respectful and courteous. Begin with "May it please the Court." When a judge speaks, stop talking. When the red light comes on, stop talking and ask permission to complete the thought.

I. Be credible. Don't misrepresent the facts or the law, and never argue outside of the record. You should concede arguments when appropriate. You gain credibility for it.

J. Don't feel as if you have to use all of your time. If you have communicated your core messages, you don't need to do more.

K. End on a high note. Have a prepared exit line, and don't slink away ambiguously or apologetically.

VIII. CONCLUSIONS

A. The essence of good advocacy in reviewing LUBA orders in the Court of Appeals is to focus on the LUBA rulings at issue, put them in context, and identify and rationalize the desired rules of law.

B. You should do that efficiently and with as little consumption of judicial resources as possible.

C. If you do that, you will gain the appreciation of the Court and your clients.
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EXCERPT FROM OREGON COURT OF APPEALS:
INTERNAL PRACTICES GUIDELINES

THE DECISION-MAKING PROCESS

Preparation for Argument

Cases are assigned to a panel of three judges before the oral argument date. Except in cases that are expedited by statute or court rule, the judges receive the briefs for an argument date between two and three weeks before argument. In expedited cases, the final briefs sometimes are not delivered to the judges until a few days before argument. Each judge reads each brief before argument; briefs are not—as in some other courts—ordinarily given to law clerks or staff attorneys for preliminary review or the preparation of bench memoranda.

Before each day of oral argument, the panel meets at a pre-argument conference to discuss the cases to be heard that day and to identify what the judges think are likely to be the important issues or any specific concerns or questions they have about a case. Cases are not assigned to a particular judge for opinion preparation at that point. As of the day of oral argument, the judges have not seen the trial court record of a case. The only material that the judges have seen at that point is what is contained in the briefs.

Decisions from the Bench

Some criminal cases are submitted on the briefs without oral argument and decided at the pre-argument conference. If the court decides to affirm without writing an opinion (AWOP), it may announce that decision from the bench at the beginning of argument; an AWOP—the acronym is used by the court both as a verb and a noun—will then be issued for that case. If the court decides to take any other action on the case, the court will announce from the bench that the case has been taken under advisement. This practice generally is limited to cases in which the defendant is represented by the Office of Public Defense Services.

Post-Argument Conference and Case Assignments

Immediately following oral argument each morning and afternoon, the panel meets again to discuss the cases that have just been heard. The judges discuss the merits of the parties’ arguments and also consider any cases that have been submitted on the briefs and put on the calendar that date.

If all three of the judges agree that a case should be affirmed, the members of the panel will discuss whether an opinion should be written. As a rule, the court will write an
opinion unless the members of the panel unanimously agree that publication of an opinion would not benefit the bench, bar, or public. Most often, the judges will agree to affirm without opinion when a case is controlled by well-established precedent or by facts that would render a published decision of limited precedential value. If a case is not AWOPed, the case is taken under advisement, and the Presiding Judge assigns the responsibility for drafting the opinion to one of the three judges on the panel. Assignments are more or less random; the court does not cultivate specialization in its case assignments. The voting on cases taken under advisement at this stage is tentative only. Panel members are free to change their votes after further reflection or review of draft opinions.

Vicing of Judges

A "vice" indicates that there has been a change in the composition of the panel judges between oral argument and decision. Vicing can occur for any number of reasons, including the illness, death, resignation, or retirement of a regular panel judge, or for administrative reasons. If the composition of the panel that heard oral argument and that decided the case is the same, no "vice" is indicated even if one of the judges on the panel is a judge pro tem. On the other hand, when a judge hears oral argument but does not participate in deciding the case, a "new" judge is viced for the judge that heard argument.

Cases on Hold or Held in Abeyance

If the panel determines that there is another case within the appellate system either before the Court of Appeals or awaiting decision by the Supreme Court that addresses the same or a similar issue, the case will be held for the other case. A panel rarely holds a case pending a decision by the Supreme Court, but one panel may hold a case pending the outcome of another Court of Appeals case. A case "On Hold" will be considered at the next department conference.

The panel may decide to hold the appeal in abeyance. If the panel does so, it issues an order placing the appeal in abeyance.

Opinion Drafting

The judge to whom a case has been assigned may personally draft an opinion without the assistance of a law clerk or staff attorney. However, the judge usually will work with his or her staff in preparing a draft opinion. In that circumstance, the judge will assign the case to a law clerk or staff attorney, who will perform necessary research, review the trial court record and exhibits, and prepare a research memorandum or draft opinion. There often is a great deal of discussion between the law clerk or staff attorney and the judge throughout the research and writing process. On receipt of the memorandum or draft
opinion, the judge then usually reviews the briefs and the research and prepares a final draft opinion for circulation to the department.

**Forms of Opinions**

A department's opinion may be "signed" or issued per curiam. An opinion is regarded as having been "signed" if the author is identified by name at the beginning of the opinion. A per curiam opinion from the Court of Appeals is simply a very short opinion; the rule of thumb is that opinions that are shorter than two full pages are issued per curiam. Whether a decision is issued per curiam has nothing to do with the importance of the case.

A signed opinion may take one of four forms: A majority, a lead, a concurring, or a dissenting opinion.

A majority opinion is just that--an opinion in which two or more of the panel's members join that announces a result and explains reasons for reaching that result. A "lead opinion" is issued when a majority of the panel agrees on a result, but not on the reasoning. The Presiding Judge generally designates one of the two judges who agree on the result to draft the lead opinion, which merely refers to the opinion that goes first in the published reporter and generally sets out the relevant facts, issues, and the like. Because the lead opinion does not command a majority of the panel, it has no precedential value.

A "concurring" opinion refers to an opinion authored by a judge who agrees with the result proposed by the majority or lead opinion but either does not agree with some or all of the reasoning or wishes to state other reasons for concurring in the result. Some courts draw a distinction between a "concurring" opinion and a "specially concurring opinion." The former generally refers to an opinion in which the authoring judge agrees with the result and the reasoning of the majority opinion, but wishes to state additional reasons for the result or to address an issue not discussed by the majority opinion. The latter generally refers to an opinion in which the authoring judge agrees with the result only and would rely on different reasoning to justify that result. The Oregon Court of Appeals does not draw that distinction and uses the term "concurring" opinion to refer to either type of opinion.

A "dissenting" opinion may be submitted by a participating judge who disagrees with the result announced in the majority or lead opinion. A judge may also dissent without opinion.
Department Conferences

Each of the court's three departments meets regularly, usually twice a month, to review and vote on draft opinions. In attendance are the three judges of the department, the Chief Judge, any other judges who are substituting for regular department members, and the staff attorneys involved with the case. A judge who has authored a draft opinion circulates the draft to the other judges on the panel that heard the case. Copies of the draft also are circulated to the department's staff attorneys and to the law clerks who work for the judges on the panel. Generally, to be eligible for consideration at a department conference, a draft must be circulated no later than four business days before the conference.

Sometimes, after reviewing the case record and performing necessary research, a judge may recommend that a case be affirmed without opinion. That judge typically will prepare a memorandum addressed to the other members of the panel explaining the recommendation.

The day after the deadline for submission of draft opinions, the Presiding Judge's judicial assistant prepares an agenda, which lists all new draft opinions that have been submitted, along with any other matters that remain under consideration by the panel.

During the following three days before conference, the judges may circulate memoranda detailing their comments or suggestions concerning any of the draft opinions on the agenda, or the judges may confer informally about the draft opinions. The Chief Judge presides over the department conference itself, but does not vote on any of the opinions unless he or she is substituting for a regular department member.

Generally, the department works its way through the agenda, discussing each draft opinion and determining whether to approve it to "go down from department." The department discusses both the form and the substance of each opinion; not infrequently, the discussion will lead to changes in the draft opinion. If all three voting members agree that the opinion--either in its original or its modified form--is acceptable, the opinion is approved to go down. If any member of the panel is not ready to cast a vote on an opinion, or if the discussion leads the author to believe that additional research or record review is necessary, the opinion is "passed" for consideration at the next department conference. The case also may be passed by the Chief Judge or by a member of the panel who wishes to prepare a concurring or dissenting opinion. If the voting on the opinion reveals that the result proposed in the draft opinion is not supported by a majority of the panel, the Presiding Judge will reassign the case to another judge.

If a case has been passed, it is customary for the judge who passed it to give that case first priority in his or her opinion drafting workload; that is, the passing judge is discouraged
from submitting new draft opinions in other cases unless he or she has resolved whatever issue led to the passing of the case at the department conference. A case may be passed only twice before the passing judge is required either to vote in favor of the opinion, submit a separate opinion, or have his or her vote (concurring or dissenting) recorded without opinion.

At the department conference, the department also considers cases that have been submitted on the briefs and have been assigned to that department by the Chief Judge. Generally, as in the case of post-argument deliberations, the department determines whether to affirm and, if so, whether to write an opinion or A WOP. If the department decides to write an opinion affirming the judgment or final order, or if the department decides to reverse, the Presiding Judge will assign the case to a member of the department.

The department also considers petitions for reconsideration and attorney fees at each department conference. If the department decides that a written opinion is necessary, generally, responsibility for the opinion is assigned to the author of the original opinion.

**Circulation of Opinions Approved to Go Down from Department; Referral to Full Court**

When an opinion--together with any concurrences or dissents--has been approved to go down from department, the opinion is circulated to all judges and all staff attorneys. Generally, that circulation occurs by the first Thursday following the department conference. If any single judge wishes to pull the opinion out of the normal publication process and place the case on the agenda for possible en banc consideration, that judge may "refer" the case to the "full court." Most often, a case will be referred to full court because the referring judge believes the draft opinion is incorrect. In addition, to the extent that different panels proposed to resolve the same issues differently, cases are referred so that any potential inconsistencies may be resolved by the full court. Finally, if an opinion approved to go down from department overrules an existing Court of Appeals precedent, the department automatically refers the case to full court. The deadline for referrals is generally the first Tuesday following circulation of the opinion.

**Staff Attorney Conference**

All of the staff attorneys meet once each week to discuss all of the opinions that have been circulated as approved to go down and are subject to referral to the full court by the deadline the following day. The staff attorneys primarily review the opinions for matters of substantive content, but may also make editorial suggestions. The suggestions of the staff attorneys are directed to the authoring judge. In general, the authoring judge may incorporate non-substantive editorial suggestions without the necessity of referring the
case back to department for review by the other judges. But, if the authoring judge is persuaded that a staff attorney suggestion of a more substantive nature necessitates redrafting of the opinion, the judge will pull the case out of the publication process and send it back to department for further consideration by the panel.

**Issuance of Opinions**

If an opinion that has been approved to go down from department has not been referred to the full court, it is prepared for publication. The process is completed during the three days following the referral deadline, i.e., by noon on Friday. First, the law clerk for the authoring judge or the staff attorney who worked on the opinion conducts a final "cite check." This entails double-checking each and every citation of authority, every quotation, and every reference to the record. Second, the authoring judge edits the opinion one final time, incorporating any non-substantive editorial suggestions from the staff attorneys or from other members of the court. Third, the law clerk or staff attorney prepares a summary if the decision is a signed opinion or a particular type of per curiam opinion, as well as substantive index entries for use in the Advance Sheets. At noon Friday, copies of the opinion are put "on the cart" and sent to the Records Section, which sends copies of the opinion to the parties the following Tuesday and releases them to the public on Wednesday. Copies of the opinion, and any other opinions or AWOPs released that day, are made available on the court's website at the same time.

