Real Estate and Land Use Spring Forum 2017

Cosponsored by the
Real Estate and Land Use Section

Friday, April 28, 2017
8:55 a.m.–4:45 p.m.

5.75 General CLE credits and
.5 Ethics credit
REAL ESTATE AND LAND USE SPRING FORUM 2017

SECTION PLANNERS

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Anne Davies, Lane Council of Governments, Eugene
Lauren King, Portland Office of City Attorney, Portland
Marisol McAllister, Farleigh Wada Witt, Portland
Paul Trinchero, Garvey Schubert Barer, Portland

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TABLE OF CONTENTS

Schedule ........................................................................................................................................... v

Faculty ............................................................................................................................................... vii

1A. Local Ordinances Relating to Rent Increases and No-Cause Termination Notices ........... 1A–i
     — Andrew Hahs, Bittner & Hahs PC, Lake Oswego, Oregon

1B. The Rental Housing Crisis: Proposed State Legislation ......................................................... 1B–i
     — John VanLandingham, Lane County Legal Aid/Oregon Law Center, Eugene, Oregon

2. Is It a Lot, Parcel, or Legal Lot, and Why Do We Care? ......................................................... 2–i
     — Chas “Cleve” Abbe, Lawyers Title of Oregon LLC, Portland, Oregon
     — Anne Davies, Lane Council of Governments, Eugene, Oregon
     — Margot Seitz, Farleigh Wada Witt, Portland, Oregon

3. Prescriptive Easements over Existing Roadways ................................................................. 3–i
     — Clayton Patrick, Attorney at Law, Clatskanie, Oregon

4A. Inclusionary Zoning in Oregon ............................................................................................... 4A–i
     — Mary Kyle McCurdy, 1000 Friends of Oregon, Portland, Oregon

4B. Portland Zoning Code and Affordable Housing Update ....................................................... 4B–i
     — Christen White, Radler White Parks & Alexander LLP, Portland, Oregon

5. What You May Not Know About Attorney-Client Privilege, Work Product Doctrine, and Joint Defense Doctrine in Oregon ................................................................. 5–i
     — Daniel Keppler, Garvey Schubert Barer, Portland, Oregon

6A. Oregon Consultation on the National Flood Insurance Program—Presentation Slides .... 6A–i
     — Laurie Beale, NOAA Office of General Counsel, Northwest Section, Seattle, Washington
     — Bonnie Shorin, Program Analyst, NOAA, Lacey, Washington
     — Eric Murray, NOAA Fisheries West Coast, Portland, Oregon

6B. FEMA’s NFIP ESA Consultation in Oregon: What Is Changing and When—Presentation Slides .......................................................... 6B–i
     — Scott Van Hoff, Senior Floodplain Management Specialist, FEMA, Bothell, Washington

7A. CC&Rs and Public Policy .......................................................................................................... 7A–i
     — Alan Rappleyea, Washington County Counsel, Hillsboro, Oregon

7B. Private Land Use Regulation Through CC&Rs—Presentation Slides ..................................... 7B–i
     — Paul Trinchero, Garvey Schubert Barer, Portland, Oregon
     — Patrick Conti, Garvey Schubert Barer, Portland, Oregon
SCHEDULE

8:00  Registration

8:55  Welcome

9:00  The Rental Housing Crisis: State and Local Governments’ Response
  ✦ Tenant protections for large rent increases and low inventory
  ✦ Rent control, stabilization, and limits on no-cause termination notices
  ✦ The General Landlord/Tenant Coalition and landlord and tenant advocates

  Andrew Hahs, Bittner & Hahs PC, Lake Oswego
  John VanLandingham, Lane County Legal Aid/Oregon Law Center, Eugene

10:00 Is It a Lot, Parcel, or Legal Lot, and Why Do We Care?
  ✦ Terminology
  ✦ Legal statutes and case law
  ✦ Legal transfers by deed and property line adjustments
  ✦ Title insurance coverage issues for illegally created lots

  Chas “Cleve” Abbe, Lawyers Title of Oregon LLC, Portland
  Anne Davies, Lane Council of Governments, Eugene
  Margot Seitz, Farleigh Wada Witt, Portland

10:45 Break

11:00 Prescriptive Easements over Existing Roadways: Life Before and After Wels v. Hippe
  ✦ Resolving access disputes

  Clayton Patrick, Attorney at Law, Clatskanie

11:45 Lunch

12:45 Inclusionary Zoning
  ✦ History and development of the Oregon program
  ✦ The City of Portland program

  Mary Kyle McCurdy, 1000 Friends of Oregon, Portland
  Christen White, Radler White Parks & Alexander LLP, Portland

1:45 What You May Not Know About Attorney-Client Privilege, Work Product Doctrine, and Joint Defense Doctrine in Oregon
  ✦ Does sharing work product with a third party waive the protection from discovery?
  ✦ How do the RPCs protecting client confidences overlap with various privileges?
  ✦ Does the signed joint defense agreement portend a future conflict of interest?