The court also prepares a media release, which lists signed opinions, per curiam opinions, and AWOPs that are issued on a particular day and includes summaries of all signed opinions. The media release is available at the same time that the opinions are released to the public.
Chapter 5B

Effective Advocacy of Land Use Appeals Before LUBA

SETH KING
Perkins Coie LLP
Portland, Oregon

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II. Appeal Filing/Intervening ................................................................. 5B–2
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V. After Appeal Is Decided ................................................................. 5B–4
LUBA Caseload ................................................................................. 5B–5
LUBA Performance Measures .......................................................... 5B–7
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I. Before An Appeal is Filed – Local Proceedings

A. Build your evidentiary record

1. LUBA review generally limited to local record – ORS 197.835(2)(a)

2. Local government’s decision must be supported by substantial evidence in the whole record – ORS 197.835(9)(a)(C)

B. Preserve your issues – ORS 197.763(1), ORS 197.835(3)

1. Exception if local government failed to list all applicable approval criteria for the decision or when approval was not reasonably described in the notice – ORS 197.835(4)

2. Compare: No preservation requirement for arguments

C. Exhaust your local appeals – ORS 197.825(2)


D. If applicant, work with local government to avoid errors

1. Review content and timing of notices for legality


E. Additional requirements that may affect strategy

1. For interpretation of local code provision, type of decision-maker affects level of deference on appeal – *Gage v. City of Portland*, 319 Or 308, 317 n 7, 877 P2d 1187 (1994)

   a. Governing body – “Plausible” (deference)

   b. Hearings officer – “Reasonable and correct” (no deference)
2. Elevate Type I decision to higher level of review to provide notice
and opportunity for comment and avoid later procedural challenge

F. Obtain a favorable decision that is defensible on appeal

II. Appeal Filing/Intervening

A. Comply with deadlines

1. Generally, must file notice of intent to appeal with LUBA within 21
days after local decision becomes final – ORS 197.830(9)
   a. “Final” when committed to writing and signed unless local
code provides for later date – OAR 661-010-0010(3)
   b. Exceptions for post-acknowledgment plan amendments and
if local government makes land use decision without
providing hearing
   c. Filing date is date of receipt by LUBA unless sent by
registered or certified mail and sender retains proof of
mailing date – OAR 661-010-0015(1)(b)

2. Must intervene within 21 days after filing of notice of intent to
appeal – OAR 661-010-0050(2)

III. Briefing the Appeal

A. Follow the rules – OAR 661-010-0030, OAR 661-010-0035

1. Assignments of error

2. Standard of review – ORS 197.835(9)

3. Format – brief length, font size – LUBA Notice to Parties Regarding
Briefs

B. Make it user-friendly

1. Use headings and guideposts to organize and break up argument
2. Utilize excerpt of record/appendix

C. Follow CREACC

D. Explain why you win and why you don’t lose

E. Don’t overread cases – e.g., required interpretation v. one that is not erroneous

F. State and justify requested relief (e.g., reversal only if “prohibited as a matter of law” – OAR 661-010-0071(1)(c))

IV. Oral Argument for Appeal

A. Only available to parties who file briefs – OAR 661-010-0040(1)

B. 30 minutes per side

C. Limited to issues raised in briefs

D. Tips

1. Prepare
   a. Identify key points you want to make
   b. Anticipate questions and develop answers

2. Don’t read a script

3. Think of it as a “conversation,” not an argument

4. Manage your time, including rebuttal

5. Don’t fight hypotheticals

6. Consider use of exhibits – OAR 661-010-0040(5)

7. Be respectful
Chapter 5B—Effective Advocacy of Land Use Appeals Before LUBA

V. After Appeal is Decided

A. Attorney fees/costs

1. Attorney fees

   a. May be awarded to prevailing party against any other party LUBA finds presented a position without probable cause to believe position was well-founded in law or on factually supported information – ORS 197.830(15)(b)

   b. May be awarded to applicant against governing body if LUBA reverses with order to approve – ORS 197.835(10)

2. Costs – to prevailing party – OAR 661-010-0075(1)

B. No option for reconsideration – *Alliance for Responsible Land Use v. Deschutes County*, 23 Or LUBA 717 (1992)

C. Keep track of deadlines

1. Appeal to Court of Appeals – 21 days after mailing of LUBA final opinion and order – ORS 197.850(3)(a)

2. Remand to local government – must initiate within 180 days after effective date of final order/final resolution of judicial review or application deemed terminated – ORS 227.181(2)(a), ORS 215.435(2)(a)

**Attachments:** LUBA Caseload, LUBA Performance Measures, LUBA SB 77 Reporting
BUDGET NARRATIVE

LUBA CASES FILED

2015-17 ✓ Agency Request    ___ Governor’s Balanced    ___ Legislatively Adopted    Budget Page 6
Performance Measure 1

Potential: Issue 90% of final opinions within statutory deadlines or with no more than a 7-day stipulated delay.

<table>
<thead>
<tr>
<th>Performance Measure 1</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of Final Opinions issued:</td>
<td>104</td>
</tr>
<tr>
<td>Final Opinions issued with no more than a 7-day stipulated delay:</td>
<td>91 (88%)</td>
</tr>
</tbody>
</table>

Performance Measure 2

Potential: Issue orders on record objections within 60 days of receiving the objection 95% of the time.

<table>
<thead>
<tr>
<th>Performance Measure 2</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of Record Objections received:</td>
<td>20</td>
</tr>
<tr>
<td>Total number of Orders issued within 60 days:</td>
<td>20 (100%)</td>
</tr>
</tbody>
</table>

Performance Measure 3

Potential: Resolve all issues when reversing or remanding a land use decision in 100% of final opinions.

<table>
<thead>
<tr>
<th>Performance Measure 3</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of Final Opinions issued that reverse or remand:</td>
<td>32</td>
</tr>
<tr>
<td>Final Opinions that reverse or remand and resolve all issues:</td>
<td>32 (100%)</td>
</tr>
</tbody>
</table>

Performance Measure 4

Potential: Issue final decisions that are sustained on appeal 90% of the time.

<table>
<thead>
<tr>
<th>Performance Measure 4</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of Appellate Judgments received:</td>
<td>22</td>
</tr>
<tr>
<td>Appellate Judgments sustaining LUBA decision:</td>
<td>19 (86%)</td>
</tr>
</tbody>
</table>
Performance Measure 5

Potential: Percent of customers rating their satisfaction with the agency’s customer service as “good” or “excellent.”

<table>
<thead>
<tr>
<th>CATEGORY</th>
<th>1st qtr</th>
<th>2nd qtr</th>
<th>3rd qtr</th>
<th>4th qtr</th>
<th>5th qtr</th>
<th>6th qtr</th>
<th>7th qtr</th>
<th>8th qtr</th>
<th>To Date</th>
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<tbody>
<tr>
<td><strong>Timeliness</strong></td>
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<td></td>
<td></td>
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<td>Actual</td>
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<td>88%</td>
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<td>100%</td>
<td>97%</td>
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<td>90%</td>
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</tr>
<tr>
<td><strong>Accuracy</strong></td>
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<tr>
<td><strong>Helpfulness</strong></td>
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<tr>
<td><strong>Expertise</strong></td>
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</tr>
<tr>
<td><strong>Availability of Information</strong></td>
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</tr>
<tr>
<td>Actual</td>
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<td></td>
<td>63%</td>
<td>100%</td>
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<td>100%</td>
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<tr>
<td>Actual</td>
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<td>100%</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
<td>98%</td>
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<td>90%</td>
<td>90%</td>
<td>90%</td>
<td>90%</td>
<td>90%</td>
<td>90%</td>
</tr>
</tbody>
</table>
Calendar Year 2016  
First Quarter  
January 1, 2016 - March 31, 2016

(Disposition of Appeals--Where Petition for Review Was Filed)

<table>
<thead>
<tr>
<th>Disposition</th>
<th>Number</th>
<th>Percentage of Total</th>
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</thead>
<tbody>
<tr>
<td>Appeal Dismissed</td>
<td>5</td>
<td>38%</td>
</tr>
<tr>
<td>Appeal Transferred</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>Decision Affirmed</td>
<td>3</td>
<td>23%</td>
</tr>
<tr>
<td>Decision Remanded</td>
<td>4</td>
<td>31%</td>
</tr>
<tr>
<td>Decision Reversed</td>
<td>1</td>
<td>8%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>13</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

Disposition of All Appeals

<table>
<thead>
<tr>
<th>Disposition</th>
<th>Number</th>
<th>Percentage of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appeal Dismissed</td>
<td>18</td>
<td>58%</td>
</tr>
<tr>
<td>Appeal Transferred</td>
<td>3</td>
<td>10%</td>
</tr>
<tr>
<td>Decision Affirmed</td>
<td>4</td>
<td>13%</td>
</tr>
<tr>
<td>Decision Remanded</td>
<td>5</td>
<td>16%</td>
</tr>
<tr>
<td>Decision Reversed</td>
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<td>3%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>31</strong></td>
<td><strong>100%</strong></td>
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### General Categories of Appealed Decision

<table>
<thead>
<tr>
<th>Category</th>
<th>Number</th>
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</thead>
<tbody>
<tr>
<td>A-1/Plan Text Amendment (Nonspecific)</td>
<td>2</td>
</tr>
<tr>
<td>C-1/Land Use Regulation Text Amendment (Nonspecific)</td>
<td>3</td>
</tr>
<tr>
<td>D-1/Land Use Regulation Map Amendment (Nonspecific)</td>
<td>1</td>
</tr>
<tr>
<td>E-1/Land Division (Subdivision)</td>
<td>4</td>
</tr>
<tr>
<td>F-1/permit (Nonspecific)</td>
<td>1</td>
</tr>
<tr>
<td>F-4/permit (Conditional Use) (CUP)</td>
<td>2</td>
</tr>
<tr>
<td>F-7/permit (Planned Unit Development) (PUD)</td>
<td>3</td>
</tr>
<tr>
<td>F-9/permit (Site Plan/Design Review)</td>
<td>2</td>
</tr>
<tr>
<td>G-1/Other Decision (Nonspecific / Unknown)</td>
<td>2</td>
</tr>
<tr>
<td>G-2/Other Decision (Annexation)</td>
<td>1</td>
</tr>
<tr>
<td>G-4/Other Decision (Interpretation of Plan or Land Use Regulation)</td>
<td>2</td>
</tr>
<tr>
<td>G-9/Other Decision (Non-Conforming Use)</td>
<td>3</td>
</tr>
</tbody>
</table>

1 Number of decisions exceeds total number of appeals because some appealed decisions grant more than one approval (for example a single decision may grant a plan map amendment, zoning map amendment and a permit approval).
## Petitioners

<table>
<thead>
<tr>
<th>Name</th>
<th>No. of Appls</th>
<th>Dismiss (%)</th>
<th>Trans (%)</th>
<th>Aff’d (%)</th>
<th>Rem’d (%)</th>
<th>Rev’d (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Altamont Homeowners’ Association, Inc.</td>
<td>1</td>
<td></td>
<td></td>
<td>1 (100%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Anton Eilers, Raylene Eilers</td>
<td>1</td>
<td>1 (100%)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bethany Neighborhood Coalition</td>
<td>1</td>
<td>1 (100%)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Central Oregon Landwatch</td>
<td>5</td>
<td>5 (100%)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Chapman and Chapman LLC</td>
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<td>1 (100%)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Clean Water Services</td>
<td>1</td>
<td>1 (100%)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Donald Lieuallen, Gilberta Lieuallen</td>
<td>1</td>
<td>1 (100%)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Emerald Cove LLC</td>
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<td>1 (100%)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Environ-Metal Properties, LLC</td>
<td>1</td>
<td></td>
<td></td>
<td>1 (100%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Howard Grabhorn, Grabborn, Inc.</td>
<td>1</td>
<td></td>
<td></td>
<td>1 (100%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>J. Conser and Sons, LLC</td>
<td>1</td>
<td></td>
<td></td>
<td>1 (100%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jake Krishnan Iyer</td>
<td>1</td>
<td>1 (100%)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jeff Simonson</td>
<td>1</td>
<td>1 (100%)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jeffrey Woodward</td>
<td>2</td>
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<td></td>
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</tr>
<tr>
<td>John Gilmour</td>
<td>1</td>
<td></td>
<td></td>
<td>1 (100%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kevin Billman, Valerie Wilson</td>
<td>1</td>
<td></td>
<td></td>
<td>1 (100%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Laurel Hill Valley Citizens</td>
<td>1</td>
<td></td>
<td></td>
<td>1 (100%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Marion County Housing Authority, Silverplace Apartments, LLC, Silver Place Apartments, LLC, Silverplace Apartments, LLC</td>
<td>1</td>
<td>1 (100%)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>McLoughlin Neighborhood Association, Cameron B. McCredie, Jesse A. Buss</td>
<td>1</td>
<td>1 (100%)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Oregon Coast Alliance</td>
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<td></td>
<td>1 (100%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Paul Meyer, Kristin Meyer</td>
<td>1</td>
<td></td>
<td></td>
<td>1 (100%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Peter Nesterenko</td>
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<td>1 (100%)</td>
<td></td>
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</tr>
<tr>
<td>Rogue Advocates, Peter Storm</td>
<td>1</td>
<td>1 (100%)</td>
<td></td>
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<tr>
<td>Scott Fernandez</td>
<td>1</td>
<td></td>
<td></td>
<td>1 (100%)</td>
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</tr>
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## Respondents

<table>
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<th>Trans (%)</th>
<th>Aff’d (%)</th>
<th>Rem’d (%)</th>
<th>Rev’d (%)</th>
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## Appeals Where Attorney Fees Were Awarded

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Calendar Year 2015
Fourth Quarter
October 1, 2015 - December 31, 2015

(Disposition of Appeals--Where Petition for Review Was Filed)

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<tr>
<td>Decision Affirmed</td>
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<tr>
<td>Decision Remanded</td>
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Disposition of All Appeals

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<td>Decision Remanded</td>
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### General Categories of Appealed Decision

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<td>A-2/Plant Text Amendment (Goal Exception)</td>
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<td>B-1/Plan Map Amendment (Nonspecific)</td>
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<td>C-1/Land Use Regulation Text Amendment (Nonspecific)</td>
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<td>D-1/Land Use Regulation Map Amendment (Nonspecific)</td>
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<td>E-1/Land Division (Subdivision)</td>
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<td>F-1/Permit (Nonspecific)</td>
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<td>G-2/Other Decision (Annexation)</td>
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<td>G-6/Other Decision (Lot Line Adjustment)</td>
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1 Number of decisions exceeds total number of appeals because some appealed decisions grant more than one approval (for example a single decision may grant a plan map amendment, zoning map amendment and a permit approval).
## Petitioners

<table>
<thead>
<tr>
<th>Name</th>
<th>No. of Apps</th>
<th>Dismiss (%)</th>
<th>Trans (%)</th>
<th>Aff’d (%)</th>
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### Appeals Where Attorney Fees Were Awarded

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<th>Circumstances</th>
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Calendar Year 2015  
Third Quarter  
July 1, 2015 - September 30, 2015  

(Disposition of Appeals—Where Petition for Review Was Filed)

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Disposition of All Appeals

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## General Categories of Appealed Decision

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<td>C-1/Land Use Regulation Text Amendment (Nonspecific)</td>
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<td>F-1/Permit (Nonspecific)</td>
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1 Number of decisions exceeds total number of appeals because some appealed decisions grant more than one approval (for example a single decision may grant a plan map amendment, zoning map amendment and a permit approval).
### Petitioners

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### Appeals Where Attorney Fees Were Awarded

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Calendar Year 2015
Second Quarter
April 1, 2015 - June 30, 2015

(Disposition of Appeals--Where Petition for Review Was Filed)

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Disposition of All Appeals

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1 Number of decisions exceeds total number of appeals because some appealed decisions grant more than one approval (for example a single decision may grant a plan map amendment, zoning map amendment and a permit approval).
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### Respondents

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Chapter 6

A New Green Revolution: Marijuana’s Impacts on Oregon Land Use Planning—Presentation Slides

CORINNE CELKO
Emerge Law Group
Portland, Oregon
A New Green Revolution: Marijuana’s Impacts on Oregon Land Use Planning

Ken Helm  
Oregon State Representative

Corinne Celko  
Attorney, Emerge Law Group

Marijuana Legislation - 2015 Session

- House Bill 3400 – 2015 Or. Laws Ch. 614
- Combined with existing Oregon Medical Marijuana Act
- Now codified in ORS as chapter 475B
ORS 475B – State Land Use Regulation

- Defines marijuana as “crop” for purposes of “farm use” and “farming practice”
- Specifically excludes certain uses otherwise allowed in EFU zone under ORS chapters 195, 196, 197, and 215 when in conjunction with a marijuana crop:
  - A new dwelling
  - A farm stand
  - A commercial activity
- Requires that medical marijuana dispensaries and retail marijuana stores be at least 1,000 ft. from public or private school
- Requires locally-issued land use compatibility statement for state license

ORS 475B – Local Control

- Opt-out – gives authority to local jurisdiction to opt out of all adult use cannabis businesses and medical marijuana businesses except grow sites
  - If jurisdiction voted more than 55% against Measure 91, local government could opt out completely through ordinance until late December 2015
  - If jurisdiction voted less than 55% against Measure 91, local government could opt out through ordinance to be referred to voters at next statewide election
  - Citizens may initiate opt-out through initiative petition signed by 10% of voters
- 19 Counties and 82 Cities have opted out of OLCC licenses, of these, 7 county ordinances and 42 city ordinances will be referred to voters in November 2016
- Opt-out ordinance creates moratorium until election
- Opt-out jurisdiction will not receive any part of sales tax revenue distribution
ORS 475B – Local Control

- Local government has authority to adopt reasonable regulations to regulate time, place, and manner of marijuana businesses
- Local government may allow marijuana production in farm or forest zone in same manner as allowance in exclusive farm use zone
- Local government may prohibit establishment of adult use retail store within at maximum 1,000 ft. of existing adult use retail

2016 Session – HB 4014

- Grants authority to OLCC to adopt rules to ease barriers to entry for small farmers through “Micro canopy” license
- City or County that has adopted opt-out ordinance is not required to issue land use compatibility statement while under moratorium
- Provides mechanism for repeal of local opt-out ordinance
- If voter-referred opt-in adopted, licenses will begin issuing beginning January after election
- Allows state to enter into agreement with federally-recognized Indian tribes for coordination and enforcement for cannabis licenses issued by the tribes
2016 Session – SB 1511

- Allows for collocation of adult use and medical cannabis businesses
- Allows local jurisdiction to adopt ordinance reducing required distance between retailer or dispensary and school to 500 ft. if physical or geographic barrier present between the two

2016 Session – SB 1598

- Eliminates LUCS requirement for existing grow sites applying for OLCC producer license if:
  - Outside city limits
  - At least one current grower registered to site was so before January 1, 2015
  - Each grower registered to site was so before February 1, 2016
  - Canopy will be less than 5,000 sq. ft. outdoors or 1,250 sq. ft. indoors
- Clarifies that medical marijuana or marijuana grown for research purposes is “crop” for purposes of “farm use” and “farming practice”
2016 Session – SB 1598

- Allows a city or county to adopt nuisance regulation on farm or forest land for marijuana notwithstanding ORS 30.935
- Allows a city or county to adopt restriction or regulation on structures or farming practice on EFU land notwithstanding ORS 215.253
- Prohibits local government from adopting an ordinance after January 1, 2015, that imposes a setback requirement on an agricultural building for a building used to produce marijuana under an OLCC license if the building:
  - Was built prior to July 1, 2015 in compliance with land use and building code
  - Is located at an address registered as a medical grow site before January 1, 2015
  - Was used to produce medical marijuana before January 1, 2015
  - Has four opaque walls and a roof

Thank You!

For More Information, Contact:
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- Corinne Celko
  - Corinne@emerglawgroup.com
Chapter 7A
A Debate About Planning Tools Aimed at Affordable Housing

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Garvey Schubert Barer
Portland, Oregon

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As part of a four-bill package – SB 1533, SB 1573, HB 4143, and HB 4079 – the Speaker of the House, Tina Kotek used the short session to try and push housing advocates’ agenda forward, but the bills got hijacked by development interests. This post explores the so-called inclusionary zoning bill, Senate Bill 1533. Inclusionary zoning is a planning tool that requires new housing developments to offer a portion of the new units at affordable levels for purchase or rent.

Housing advocates never expected inclusionary zoning to singularly solve the affordable housing crisis, but hoped it would be one avenue to create equitable neighborhoods. The hope was to have affordable housing placed in all neighborhoods, near transit options, fresh food, and quality schools. But, at the end of the day, Oregon jurisdictions are left with little in the way of mandating inclusionary housing, except for possibly, the City of Portland.

In most inclusionary zoning programs across the country, the threshold sale or rent level is left to the local government to decide and is often set at 60% of the median family income as determined by the Department of Housing and Urban Development. Under SB 1533, affordable housing is defined as housing where rents are set at 80% or above of the median family income for the county in which the housing is built, and it is at that level where local governments can impose the affordability requirement. For example, in 2015, Multnomah County’s 80% median family income for a family of three was $52,950 and corresponded with rental limits for a two-bedroom unit of $1,323 per month. In comparison, the 60% median family income for a family of three in 2015 was $39,720 and rental limits for a three-bedroom unit were $1,051 per month. Thus, SB 1533 artificially reduces the populations that can be served by inclusionary zoning programs, and acts to exclude people who cannot afford $300 in additional rent per month.

The authorization under SB 1533 to impose the requirement to construct affordable units to offer to the 80% median family income group, requires that the new construction is a multi-family structure. The definition of multifamily structure is really where Senate Bill 1533 got lost in translation. The multifamily structure definition is a structure with three or more housing units sharing at least one wall, floor or ceiling surface in common with another unit. However, inclusionary zoning requirements can only be imposed on multifamily structures that contain at least 20 housing units. Most cities in Oregon do not support this kind of high density development occurring within single structures, and those that do will face development proposals that artificially reduce density below 20 units to avoid inclusionary zoning impacts.

Moreover, developers must be provided with the option of paying an “in lieu fee” to avoid building inclusionary units. This in lieu fee option further erodes the equity factor that housing advocates sought because the city or county is under no obligation
to use those fees to create housing in particular neighborhoods. Further, the efficiencies of inclusive housing are lost when the developer – schooled in construction of housing – can add units to a project at lower cost than government funded housing developments.

In addition, SB 1533 offers cities and counties the ability to impose a construction excise tax on those projects that add new residential structures or additional square footage in an existing residential structure, in residential zones; and commercial and industrial zones. The tax may not exceed the low percentage of 1% of the permit valuation for residential construction permits. However, the funds raised through the excise tax in residential zones must be used in the following manner:

- 50% to fund developer incentives for inclusionary zoning (which could include, but are not limited to, increasing the number of affordable housing units in a development and/or building affordable units for households who have qualifying incomes below 80% median family income);
- 15% distributed to the Housing and Community Services Department to fund home ownership programs; and
- 35% for programs and incentives of the city or county related to affordable housing.

Some have suggested that in those cities or counties where inclusionary zoning will never occur, the jurisdiction must still adopt an inclusionary zoning ordinance in order to adopt an excise tax for residentially zoned property, and 50% of those funds must be held aside until a qualifying project comes along. It is unclear how this provision will play out.

The use of excise tax funds raised in commercial and industrial zones are less restrictive than those funds raised in residential zones. The only restriction on the use of these funds is that 50% of the funds raised must be used for housing.

What should have been straightforward overturning of Oregon’s statutory ban on inclusionary zoning, instead became a closed loop system for multifamily developers – offering extensive incentives to entice developers to construct inclusionary units; and collecting taxes from developers and redistributing them among the very same developers through the construction excise tax. Instead of giving local governments the option to create inclusionary zoning programs that work in their neighborhoods, it is likely that only the City of Portland will be able to impose a workable inclusionary system – and it will be at least six more months before we know what the City’s program could entail.
Enrolled

Senate Bill 1533

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with presession filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Senate Interim Committee on Workforce and General Government)

AN ACT

Relating to affordable housing; creating new provisions; amending ORS 197.309, 320.170, 320.176 and 320.186 and section 1, chapter 829, Oregon Laws 2007; repealing section 9, chapter 829, Oregon Laws 2007; and prescribing an effective date.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 197.309 is amended to read:
197.309. (1) As used in this section:
(a) “Affordable housing” means housing that is affordable to households with incomes equal to or higher than 80 percent of the median family income for the county in which the housing is built.
(b) “Multifamily structure” means a structure that contains three or more housing units sharing at least one wall, floor or ceiling surface in common with another unit within the same structure.

(2) Except as provided in subsection (3) of this section, a city, county or metropolitan service district may not adopt a land use regulation or functional plan provision, or impose as a condition for approving a permit under ORS 215.427 or 227.178, a requirement, that has the effect of establishing the sales or rental price for a housing unit or residential building lot or parcel, or that requires a housing unit or residential building lot or parcel to be designated for sale or rent to any a particular class or group of purchasers or renters.

(3) This The provisions of subsection (2) of this section does do not limit the authority of a city, county or metropolitan service district to:
(a) Adopt or enforce a land use regulation, functional plan provision or condition of approval requirement creating or implementing an incentive, contract commitment, density bonus or other voluntary regulation, provision or condition requirement designed to increase the supply of moderate or lower cost housing units; or
(b) Enter into an affordable housing covenant as provided in ORS 456.270 to 456.295.

(4) Notwithstanding ORS 91.225, a city or county may adopt a land use regulation or functional plan provision, or impose as a condition for approving a permit under ORS 215.427 or 227.178 a requirement, that has the effect of establishing the sales or rental price for a new multifamily structure, or that requires a new multifamily structure to be designated for sale or rent as affordable housing.

(5) A regulation, provision or requirement adopted or imposed under subsection (4) of this section:
(a) May not require more than 20 percent of housing units within a multifamily structure to be sold or rented as affordable housing;
(b) May apply only to multifamily structures containing at least 20 housing units;
(c) Must provide developers the option to pay an in-lieu fee, in an amount determined by the city or county, in exchange for providing the requisite number of housing units within the multifamily structure to be sold or rented at below-market rates; and
(d) Must require the city or county to offer a developer of multifamily structures, other than a developer that elects to pay an in-lieu fee pursuant to paragraph (c) of this subsection, at least one of the following incentives:
   (A) Whole or partial fee waivers or reductions.
   (B) Whole or partial waivers of system development charges or impact fees set by the city or county.
   (C) Finance-based incentives.
   (D) Full or partial exemption from ad valorem property taxes on the terms described in this subparagraph. For purposes of any statute granting a full or partial exemption from ad valorem property taxes that uses a definition of “low income” to mean income at or below 60 percent of the area median income and for which the multifamily structure is otherwise eligible, the city or county shall allow the multifamily structure of the developer to qualify using a definition of “low income” to mean income at or below 80 percent of the area median income.

(6) A regulation, provision or requirement adopted or imposed under subsection (4) of this section may offer developers one or more of the following incentives:
   (a) Density adjustments.
   (b) Expedited service for local permitting processes.
   (c) Modification of height, floor area or other site-specific requirements.
   (d) Other incentives as determined by the city or county.

(7) Subsection (4) of this section does not restrict the authority of a city or county to offer developers voluntary incentives, including incentives to:
   (a) Increase the number of affordable housing units in a development.
   (b) Decrease the sale or rental price of affordable housing units in a development.
   (c) Build affordable housing units that are affordable to households with incomes equal to or lower than 80 percent of the median family income for the county in which the housing is built.

(8)(a) A city or county that adopts or imposes a regulation, provision or requirement described in subsection (4) of this section may not apply the regulation, provision or requirement to any multifamily structure for which an application for a permit, as defined in ORS 215.402 or 227.160, has been submitted as provided in ORS 215.416 or 227.178 (3), or, if such a permit is not required, a building permit application has been submitted to the city or county prior to the effective date of the regulation, provision or requirement.
   (b) If a multifamily structure described in paragraph (a) of this subsection has not been completed within the period required by the permit issued by the city or county, the developer of the multifamily structure shall resubmit an application for a permit, as defined in ORS 215.402 or 227.160, as provided in ORS 215.416 or 227.178 (3), or, if such a permit is not required, a building permit application under the regulation, provision or requirement adopted by the city or county under subsection (4) of this section.

(9)(a) A city or county that adopts or imposes a regulation, provision or requirement under subsection (4) of this section shall adopt and apply only clear and objective standards, conditions and procedures regulating the development of affordable housing units within its jurisdiction. The standards, conditions and procedures may not have the effect, either individually or cumulatively, of discouraging development of affordable housing units through unreasonable cost or delay.
   (b) Paragraph (a) of this subsection does 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.

(c) In addition to an approval process for affordable housing based on clear and objective standards, conditions and procedures as provided in paragraph (a) of this subsection, a city or county 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 developer retains the option of proceeding under the approval process that meets the requirements of paragraph (a) of this subsection;

(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 paragraph (a) of this subsection.

(10) If a regulation, provision or requirement adopted or imposed by a city or county under subsection (4) of this section requires that a percentage of housing units in a new multifamily structure be designated as affordable housing, any incentives offered under subsection (5)(d) or (6) of this section shall be related in a manner determined by the city or county to the required percentage of affordable housing units.

SECTION 2. ORS 320.170 is amended to read:

320.170. (1) [Construction taxes may be imposed by] A school district, as defined in ORS 330.005, may impose a construction tax only in accordance with ORS 320.170 to 320.189.

(2) Construction taxes imposed by a school district must be collected, subject to ORS 320.179, by a local government, local service district, special government body, state agency or state official that issues a permit for structural improvements regulated by the state building code.

SECTION 3. Section 1, chapter 829, Oregon Laws 2007, is added to and made a part of ORS 320.170 to 320.189.

SECTIONS 4. Section 1, chapter 829, Oregon Laws 2007, is amended to read:

Sec. 1. (1) A local government or local service district, as defined in ORS 174.116, or a special government body, as defined in ORS 174.117, may not impose a tax on the privilege of constructing improvements to real property except as provided in [sections 2 to 8 of this 2007 Act] ORS 320.170 to 320.189.

(2) Subsection (1) of this section does not apply to:

(a) A tax that is in effect as of May 1, 2007, or to the extension or continuation of such a tax, provided that the rate of tax does not increase from the rate in effect as of May 1, 2007;

(b) A tax on which a public hearing was held before May 1, 2007; or

(c) The amendment or increase of a tax adopted by a county for transportation purposes prior to May 1, 2007, provided that the proceeds of such a tax continue to be used for those purposes.

(3) For purposes of [this section and sections 2 to 8 of this 2007 Act] ORS 320.170 to 320.189, construction taxes are limited to privilege taxes imposed under [sections 2 to 8 of this 2007 Act] ORS 320.170 to 320.189 and do not include any other financial obligations such as building permit fees, financial obligations that qualify as system development charges under ORS 223.297 to 223.314 or financial obligations imposed on the basis of factors such as income.

SECTION 5. ORS 320.176 is amended to read:

320.176. (1) Construction taxes imposed [under ORS 320.170 to 320.189] by a school district pursuant to ORS 320.170 may be imposed only on improvements to real property that result in a new structure or additional square footage in an existing structure and may not exceed:

(a) $1 per square foot on structures or portions of structures intended for residential use, including but not limited to single-unit or multiple-unit housing; and
(b) $0.50 per square foot on structures or portions of structures intended for nonresidential use, not including multiple-unit housing of any kind.

(2) In addition to the limitations under subsection (1) of this section, a construction tax imposed on structures intended for nonresidential use may not exceed $25,000 per building permit or $25,000 per structure, whichever is less.

(3)(a) For years beginning on or after June 30, 2009, the limitations under subsections (1) and (2) of this section shall be adjusted for changes in construction costs by multiplying the limitations set forth in subsections (1) and (2) of this section by the ratio of the averaged monthly construction cost index for the 12-month period ending June 30 of the preceding calendar year over the averaged monthly construction cost index for the 12-month period ending June 30, 2008.

(b) The Department of Revenue shall determine the adjusted limitations under this section and shall report those limitations to entities imposing construction taxes. The department shall round the adjusted limitation under subsection (2) of this section to the nearest multiple of $100.

(c) As used in this subsection, “construction cost index” means the Engineering News-Record Construction Cost Index, or a similar nationally recognized index of construction costs as identified by the department by rule.

SECTION 6. ORS 320.186 is amended to read:

320.186. A school district may pledge construction taxes imposed pursuant to ORS 320.170 to the payment of obligations issued to finance or refinance capital improvements as defined in ORS 320.183.

SECTION 7. Sections 8 and 9 of this 2016 Act are added to and made a part of ORS 320.170 to 320.189.

SECTION 8. (1) The governing body of a city or county may impose a construction tax by adoption of an ordinance or resolution that conforms to the requirements of this section and section 9 of this 2016 Act.

(2)(a) A tax may be imposed on improvements to residential real property that result in a new residential structure or additional square footage in an existing residential structure, including remodeling that adds living space.

(b) An ordinance or resolution imposing the tax described in paragraph (a) of this subsection must state the rate of the tax. The tax may not exceed one percent of the permit valuation for residential construction permits issued by the city or county either directly or through the Building Codes Division of the Department of Consumer and Business Services.

(3)(a) A tax may be imposed on improvements to commercial and industrial real property, including the commercial and industrial portions of mixed-use property, that result in a new structure or additional square footage in an existing structure, including remodeling that adds living space.

(b) An ordinance or resolution imposing the tax described in paragraph (a) of this subsection must state the rate and base of the tax.

(4) Taxes imposed pursuant to this section shall be paid at the time specified in ORS 320.189 to the city or county that imposed the tax.

(5)(a) This section and section 9 of this 2016 Act do not apply to a tax described in section 1 (2), chapter 829, Oregon Laws 2007.

(b) Conformity of a tax imposed pursuant to this section by a city or county to the requirements of this section and section 9 of this 2016 Act shall be determined without regard to any tax described in section 1 (2), chapter 829, Oregon Laws 2007, that is imposed by the city or county.

SECTION 9. (1) As soon as practicable after the end of each fiscal quarter, a city or county that imposes a construction tax pursuant to section 8 of this 2016 Act shall deposit the construction tax revenues collected in the fiscal quarter just ended in the general fund of the city or county.
(2) Of the revenues deposited pursuant to subsection (1) of this section, the city or county may retain an amount not to exceed four percent as an administrative fee to recoup the expenses of the city or county incurred in complying with this section.

(3) After deducting the administrative fee authorized under subsection (2) of this section and paying any refunds, the city or county shall use the remaining revenues received under section 8 (2) of this 2016 Act as follows:

(a) Fifty percent to fund developer incentives allowed or offered pursuant to ORS 197.309 (5)(c) and (d) and (7);

(b) Fifteen percent to be distributed to the Housing and Community Services Department to fund home ownership programs that provide down payment assistance; and

(c) Thirty-five percent for programs and incentives of the city or county related to affordable housing as defined by the city or county, respectively, for purposes of this section and section 8 of this 2016 Act.

(4) After deducting the administrative fee authorized under subsection (2) of this section and paying any refunds, the city or county shall use 50 percent of the remaining revenues received under section 8 (3) of this 2016 Act to fund programs of the city or county related to housing.

SECTION 10. Section 9, chapter 829, Oregon Laws 2007, is repealed.

SECTION 11. A city or county may not adopt a regulation, provision or requirement under ORS 197.309, as amended by section 1 of this 2016 Act, until the 180th day after the effective date of this 2016 Act.

SECTION 12. This 2016 Act takes effect on the 91st day after the date on which the 2016 regular session of the Seventy-eighth Legislative Assembly adjourns sine die.
SUPREME COURT OF THE UNITED STATES

CALIFORNIA BUILDING INDUSTRY ASSOCIATION v.
CITY OF SAN JOSE, CALIFORNIA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 15–330. Decided February 29, 2016

The petition for writ of certiorari is denied.

JUSTICE THOMAS, concurring in the denial of certiorari.

This case implicates an important and unsettled issue under the Takings Clause. The city of San Jose, California, enacted a housing ordinance that compels all developers of new residential development projects with 20 or more units to reserve a minimum of 15 percent of for-sale units for low-income buyers. See San Jose Municipal Ordinance No. 28689, §§5.08.250(A), 5.08.400(A)(a) (2010). Those units, moreover, must be sold to these buyers at an “affordable housing cost”—a below-market price that cannot exceed 30 percent of these buyers’ median income. §§5.08.105, 5.08.400(A)(a); see Cal. Health & Safety Code Ann. §§50052.5(b)(1)–(4) (West 2014). The ordinance requires these restrictions to remain in effect for 45 years. San Jose Municipal Ordinance No. 28689, §5.08.600(B); Cal. Health & Safety Code Ann. §33413(C). Petitioner, the California Building Industry Association, sued to enjoin the ordinance. A California state trial court enjoined the ordinance, but the Court of Appeal reversed, and the Supreme Court of California affirmed that decision. 61 Cal. 4th 435, 351 P. 3d 974 (2015).

Our precedents in Nollan v. California Coastal Comm’n, 483 U. S. 825 (1987), and Dolan v. City of Tigard, 512 U. S. 374 (1994), would have governed San Jose’s actions had it imposed those conditions through administrative action. In those cases, which both involved challenges to administrative conditions on land use, we recognized that
governments “may not condition the approval of a land-use permit on the owner’s relinquishment of a portion of his property unless there is a ‘nexus’ and ‘rough proportionality’ between the government’s demand and the effects of the proposed land use.” *Koontz v. St. Johns River Water Management Dist.*, 570 U. S. ___, ___ (2013) (slip op., at 1) (describing Nollan/Dolan framework).

For at least two decades, however, lower courts have divided over whether the Nollan/Dolan test applies in cases where the alleged taking arises from a legislatively imposed condition rather than an administrative one. See *Parking Assn. of Georgia, Inc. v. Atlanta*, 515 U. S. 1116, 1117 (1995) (THOMAS, J., dissenting from denial of certiorari). That division shows no signs of abating. The decision below, for example, reiterated the California Supreme Court’s position that a legislative land-use measure is not a taking and survives a constitutional challenge so long as the measure bears “a reasonable relationship to the public welfare.” 61 Cal. 4th, at 456–459, and n. 11, 351 P. 3d, at 987–990, n. 11; compare ibid. with, e.g., *Home Builders Assn. of Dayton and Miami Valley v. Beavercreek*, 89 Ohio St. 3d 121, 128, 729 N. E. 2d 349, 356 (2000) (applying the Nollan/Dolan test to legislative exaction).

I continue to doubt that “the existence of a taking should turn on the type of governmental entity responsible for the taking.” *Parking Assn. of Georgia, supra*, at 1117–1118. Until we decide this issue, property owners and local governments are left uncertain about what legal standard governs legislative ordinances and whether cities can legislatively impose exactions that would not pass muster if done administratively. These factors present compelling reasons for resolving this conflict at the earliest practicable opportunity.

Yet this case does not present an opportunity to resolve the conflict. The City raises threshold questions about the timeliness of the petition for certiorari that might preclude
us from reaching the Takings Clause question. Moreover, petitioner disclaimed any reliance on *Nollan* and *Dolan* in the proceedings below. Nor did the California Supreme Court’s decision rest on the distinction (if any) between takings effectuated through administrative versus legislative action. See 61 Cal. 4th, at 461–462, 351 P. 3d, at 991–992. Given these considerations, I concur in the Court’s denial of certiorari.
Health and Safety Code section 50003, subdivision (a), currently provides: 

“The Legislature finds and declares that . . . there exists within the urban and rural areas of the state a serious shortage of decent, safe, and sanitary housing which persons and families of low or moderate income . . . can afford. This situation creates an absolute present and future shortage of supply in relation to demand . . . and also creates inflation in the cost of housing, by reason of its scarcity, which tends to decrease the relative affordability of the state’s housing supply for all its residents.”

This statutory language was first enacted by the Legislature over 35 years ago, in the late 1970s. (Stats. 1975, 1st Ex. Sess., ch. 1, § 7, pp. 3859-3861, adding Health & Saf. Code, former § 41003; Stats. 1979, ch. 97, § 2, p. 225,
amending Health & Saf. Code, § 50003.) It will come as no surprise to anyone familiar with California’s current housing market that the significant problems arising from a scarcity of affordable housing have not been solved over the past three decades. Rather, these problems have become more severe and have reached what might be described as epic proportions in many of the state’s localities. All parties in this proceeding agree that the lack of affordable housing is a very significant problem in this state.

As one means of addressing the lack of a sufficient number of housing units that are affordable to low and moderate income households, more than 170 California municipalities have adopted what are commonly referred to as “inclusionary zoning” or “inclusionary housing” programs. (Non-Profit Housing Association of Northern California, Affordable by Choice: Trends in California Inclusionary Housing Programs (2007) p. 3 (hereafter NPH Affordable by Choice).) As a 2013 publication of the United States Department of Housing and Urban Development (HUD) explains, inclusionary zoning or housing programs “require or encourage developers to set aside a certain percentage of housing units in new or rehabilitated projects for low- and moderate-income residents. This integration of affordable units into market-rate projects creates opportunities for households with diverse socioeconomic backgrounds to live in the same developments and have access to [the] same types of community services and amenities . . . .” (U.S. Dept. of Housing and Urban Development, Inclusionary Zoning and Mixed-Income Communities (Spring 2013) Evidence Matters, p. 1, fn. omitted (hereafter 2013 HUD Inclusionary Zoning)
In 2010, after considerable study and outreach to all segments of the community, the City of San Jose (hereafter sometimes referred to as the city or San Jose) enacted an inclusionary housing ordinance that, among other features, requires all new residential development projects of 20 or more units to sell at least 15 percent of the for-sale units at a price that is affordable to low or moderate income households. (The ordinance is described in greater detail in pt. II., post.)

Very shortly after the ordinance was enacted and before it took effect, plaintiff California Building Industry Association (CBIA) filed this lawsuit in superior court, maintaining that the ordinance was invalid on its face on the ground that the city, in enacting the ordinance, failed to provide a sufficient evidentiary basis “to demonstrate a reasonable relationship between any adverse public impacts or needs for additional subsidized housing units in the City ostensibly caused by or reasonably attributed to the development of new

1 The 2013 HUD article further explains that inclusionary zoning or housing programs “vary in their structure; they can be mandatory or voluntary and have different set-aside requirements, affordability levels, and control periods. Most [inclusionary zoning] programs offer developers incentives such as density bonuses, expedited approval, and fee waivers to offset some of the costs associated with providing the affordable units. Many programs also include developer opt-outs or alternatives, such as requiring developers to pay fees or donate land in lieu of building affordable units or providing the units offsite. Studies show that mandatory programs produce more affordable housing than voluntary programs, and developer opt-outs can reduce opportunities for creating mixed-income housing. At the same time, [inclusionary zoning’s] reliance on the private sector means that its effectiveness also depends on the strength of a locality’s housing market, and researchers acknowledge that a certain degree of flexibility is essential to ensuring the success of [inclusionary zoning] programs.” (2013 HUD Inclusionary Zoning, supra, at p. 1, fns. omitted.)
residential developments of 20 units or more and the new affordable housing exactions and conditions imposed on residential development by the Ordinance.” The complaint maintained that under the “controlling state and federal constitutional standards governing such exactions and conditions of development approval, and the requirements applicable to such housing exactions as set forth in San Remo Hotel v. City and County of San Francisco (2002) 27 Cal.4th 643, and Building Industry Assn. of Central California v. City of Patterson (2009) 171 Cal.App.4th 886” the conditions imposed by the city’s inclusionary housing ordinance would be valid only if the city produced evidence demonstrating that the requirements were reasonably related to the adverse impact on the city’s affordable housing problem that was caused by or attributable to the proposed new developments that are subject to the ordinance’s requirements, and that the materials relied on by the city in enacting the ordinance did not demonstrate such a relationship. Although the complaint did not explicitly spell out the specific nature of its constitutional claim, CBIA has subsequently clarified that its challenge rests on “the unconstitutional conditions doctrine, as applied to development exactions” under the takings clauses (or, as they are sometimes denominated, the just compensation clauses) of the United States and California Constitutions. CBIA’s challenge is based on the premise that the conditions imposed by the San Jose ordinance constitute “exactions” for purposes of that doctrine. The superior court agreed with CBIA’s contention and issued a judgment enjoining the city from enforcing the challenged ordinance.

The Court of Appeal reversed the superior court judgment, concluding that the superior court had erred (1) in finding that the San Jose ordinance requires a developer to dedicate property to the public within the meaning of the takings clause, and (2) in interpreting the controlling constitutional principles and the decision in San Remo Hotel v. City and County of San Francisco, supra, 27
Cal. 4th 643 (San Remo Hotel), as limiting the conditions that may be imposed by such an ordinance to only those conditions that are reasonably related to the adverse impact the development projects that are subject to the ordinance themselves impose on the city’s affordable housing problem. Distinguishing the prior appellate court decision in Building Industry Assn. of Central California v. City of Patterson, supra, 171 Cal. A pp. 4th 886 (City of Patterson), the Court of Appeal held that the appropriate legal standard by which the validity of the ordinance is to be judged is the ordinary standard that past California decisions have uniformly applied in evaluating claims that an ordinance regulating the use of land exceeds a municipality’s police power authority, namely, whether the ordinance bears a real and substantial relationship to a legitimate public interest. The Court of Appeal concluded that the matter should be remanded to the trial court for application of this traditional standard.

CBIA sought review of the Court of Appeal decision in this court, maintaining that the appellate court’s decision conflicts with the prior Court of Appeal decision in City of Patterson, supra, 171 Cal. A pp. 4th 886, and that City of Patterson was correctly decided and should control here. We granted review to determine the soundness of the Court of Appeal’s ruling in this case.

For the reasons discussed below, we conclude that the Court of Appeal decision in the present case should be upheld. As explained hereafter, contrary to CBIA’s contention, the conditions that the San Jose ordinance imposes upon future developments do not impose “exactions” upon the developers’ property so as to bring into play the unconstitutional conditions doctrine under the takings clause of the federal or state Constitution. Furthermore, unlike the condition that was at issue in San Remo Hotel, supra, 27 Cal. 4th 643, and to which the passage in that opinion upon which CBIA relies was addressed — namely, an in lieu monetary fee that is imposed to mitigate a particular adverse effect of the
development proposal under consideration — the conditions imposed by the San Jose ordinance at issue here do not require a developer to pay a monetary fee but rather place a limit on the way a developer may use its property. In addition, the conditions are intended not only to mitigate the effect that the covered development projects will have on the city’s affordable housing problem but also to serve the distinct, but nonetheless constitutionally legitimate, purposes of (1) increasing the number of affordable housing units in the city in recognition of the insufficient number of existing affordable housing units in relation to the city’s current and future needs, and (2) assuring that new affordable housing units that are constructed are distributed throughout the city as part of mixed-income developments in order to obtain the benefits that flow from economically diverse communities and avoid the problems that have historically been associated with isolated low income housing. Properly understood, the passage in San Remo Hotel upon which CBIA relies does not apply to the conditions imposed by San Jose’s inclusionary housing ordinance.

Accordingly, we conclude that the judgment of the Court of Appeal in this case should be affirmed.
Chapter 7A—A Debate About Planning Tools Aimed at Affordable Housing

City of Happy Valley
Planning Commission
16000 SE Misty Drive
Happy Valley, OR 97086

January 19, 2016

RE: “EAGLES LOFT ESTATES”
COMPREHENSIVE PLAN MAP/ZONING MAP AMENDMENT (CPA-14-15/LDC-15-15); 31-LOT SUBDIVISION (SUB-03-15); AND VARIANCE (VAR-08-15)

Dear Planning Commissioners:

This letter is jointly submitted by the Fair Housing Council of Oregon (FHCO) and Housing Land Advocates (HLA). Both FHCO and HLA are Oregon non-profit organizations that advocate for land use policies and practices that ensure an adequate and appropriate supply of affordable housing for all Oregonians.

For the reasons set forth below, we request that the proposed comprehensive plan and zoning amendments be denied, together with the subdivision and variance applications that depend on those amendments.

1. The proposed amendments do not comply with Oregon’s Needed Housing Statutes, with Oregon’s Statewide Housing Goal (Goal 10) and Planning Goal (Goal 2), or with LCDC’s interpretive rules.

ORS 197.307(6) provides that local governments cannot adopt standards that have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.

ORS 197.303(3) provides that, when a need has been shown for housing of particular ranges and rent levels, such 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.

The record lacks evidence sufficient to enable the city to determine, among other things, the city’s current state of compliance or noncompliance with these statutes, such as the city’s housing needs, the relevant buildable lands inventories, how the current designation addresses existing and projected needs, the city’s fair share of regional housing needs and supplies, and other information necessary to establish that the proposed amendments will not have the effects proscribed by ORS 197.307(6) and that city will either remain in compliance or not slip further out of compliance as a result of the proposed amendments and variances.

The City’s decision does not comply with Goal 10 requirements that land use regulations related to housing must be based on an inventory of buildable lands. Goal 10 requires the city:
“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.”

Goal 10 requires local governments to inventory their buildable land, identify needed housing, and designate and zone enough buildable land to satisfy the identified housing need. Burk v. Umatilla County, 20 Or LUBA 54 (1990). See also, McIntyre-Cooper Co. v. Board of Comm. Washington County, 2 Or LUBA 126, 129 (1980), aff'd, 55 Or App 78, rev'd, 292 Or 589 (1981). The burden of proving that housing needs are met by the land use regulation rests with the City. Gann v. City of Portland, 12 Or LUBA 1, 4 (1984).

When a city with an acknowledged comprehensive plan and implementing ordinances amends its implementing ordinances to downzone or impose other substantial restrictions on lands within its acknowledged Goal 10 land supplies, the city must demonstrate that its actions do not leave it with less than adequate supplies in the types, locations, and affordability ranges affected. Opus Development v. City of Eugene, 28 Or LUBA 670 (1995) (Opus I); 30 Or LUBA 360, 373(1996) (Opus II), aff'd 141 Or App 249, 918 P2d 116 (1996) (Opus III); Volny v. City of Bend, 37 Or LUBA at 510-11; Mulford v. Town of Lakeview, 36 Or LUBA 715, 731 (1999) (re zoning residential land for industrial uses); Gresham v. Fairview, 3 Or LUBA 219 (same); Home Builders Assn. of Lane County v. City of Eugene, 41 Or LUBA 370, 422 (2002) (subjecting Goal 10 inventories to tree and waterway protection zones of indefinite quantities and locations).

Further, OAR 660-008-0010 provides LCDC’s interpretation of Goal 10 Housing specific to Portland Metro and its planning jurisdictions:

“The mix and density of needed housing is determined in the housing needs projection. Sufficient buildable land shall be designated on the comprehensive plan map to satisfy housing needs by type and density range as determined in the housing needs projection. The local buildable lands inventory must document the amount of buildable land in each residential plan designation.”

LCDC’s generally-applicable housing interpretive rule defines “housing needs projection” as:

“[a] local determination, justified in the plan, as to the housing types, amounts and densities that will be: (a) Commensurate with the financial capabilities of present and future area residents of all income levels during the planning period; (b) consistent with OAR 660-007-0010 through 660-007-0037 and any other adopted regional housing standards; and (c) consistent with Goal 14 requirements for the efficient provision of public facilities and services, and efficiency of land use.” OAR 660-007-0005(5)
OAR 660-007-0005(6) defines "Multiple Family Housing" as "attached housing where each dwelling unit is not located on a separate lot."

OAR 660-007-0005(7) defines "Needed Housing" as follows:

"‘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, including at least the following housing types:

(a) Attached and detached single-family housing and multiple family housing for both owner and renter occupancy; . . . ‘"

Nowhere in the record is there any evidence concerning or reasoned analysis of these statutes, goals, and rules, of Happy Valley or Portland Metro’s buildable land inventories, housing needs projections, fair share allocations, housing and coordination policies, or of their application to these proposed amendments and entitlements.

Such analysis and evidentiary support is essential. In one of its earliest affordable housing opinions, Kneebone v. Ashland, 3 LCDC 131 (1979), the LCDC remanded a City of Ashland ordinance downzoning needed residential lands because the city’s record failed to demonstrate that the downzoning would not reduce Ashland’s supply of lands for needed housing in violation of the statewide housing goal. In its opinion, LCDC reminded Oregon’s local governments that

"Planning decisions must meet the standards set by the goals. Insofar as compliance depends upon specific, ascertainable fact, compliance must be shown by substantial evidence in the record. Insofar as compliance depends upon value judgments and policy, compliance must be shown by a coherent and defensible statement of reasons relating the policies stated or implied in the goals to the policies of the planning jurisdiction." 3 LCDC at 124

LCDC’s Metro Housing Rule, at OAR 660-008-0060, provides as follows:

“(2) For plan and land use regulation amendments which are subject to OAR 660, Division 18 [Post-Acknowledgment Plan and Zoning Amendments, or PAPAs], the local jurisdiction shall either:

(a) Demonstrate through findings that the mix and density standards in this Division are met by the amendment; or

(b) Make a commitment through the findings associated with the amendment that the jurisdiction will comply with provisions of this Division for mix or density through subsequent plan amendments.”

The city has not made, and almost certainly cannot make, either the demonstration called for in subsection (a) or the commitment called for in subsection (b), both of which would require a
showing of surpluses in supplies over projected needs, supported by the kind of reasoned analysis and evidentiary support that LCDC required in Kneebone. Given the current shortage of buildable, available, affordable lands planned and zoned for multi-family housing in Happy Valley, its sub-region, and Portland Metro as a whole, FHCO and HLA do not believe that the requisite demonstrations can be made at this time or in the foreseeable future.

2. **The proposed amendments do not comply with the intergovernmental coordination requirements of LCDC’s statewide Goals 2 (Land Use Planning) and 10 (Housing) because the city failed to coordinate its actions with all other affected governmental units.**

There is no evidence in the record of this proceeding that the Oregon Department of Land Conservation and Development, Portland Metro, as regional coordinator, or other nearby jurisdictions such as Gresham, Portland, Clackamas County, and Oregon City, have agreed to increase their share of comparably planned, zoned, serviced, and located land or that Happy Valley has made any efforts to coordinate with them concerning their ability and willingness to accommodate the reallocation of housing need effected by the proposed amendments. See Creswell Court v. City of Creswell, 35 Or LUBA 234 (1998); 1,000 Friends of Oregon v. North Plains, 27 Or LUBA 371, aff’d 130 Or App 406, 991 P2d 1130 (1994).

3. **The proposed amendments and variances are inconsistent with the City of Happy Valley’s Comprehensive Plan.**

Applicable Happy Valley Comprehensive Plan Policies that are not addressed adequately or at all to date include the following:

- **Policy 8:** To assume proportionate responsibility for development within the City of Happy Valley consistent with projected population for the City.

- **Policy 42:** To increase the supply of housing to allow for population growth and to provide for the housing needs of a variety of citizens of Happy Valley.

- **Policy 43:** To develop housing in areas that reinforce and facilitate orderly and compatible community development.

- **Policy 44:** To provide a variety of lot sizes, a diversity of housing types including single family attached (townhouses) duplexes, senior housing and multiple family and range of prices to attract a variety of household sizes and incomes to Happy Valley.

- **Policy 45:** The City shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels that are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density.

- **Policy 46:** The City shall provide a range of housing that includes land use districts that allow senior housing, assisted living and a range of multi-family housing products. This
range improves housing choice for the elderly, young professionals, single households, families with children, and other household types.

Before the city can approve the amendments and the related subdivision and variance entitlements, you must be able to find that the applicant has proven by a preponderance of the evidence that all of the above policies have been satisfied. HLA simply does not believe this is possible given the current state of affordable housing need and supply in Happy Valley, its sub-region of Portland Metro, and Portland Metro as a whole.

4. The proposed amendments and variances are inconsistent with Metro’s Functional Plan.

The applicant has not demonstrated compliance with Title I of the Metro Urban Growth Management Functional Plan, which requires each city to maintain or increase its housing capacity. FHCO and HLA do not believe that the applicant can meet this requirement because the requested zone change would reduce the city’s housing capacity with respect to scarce needed housing types, densities, location, and affordability ranges.

5. The proposed amendments risk violation of federal fair housing requirements.

HLA believes that any action by the City that results in a reduction in housing diversity and affordability could violate the city’s obligation to affirmatively further fair housing under them Federal fair Housing Act, 42 U.S.C. §§ 5304(b)(2), 5306(d)(7)(B), 12705(b)(15), 1437C-1(d)(16).

The Fair Housing Act (the Act) declares that it is “the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.” It does so by prohibiting discrimination in the sale, rental, and financing of dwellings, and in other real estate-related transactions because of race, color, religion, sex, familial status, national origin, or disability. In addition, the Fair Housing Act requires that HUD administer programs and activities relating to housing and urban development in a manner that affirmatively furthers the policies of the Act.

Courts have examined the legislative history of the Fair Housing Act and related statutes. They have found that the purpose of the affirmatively furthering fair housing mandate is to ensure that recipients of Federal housing and urban development funds do more than simply not discriminate: recipients also must address segregation and related barriers for groups with characteristics protected by the Act, including segregation and related barriers in racially or ethnically concentrated areas of poverty. In the 1972 Supreme Court case, Trafficante v. Metropolitan Life Insurance Company, 409 U.S. 205, 211 (1972), the Court quoted the Act’s co-sponsor, Senator Walter F. Mondale, in noting that the Fair Housing Act was enacted by Congress to replace the racially or ethnically concentrated areas that were once called “ghettos” with “truly integrated and balanced living patterns.” In 2015, in Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc., 576 U.S. ___ (2015), the Supreme Court again acknowledged the Fair Housing Act’s continuing role in moving the Nation toward a more integrated society, holding that disparate impacts on protected classes, whether intended or not, can result in violations of the Act.
High concentrations of wealth appear to be a proxy for exclusionary zoning practices in Happy Valley. As reported on June 23, 2015, in the Oregonian, Happy Valley is the “richest town” in Oregon. See Exhibit A attached here. This raises concerns about the city’s ability to comply with the Act. The Clackamas County Consolidated Plan (“Con Plan” available at http://www.clackamas.us/communitydevelopment/documents/conplan_final.pdf - pages referred to below are attached as Exhibit B) shows that Happy Valley’s population growth between 2000-2010 was 208%, and in 2010, 76% of the population was white. See Con. Plan p. 26 and 31.
Poverty has increased in the County by 10.4% between 2000 and 2010 and nearly half of female householders with young children under 5 (a protected class) lived in poverty. Id. at 53.
Notwithstanding this crisis, Happy Valley’s housing supply consists almost exclusively of single family units. Id. at 55. Downzoning the subject property will continue the trend of ignoring the need for affordable housing in areas of opportunity, such as Happy Valley.

Thank you for your consideration. Please provide written notice of your decision, to FHCO and HLA, c/o Louise Dix, at 1221 SW Yamhill Street, Portland, OR 97205.

Louise Dix
Fair Housing Council of Oregon

Jennifer Bragar, President
Housing Land Advocates

GSB:7496250.1 [30187.00129]
Exhibit A is a copy of an Oregonian/OregonLive.com article, “‘Richest Town in Oregon’ May Surprise You,” discussing a 24/7 Wall St. post (http://247wallst.com/special-report/2015/06/17/the-richest-town-in-each-state/) listing the richest towns in each state. The top town is Happy Valley; at the other end of the spectrum is Prineville. Below is a link to the article:

2012-2016 CONSOLIDATED PLAN
FOR HOUSING AND
COMMUNITY DEVELOPMENT

CLACKAMAS COUNTY
COMMUNITY DEVELOPMENT DIVISION

April 2012

EXHIBIT B
A few examples illustrate the rich history of the County and its cities. Canby, in its early days, boasted an abundant crop of wild strawberries. Early settlers grew apples to ship to gold miners in California. Canby remains a rich agricultural area today. Speculation in real estate in the late 1800s in Gladstone, followed by an auditorium seating 3,000 people in 1895 brought people from all around for “concerts, ball games and sermons by evangelists such as John Phillip Sousa, Billy Sunday and William Jennings Bryant.”

Oregon City is the oldest city, as mentioned above, and is located at the end of the Oregon Trail. Before that settlement though, the area had been a focal point for fishing and trade among Native Americans. Early fur traders were gradually replaced by more permanent settlers, including missionaries in the 1830s and steamboat transportation in the 1850s which fostered transportation of agricultural and timber products spurred by the needs of the gold rush in California. Population and industry in the County continued to grow and diversify. Wilsonville is a relatively new city in the County and is home to several modern corporate headquarters.

**POPULATION**

Population Growth

<table>
<thead>
<tr>
<th>Location</th>
<th>1990</th>
<th>2000</th>
<th>2010</th>
<th>Change 2000-2010</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oregon</td>
<td>2,842,321</td>
<td>3,421,399</td>
<td>3,831,074</td>
<td>12%</td>
</tr>
<tr>
<td>Clackamas County</td>
<td>278,850</td>
<td>338,391</td>
<td>375,992</td>
<td>11%</td>
</tr>
<tr>
<td>Barlow</td>
<td>118</td>
<td>140</td>
<td>135</td>
<td>-4%</td>
</tr>
<tr>
<td>Canby</td>
<td>8,990</td>
<td>12,790</td>
<td>15,829</td>
<td>24%</td>
</tr>
<tr>
<td>Damascus</td>
<td></td>
<td></td>
<td>10,539</td>
<td>n/a</td>
</tr>
<tr>
<td>Estacada</td>
<td>2,016</td>
<td>2,371</td>
<td>2,695</td>
<td>14%</td>
</tr>
<tr>
<td>Gladstone</td>
<td>10,152</td>
<td>11,438</td>
<td>11,497</td>
<td>1%</td>
</tr>
<tr>
<td>Happy Valley</td>
<td>1,519</td>
<td>4,519</td>
<td>13,903</td>
<td>208%</td>
</tr>
<tr>
<td>Johnson City</td>
<td>586</td>
<td>634</td>
<td>566</td>
<td>-11%</td>
</tr>
<tr>
<td>Lake Oswego*</td>
<td></td>
<td>35,278</td>
<td>36,619</td>
<td>4%</td>
</tr>
<tr>
<td>Milwaukie</td>
<td>18,670</td>
<td>20,490</td>
<td>20,291</td>
<td>-1%</td>
</tr>
<tr>
<td>Molalla</td>
<td>3,637</td>
<td>5,647</td>
<td>8,108</td>
<td>44%</td>
</tr>
<tr>
<td>Oregon City</td>
<td>14,698</td>
<td>25,754</td>
<td>31,859</td>
<td>24%</td>
</tr>
<tr>
<td>Rivergrove*</td>
<td></td>
<td>324</td>
<td>289</td>
<td>-11%</td>
</tr>
<tr>
<td>Sandy</td>
<td>4,154</td>
<td>5,385</td>
<td>9,570</td>
<td>78%</td>
</tr>
<tr>
<td>West Linn</td>
<td>16,389</td>
<td>22,261</td>
<td>25,109</td>
<td>13%</td>
</tr>
<tr>
<td>Wilsonville*</td>
<td>13,991</td>
<td>19,509</td>
<td>39%</td>
<td></td>
</tr>
</tbody>
</table>

*Portland and Tualatin not included, although portions lie in the County.
**Data provided for entire city, although part outside Clackamas County.
Source: U.S. Census; Portland State University, Population Research Center

Clackamas County population grew by 11% between 2000 and 2010, according to the census, which was about half the rate of growth as that a decade earlier (21% change from 1990 to 2000). These rates are similar to those in Oregon State for the same periods. The change in individual cities is much more varied. Some cities shown in Table 1 had not been incorporated in 1990 and Damascus was not incorporated until after the 2000 census.

In addition to the cities shown in the Table 1, small portions of Tualatin and Portland lie in Clackamas County, but are not considered separately in this document. Several areas in the County are recognized under the Hamlets and Villages program, which is a grassroots, citizen-driven program developed by the County. The hamlets are Beavercreek, Molalla Prairie, Mulino and Stafford and the single village is the Villages at Mt. Hood. Clackamas County is a mixture of urban and rural. Agriculture is

1 (www.oregon.com)
Table 6: Race 2010

<table>
<thead>
<tr>
<th>Location</th>
<th>White</th>
<th>Black/African Am.</th>
<th>AK Native/Am. Indian</th>
<th>Asian</th>
<th>Other</th>
<th>Multiple</th>
<th>Total Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oregon</td>
<td>84%</td>
<td>2%</td>
<td>1%</td>
<td>4%</td>
<td>6%</td>
<td>4%</td>
<td>3,831,074</td>
</tr>
<tr>
<td>Clackamas County</td>
<td>88%</td>
<td>1%</td>
<td>1%</td>
<td>4%</td>
<td>3%</td>
<td>3%</td>
<td>375,992</td>
</tr>
<tr>
<td>Barlow</td>
<td>81%</td>
<td>1%</td>
<td>1%</td>
<td>0%</td>
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<td>4%</td>
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<tr>
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<td>1%</td>
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</tr>
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<td>91%</td>
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<td>1%</td>
<td>3%</td>
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<tr>
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<td>3%</td>
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<tr>
<td>Gladstone</td>
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<td>1%</td>
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<tr>
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<td>1%</td>
<td>3%</td>
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<td>2%</td>
<td>3%</td>
<td>4%</td>
<td>20,291</td>
</tr>
<tr>
<td>Mollala</td>
<td>87%</td>
<td>1%</td>
<td>1%</td>
<td>1%</td>
<td>8%</td>
<td>3%</td>
<td>8,108</td>
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<td>3%</td>
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<tr>
<td>Rivergrove</td>
<td>94%</td>
<td>0%</td>
<td>0%</td>
<td>3%</td>
<td>&lt;1%</td>
<td>2%</td>
<td>289</td>
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<tr>
<td>Sandy</td>
<td>90%</td>
<td>&lt;1%</td>
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<td>3%</td>
<td>9,570</td>
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<tr>
<td>West Linn</td>
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<td>1%</td>
<td>&lt;1%</td>
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<td>1%</td>
<td>3%</td>
<td>25,109</td>
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<tr>
<td>Wilsonville</td>
<td>85%</td>
<td>2%</td>
<td>1%</td>
<td>4%</td>
<td>5%</td>
<td>3%</td>
<td>19,509</td>
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*Race alone; may also be Hispanic.
Source: 2010 U.S. Census

Table 7: Ethnicity 2010

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<tr>
<th>Location</th>
<th>Hispanic</th>
<th>Non-Hispanic</th>
<th>Total Population</th>
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<td>96%</td>
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<tr>
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<td>8%</td>
<td>92%</td>
<td>2,695</td>
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<tr>
<td>Gladstone</td>
<td>9%</td>
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<tr>
<td>Johnson City</td>
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<td>566</td>
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<td>Lake Oswego</td>
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<td>Milwaukie</td>
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<td>14%</td>
<td>86%</td>
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<td>Rivergrove</td>
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</tr>
<tr>
<td>Wilsonville</td>
<td>12%</td>
<td>88%</td>
<td>19,509</td>
</tr>
</tbody>
</table>

*May be of any race.
Source: 2010 U.S. Census

Table 7 shows 2010 data on ethnicity of County residents, along with residents of Oregon and cities in Clackamas County. Of the more populated cities, Canby and Molalla had the highest percentages of Hispanic/Latino residents (21% and 14% respectively).
## Lower education levels are associated with higher unemployment and lower wages:
- Less than high school diploma: median earnings $444/week; unemployment 14.9.
- High school diploma: median earnings $626/week; unemployment rate 10.3.
- 4-year degree: median earnings $1,038/week; unemployment rate 5.4.

## Job losses since 2007 have been greatest and gains lowest for less-educated workers. The trends are predicted to continue – to be “far reaching and long lasting” and to “mark a dramatic shift away from low-skilled labor.”

## Unemployment is highest for young people (< 25) and higher still for minority youth. Youth may feel more pressured to work than enroll in college, or to work and enroll part-time, which increases the time and barriers to a college degree.

## Overall 91% of County residents age 25 and over had a high school degree or better; yet, just 58% of Hispanics had a high school degree or better.

## 12% of 2009-2010 graduating class in 10 districts in Oregon dropped out of school and did not graduate with their class.

## Failure to graduate affects both the student and the community: Cutting the number of students who dropped out in Oregon (from 11,800) would result in: $59 million in increased annual earnings, $44 million in annual spending and $72 million in economic growth.

### Income/Poverty

- Median household income in Clackamas County ($62,030) was higher than in Oregon, but there was substantial differences in cities – from $100,510 in Happy Valley and $89,118 in West Linn to just $23,438 in Johnson City and $36,713 in Estacada.
- Low income households are struggling: 17% of County households have incomes <$25,000; 26% of County households have incomes <$35,000.
- Poverty has increased in the County – 6.7% of the population lived in poverty in 2000 and by 2010 the estimate had risen to 10.4%. Nearly half of female householders with young children under 5 lived in poverty.
- Rise in poverty and unemployment is accompanied by more doubled up households and more adult children living at home.
- Federal poverty (FPL) thresholds underestimate the income needed to live:
  - Single adult with 1 preschooler needs $44,337 to meet basics (301% of FPL)
  - TANF for single parent in family of 3 in Oregon was $485 as of July 2010
Table 25 shows types of units within the County’s incorporated cities, as estimated in the 2005-2009 American Community Survey. While 72% of units in the County were single family (attached or detached), this varied by city. Notably, the cities of Barlow, Damascus, Happy Valley and Rivergrove had almost exclusively single family units. Wilsonville had a slight majority of multifamily units and the majority of units in Johnson City were mobile homes.

**Table 25: Type Units by City**

<table>
<thead>
<tr>
<th>Location</th>
<th>Total Units</th>
<th>Type of Unit</th>
<th>Single Family*</th>
<th>Multi-family</th>
<th>Other**</th>
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<tr>
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<tr>
<td>Canby</td>
<td>5,890</td>
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<td>72%</td>
<td>22%</td>
<td>6%</td>
</tr>
<tr>
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<td>92%</td>
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<td>8%</td>
</tr>
<tr>
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<td>1,155</td>
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<td>62%</td>
<td>30%</td>
<td>9%</td>
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<tr>
<td>Gladstone</td>
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</tr>
<tr>
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<td>4,708</td>
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<td>0%</td>
</tr>
<tr>
<td>Johnson City</td>
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<td>4%</td>
<td>0%</td>
<td>96%</td>
</tr>
<tr>
<td>Lake Oswego</td>
<td>16,995</td>
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<td>72%</td>
<td>28%</td>
<td>&lt;1%</td>
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<tr>
<td>Milwaukie</td>
<td>9,138</td>
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<td>68%</td>
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<tr>
<td>Molalla</td>
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<td>77%</td>
<td>17%</td>
<td>6%</td>
</tr>
<tr>
<td>Oregon City</td>
<td>12,900</td>
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<td>71%</td>
<td>25%</td>
<td>4%</td>
</tr>
<tr>
<td>Rivergrove</td>
<td>133</td>
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</tr>
<tr>
<td>Sandy</td>
<td>3,768</td>
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<td>73%</td>
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<tr>
<td>West Linn</td>
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<td>83%</td>
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</tr>
<tr>
<td>Wilsonville</td>
<td>8,487</td>
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<td>46%</td>
<td>51%</td>
<td>3%</td>
</tr>
</tbody>
</table>

*Detached and attached.  
**Mobile homes, boat, RV, van, etc.  
Source: 2010 Census (total); 2005-2009 American Community Survey (type of units)

Mobile homes accounted for 7% of housing units in Clackamas County (Table 21). Mobile homes can be an affordable housing option for lower income households, both as rentals and as owner-occupied units. Mobile home parks (manufactured home parks) sometimes sit on land attractive for redevelopment. The condition of some of the units constructed prior to the 1978 revised national standards may have deteriorated rendering them unsuitable for rehabilitation.

Still, a recent study of several manufactured home parks (MFH) in Clackamas County found that, in light of better quality of current construction, continued steps to preserve MFH is warranted and suggests additional steps to sustain this affordable housing option.\(^7\) The parks included in the study were in three locations along transportation corridors in unincorporated Clackamas County and represented 23% of mobile homes in the County. Park closures for redevelopment displace low-income individuals and families. Three parks closures in Clackamas County since 1999 displaced 349 tenants, including many elderly tenants.

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Lisa Smith  
1840 Second Street  
Columbia City, OR 97018

RE: Fair Housing Council and Housing Land Advocates Comments on Ordinance Amending Columbia City’s Development Code 7.50, High Density Residential Zone

September 1, 2015

Dear Ms. Smith,

This letter is jointly submitted on behalf of the Fair Housing Council of Oregon (FHCO) and Housing Land Advocates (HLA). Both FHCO and HLA are non-profit organizations that advocate for land use policies and practices that ensure an adequate and appropriate supply of affordable housing for all Oregonians. Please include these comments in the record for the legislative file in the above-referenced matter.

FHCO and HLA would ordinarily support, or at least not object to, a Post Acknowledgment Plan Amendment (“PAPA”) proposed by Columbia City to allow more than one building on R-3 zoned lots where multi-family developments and residential care facilities are proposed. However, the staff report’s findings in relation to Goal 10 do not provide a full analysis of the effects of this proposal or the City’s ability to meet its Goal 10 obligations.

The staff report’s Goal 10 findings state

“The Columbia City Comprehensive Plan addresses the need for residential properties in the City’s urban growth boundary while recognizing the constraints on residential development including topography, proximity to St. Helens urban growth boundary and previous commitments to conflicting uses. The proposed amendment establishes the development standards for multi-family residential while ensuring that such construction is compatible with the desired character and livability of Columbia City’s residential zones.”

But, the staff report fails to examine the County’s needed housing requirements. The Comprehensive Plan describes that the City needs 402 more units than existed in 2000 to meet the housing needs over the planning horizon. The breakdown of the housing needs projected for 2009 was 306 single-family, 68 multi-family units, and 28 manufactured homes. The Comprehensive Plan goes on to note that the City is unable to identify land appropriate for multi-

1221 SW Yamhill Street, Portland, Oregon 97205
family development in its buildable lands inventory. Yet, the staff report contains no analysis about the number of units expected from the zone change, an update on how many of the 402 needed units have been built since adoption of the Comprehensive Plan, or whether the City can meet the remaining shortfall based on its buildable lands inventory.

The only way to meet the City’s Goal 10 obligations and to provide needed housing for its residents is to amend the R-3 development Code standards further to allow more expansive development of multi-family units and assisted living facilities. One such amendment could include adjusting CDC 7.50.040.F to allow more than 50% lot coverage for these uses. Staff should further review the Code to find other opportunities to increase density. If the City’s Comprehensive Plan conclusion is still accurate — that it is unfeasible to expand the urban growth boundary to include more buildable housing land – then the City must meet its Goal 10 obligations within its current boundaries.

Also, Columbia City has an obligation to “affirmatively further fair housing” if it receives any federal funding for community development, housing and/or transportation. This further obligates the City to ensure that its decisions do not result in segregation of protected classes of people under the Fair Housing Act. A thorough analysis of the City’s multi-family needs and methods for achieving the demand will assist the City in determining its compliance with the Fair Housing Act.

While FHCO and HLA sympathize with the desire to preserve Columbia City’s open space and “village atmosphere,” we believe that more is required in order to show compliance with Goal 10. Please provide full Goal 10 analysis for the proposed amendment and consider additional Code amendment language to allow for increased density so that the City can move towards its needed housing goals. Thank you for your consideration of these comments.

Sincerely,

Louise Dix
AFFH Specialist
Fair Housing Council of Oregon

Jennifer Bragar
President
Housing Land Advocates

1221 SW Yamhill Street, Portland, Oregon 97205
Chapter 7B

Development Industry Perspectives on SB 1533

JON CHANDLER
Oregon Home Builders Association
Salem, Oregon

Contents

Development Industry Perspectives on SB 1533 .................................................. 7B–1
February 1, 2016, Oregon Home Builders Association Letter to Senate Committee on Human Services and Early Childhood Regarding Housing Related Bills ............................................... 7B–3
ORS 197.309, which prohibited mandatory inclusionary zoning (IZ), was adopted by the legislature in 1997, and in nearly every legislative session since that time, one or more bills were introduced attempting to overturn it. None of those attempts got much traction, but that began to change, due in part to the makeup of the legislature also changing but primarily because the issue of housing affordability – both for sale and for rent – became much more critical.

The conversation that led up to SB 1533 began during the 2013 session, where a workgroup was established to explore the issue after a bill to repeal 197.309 failed to advance. Neither IZ nor any other controversial issues (e.g. land use or tax policy) were part of the work group’s charge, though, so while some productive legislation was proposed for the 2014 and 2015 session, those and other topics weren’t addressed.

In 2015, another bill to repeal 197.309 was introduced and this time, it passed the House but stalled in the Senate. This led to another interim conversation, but this time, it encompassed not only traditional, i.e. for sale, inclusionary zoning but a broader discussion including rental housing.

As part of that broader discussion, we tried to articulate several policy points that were critical from our perspective:

- **The initial prohibition on mandatory IZ was based on fear that it would be misused more than on fundamental opposition to the concept.** We were, and continue to be, concerned that jurisdictions that did not want to grow in general, or who weren’t really concerned about affordable housing, or who simply didn’t know what they were doing, could adopt onerous IZ mandates that would result in no development, affordable or otherwise.

- **We have a fundamental disconnect between supply and demand.** It is a fact (see chart in the accompanying Senate testimony) that we are under-building approximately 10,000 units/year statewide (based on the state economist’s numbers and US Census data) and had been doing so since the start of the recession. This fact was used to support our point that the legislature should take care to not make the problem worse.

- **The provision of affordable housing was a matter of economics not ideology.** Developers and builders cannot be made to build projects that don’t make financial sense. Government can set the terms and conditions under which development can occur, but it cannot make the development happen. A poorly designed or overly aggressive IZ program could cause projects to fail or not be commenced in the first place.

- **We have a different housing industry here than in other parts of the country where IZ is more prevalent.** The building industry in Oregon is predominantly smaller builders who rely on bank financing, and the math of IZ that works elsewhere simply won’t work here. Moreover, incentives such as density bonuses – which are used in most other IZ
jurisdictions elsewhere – are of limited utility in Oregon where much of the
development is already required to be as dense as the market will accept.

- The problem of housing affordability is not susceptible to magic bullets. Our point was,
and continues to be, that any affordable housing program had to include land use, tax
policy, infrastructure financing, local permitting processes, local government
prerogatives along with some version of IZ.

So that brings us to SB 1533. The bill deals with two issues - inclusionary zoning and
construction excise taxes (CET). With regard to IZ, the bill allows cities and counties to adopt
mandatory IZ ordinances on either for-sale or for-rent units, but only on multi-family projects of
20 units or more, and with a maximum of 20% of the units being required to be affordable, with
“affordable” defined as 80% or more of area median income. Jurisdictions that adopt
mandatory IZ also have to provide tangible financial incentives (such as SDC waivers, property
tax abatements, etc) and may also provide site-specific intangible incentives (such as density
bonuses or expedited processing). A fee-in-lieu option is also required, as is the use of clear and
objective approval standards.

While it remains to be seen whether mandatory IZ will have much effect on affordable housing,
by limiting it to larger multi-family projects and requiring specific incentives, this bill provides a
path that might actually work but at least isn’t likely to do any harm to overall housing
production.

As for the CET, the bill provides for a local option residential CET of up to 1% of the building
permit value, with the proceeds dedicated to the financial incentives listed in the bill (50%);
other local affordable housing programs (35%); and down-payment programs administered by
the state (15%). CETs on non-residential construction are also allowed, but with no cap, and
with ½ the proceeds being dedicated to affordable housing.

The rationale for this portion of the legislation was twofold:
1. The sunset on local government excise taxes was due to expire in 2017, absent
legislative action to extend or eliminate it, so the issue was going to be on the table in
any event; and
2. The primary drivers of housing cost that are within the control of cities and counties are
things like SDCs and development fees, but reduction or elimination of those was
problematic since they funded essential services. A CET can provide a source of funding
that a jurisdiction can use to reduce these fees, and in the process reduce house prices
and rents.

SB 1533 and a companion bill, HB 4079 (UGB pilot programs), can be seen as experiments. As
they are implemented, something will be learned and, one hopes, a positive impact on housing
affordability will be achieved.
TO: Senate Committee on Human Services and Early Childhood
FROM: Jon Chandler (jchandler@oregonhba.com)
RE: Housing related bills
DATE: 1 February 2016

As this committee and others start to tackle the important problem of housing affordability, a bit of context might be helpful.

On the reverse of this page is a chart showing building permit activity in Oregon over the last several years. The data is not mine, but is taken from the US Census Bureau's website, where they have permits broken down by state and MSA. Their data breaks down permits into several multi-family categories, but what this shows is the total number of building permits, with the single family permits broken out separately.

It is offered for your consideration with just one interpretative note and one editorial comment:

The interpretative note is that the Portland MSA is actually the Portland - Hillsboro - Vancouver MSA, which means that some of the permits shown are actually being pulled in Washington, making the total numbers shown for Portland somewhat overstated.

The editorial comment is that we have, at root, a huge supply and demand problem. According to the state economist's calculations, in a normal year we should be building somewhere in the neighborhood of 21,000 units a year total - single, multi, for-sale, for-rent - statewide. Given that we have had several years of underbuilding, we probably should be closer to 25,000 units/year to catch up, and we aren't, by quite a large margin. And the delta between housing need and housing supply is increasing cumulatively by tens of thousands of units per year, every year, and that in turn means that housing prices and rents are going to continue to go up to reflect that disconnect.

This is why we have been and will continue to be so adamant that something needs to be done to increase the raw numbers of units being built, not as a stand-alone strategy but as a necessary part of any set of programs aimed at reducing housing costs. Whether it comes through adding additional land for development or making it easier and less expensive to build on the land already identified, we simply have to increase housing production if we are going to get supply to match with demand.

It is also why we have so strenuously opposed mandatory inclusionary zoning, as it won’t do anything meaningful to significantly close this gap and could easily, if done poorly, make it considerably worse.
## US Census Data - Building Permits For Oregon MSAs

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Chapter 8
Fair Housing Act and ADA—Issues in Transactional Residential Real Estate

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Chapter 8—Fair Housing Act and ADA—Issues in Transactional Residential Real Estate

1. Application of the Fair Housing Act and American’s with Disabilities Act to Multifamily Residential Properties

The Federal Fair Housing Act (42 USC §§3601-3619) ("FHA") makes it unlawful to, among other things: (a) discriminate in the sale or rental of housing based on race, color, religion, sex, handicap, familial status or national origin; (b) refuse to make reasonable accommodations in rules, policies, practices or services when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling; (c) refuse to permit, at the expense of a handicapped person, reasonable modifications to existing premises; and (d) fail to design and construct dwellings in compliance with accessibility requirements. 42 USC §3604. The FHA generally applies to the sale or rental of more than three homes or units. 42 USC §3603(b). Oregon’s Fair Housing Act (ORS 659A.421) contains similar protections, covers additional protected classes (sexual orientation, marital status and source of income) and does not include the exemption for three or less homes/units.

The American’s with Disabilities Act (42 USC Chapter 126) makes it unlawful to discriminate against an individual on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation or commercial facility. 42 USC §12182 (a). A commercial facility does not include facilities covered by the FHA. Those portions of an apartment building used only by residents and their guests are not covered by the ADA but those portions open to the public, such as the rental office are. The portions of Title III of the ADA that apply to the rental office and other areas open to the public generally are confined to the ADA Standards for Accessible Design. Joint Statement of the Department Of Housing And Urban Development and the Department Of Justice, Accessibility (Design and Construction) Requirements for Covered Multifamily Dwellings under the Fair Housing Act (2013), page 24.

2. Fair Housing and ADA Due Diligence Issues in Acquiring Multifamily Properties

When performing due diligence on a potential multifamily property purchase, it is important to consider the potential for liability to the buyer for violations of the FHA or ADA.

2.1 Compliance with FHA design and construction standards. The FHA design and construction requirements apply to "covered multifamily dwellings" designed and constructed for first occupancy after March 13, 1991. In buildings with four or more dwelling units and at least one elevator, all dwelling units and all public and common use areas are subject to the FHA’s design and construction requirements. In buildings with four or more dwelling units and no elevator, all ground floor units and public and common use areas are subject to the FHA’s design and construction requirements.

The Act requires that covered multifamily dwellings be designed and constructed with the following accessible features:
The public and common use areas must be readily accessible to and usable by persons with disabilities;

All doors designed to allow passage into and within all premises of covered dwellings must be sufficiently wide to allow passage by persons with disabilities, including persons who use wheelchairs;

All premises within covered dwellings must contain the following features:

- An accessible route into and through the dwelling unit;
- Light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;
- Reinforcements in bathroom walls to allow the later installation of grab bars;
- Usable kitchens and bathrooms such that an individual using a wheelchair can maneuver about and use the space.


To describe these requirements in more detail, HUD published the Fair Housing Act regulations (“Regulations”) at 24 C.F.R. Part 100 on January 23, 1989, Final Fair Housing Accessibility Guidelines on March 6, 1991, Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers about the Guidelines on June 28, 1994, and the Design Manual (issued in 1996 and revised and republished in 1998). In the Guidelines, the above statutory provisions appear as seven requirements, as follows:

Requirement 1. Accessible building entrance on an accessible route.

Requirement 2. Accessible and usable public and common use areas.

Requirement 3. Usable doors.

Requirement 4. Accessible route into and through the covered dwelling unit.

Requirement 5. Light switches, electrical outlets, thermostats and other environmental controls in accessible locations.


NOTE: The two year statute of limitations for claims to be filed against an owner, developer, builder or design professional based on non-compliance with the FHA accessibility standards commences at the conclusion of the design and construction phase, which occurs on the date the last certificate of occupancy is issued. *Garcia v. Brockway*, 526 F.3d 456 (9th Cir, 2008).

2.2 Compliance with ADA accessibility standards in the areas open to the public. These requirements are mostly limited to an accessible route to the rental office.

If complex was constructed prior to January, 1990, then the community must remove barriers to access to the public areas where the removal is technically feasible and readily achievable (easily accomplished and able to be carried out without much difficulty or expense). 42 USC §12182(b)(2)(A)(iv).

If the complex was constructed after January, 1990, the public areas must comply with the ADA accessibility rules. 42 USC §12183(a)(1).

2.3 Review of rental documents and rules/regulations for compliance with FHA

Look for “kid” rules

Look at advertising and social media posts by seller that could be deemed discriminatory

2.4 Any complaints filed under the FHA

What were the factual allegations? Was it related to management practices, physical condition, rental documents? Any potential for on-going liability?

2.5 Any settlements of fair housing claims (settlement agreements, consent decrees)

Settlement agreements almost always contain on-going education and reporting requirements. These may apply only to the seller but may put the complex “on the radar.”

3. Leasing and Reasonable Accommodation- When is a Dog not a Pet?


The FHA makes it unlawful for any person to refuse “… to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford …person(s) [with disabilities] equal opportunity to use and enjoy a dwelling.” 42 USC § 3604(f)(3)(B) and HUD regulations at 24 CFR §100.204.
3.1 **Requirements:**

The person requesting the accommodation must have a disability (this term has the same meaning as “handicapped”). The FHA defines a person with a disability to include (1) individuals with a physical or mental impairment that substantially limits one or more major life activities; (2) individuals who are regarded as having such an impairment; and (3) individuals with a record of such an impairment. Disability does not include the current, illegal use of or addiction to a controlled substance. 42 USC §3602 (h).

The requested accommodation must be necessary to afford the person an equal opportunity to use and enjoy a dwelling. To show that a requested accommodation may be necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the individual’s disability.

3.2 **Process:**

The disabled person makes the request. It need not be made in any particular manner, but must be made in a manner that a reasonable person would understand to be a request.

Unless the existence of the disability is obvious, the landlord may require verification of the existence of a disability. The verification can be obtained from the disabled person (such as proof that he or she receives SSI disability benefits) or obtained from a “qualified individual” such as a medical professional, a peer support group, a non-medical service agency, or a reliable third party who is in a position to know about the individual’s disability.

Unless the need for the accommodation is obvious, the landlord may require verification that what is being requested is necessary because of the disability.

Engage in an interactive process if what is being requested is not reasonable and there may be alternative accommodations.

3.3 **Denials:** An accommodation request can be denied if:

- The person is not disabled;
- There is no disability related need for the accommodation; or
- The request is not reasonable:
  - Undue financial and administrative burden;
  - Fundamental change to the program (alters the essential nature of the landlord’s operations);
The tenancy would constitute a “direct threat” to the health or safety of others (requires an individualized assessment based on reliable objective criteria); or

The tenancy would result in substantial physical damage to the property of others (requires an individualized assessment based on reliable objective criteria).