  Daniel Keppler, Of Counsel, Garvey Schubert Barer, Portland

2:45 Break
SCHEDULE (Continued)

3:00 Special Flood Hazard Areas Development: The Hows and Whys of Changing Standards
✦ Endangered Species Act (ESA) and National Flood Insurance Program (NFIP) litigation history and consultation outcome
✦ Reasonable and Prudent Alternative (RPA) implementation goals and timelines
Eric Murray, NOAA Fisheries West Coast, Portland
Bonnie Shorin, Program Analyst, NOAA, Lacey, WA
Scott Van Hoff, Senior Floodplain Management Specialist, FEMA, Bothell, WA

4:00 Private Land Use Regulation Through CC&Rs: The Tension Between Private Interest and Public Policy
✦ Enforceability of private agreements to restrict development
✦ Tension with public policy that encourages infill
Alan Rappleyea, Washington County Counsel, Hillsboro
Paul Trinchero, Garvey Schubert Barer, Portland

4:45 Adjourn
FACULTY

Chas “Cleve” Abbe, Lawyers Title of Oregon LLC, Portland. Mr. Abbe is Fidelity National Title Group’s State Counsel for Oregon. He provides state counsel underwriting for Fidelity National Title Insurance Company, Chicago Title Insurance Company, and Commonwealth Land Title Insurance Company. He also provides escrow and other assistance to the direct operations of Fidelity family companies in Oregon and underwriting assistance for Oregon agents of the Fidelity family insurers. He is a key contact for relations with the two state regulators, the Division of Financial Regulation and the Real Estate Agency. He is chair of the Oregon Land Title Association Legislative Committee, the state trade association of title companies. Mr. Abbe is the author of the “Recording and Priorities” chapter in Oregon Real Estate Deskbook (OSB Legal Pubs 2015).

Anne Davies, Lane Council of Governments, Eugene. Ms. Davies focuses her practice mainly in land use. She has represented applicants, opponents of development, and local governments. She has also served as a hearings official for local governments on land use matters and for the Oregon Department of Energy. Prior to her current position at the Lane Council of Governments, Ms. Davies provided legal assistance to the City of Eugene Planning and Development Department and served as a member of the Oregon Land Use Board of Appeals.

Andrew Hahs, Bittner & Hahs PC, Lake Oswego. Mr. Hahs represents management companies and commercial property owners. His firm handles approximately 200 evictions a month in the tri-county area and southwest Washington, as well as addressing numerous landlord/tenant issues that do not result in evictions. The firm also is heavily involved in fair housing issues, including advising and defending cases on reasonable accommodation and accessibility issues. In addition to his landlord/tenant practice, Mr. Hahs represents owners, developers, and lenders in all phases of commercial real estate development, ownership, and lending. Mr. Hahs is a founding member and past president of the Multifamily NW board. He was instrumental in developing the Multifamily NW forms and continues to work on the forms committee. He is a frequent speaker at landlord seminars. Mr. Hahs is admitted to practice in Oregon and Washington.

Daniel Keppler, Of Counsel, Garvey Schubert Barer, Portland. Mr. Keppler’s practice includes business and securities litigation, legal malpractice defense, appeals, and alternative dispute resolution. He also counsels professional and institutional clients on risk management issues. He serves as secretary of the Oregon State Bar Legal Ethics Committee.

Mary Kyle McCurdy, 1000 Friends of Oregon, Portland. Ms. McCurdy has extensive experience in equitable land use, housing, transportation, urban planning, and climate solutions. She has served 1000 Friends as Policy Director, staff attorney, and Deputy Director.

Eric Murray, NOAA Fisheries West Coast, Portland. Mr. Murray is the Endangered Species Act Section 7 Coordinator for the Oregon-Washington Coastal Area Office of the West Coast Region of NOAA’s National Marine Fisheries Service. He oversees the area office’s section 7 program, reviewing biological opinions, providing ESA training, and serving as a policy advisor to the Assistant Regional Administrator. Previously, Mr. Murray served as the project lead for the 2011 salmon and steelhead five-year review, the listing of rockfish in Puget Sound, and the listing of eulachon. Prior to his work with NOAA, Mr. Murray worked for the New York State Department of Environmental Conservation. He holds a Master’s degree from the Great Lakes Research Center at Buffalo State College.

Clayton Patrick, Attorney at Law, Clatskanie. Mr. Patrick handles civil appeals for trial attorneys and provides a wide range of consulting services to small practitioners, including legal research, law and motion practice, and consultation on issues of strategy and litigation planning. He also provides consultation on appellate rules procedure and strategies for avoiding appeal problems (and avoiding appeals). Mr. Patrick is admitted to practice in Oregon, California (inactive), and Washington (inactive) and before the the United States Supreme Court.
Alan Rappleyea, Washington County Counsel, Hillsboro. Mr. Rappleyea has served as Beaverton City Attorney, Crook County Counsel, and Planning Director. He is chair of the Oregon County Counsels Association and a member and past chair of the Oregon State Bar Government Law Section Executive Committee. Mr. Rappleyea is admitted to practice in Oregon and Washington and before the U.S. Supreme Court.

Margot Seitz, Farleigh Wada Witt, Portland. Ms. Seitz has a diverse debtor-creditor practice advising banks, credit unions, other financial service providers, creditors, trustees, and receivers in bankruptcy and receivership proceedings. She also has a broad litigation practice in state court. Her experience includes property disputes, construction defect claims, business dissolution disputes, commercial collections, contract disputes, and estate dispute litigation. In her estate planning practice, Ms. Seitz focuses mainly on estate administration, probate, conservatorships, guardianships, and estate disputes. Ms. Seitz is a member of the American Bankruptcy Institute, the Turnaround Management Association, the Oregon Mediation Association, and Oregon Women Lawyers. She contributes to the Oregon State Bar Debtor-Creditor Section newsletter and regularly presents case law updates at the section’s annual meetings.

Bonnie Shorin, Program Analyst, NOAA, Lacey, WA. Ms. Shorin works to implement the Endangered Species Act for the conservation of listed anadromous fishes and marine mammals. Previously, she worked for the Washington State Department of Ecology on Shorelands and Coastal Zone Management, water quality, and floodplain management. Ms. Shorin holds certificates in Ocean and Coastal Law and Natural Resources Law.

Paul Trinchero, Garvey Schubert Barer, Portland. Paul Trinchero helps clients resolve complex real estate disputes relating to the purchase and sale of real property, condemnation and eminent domain actions, commercial leases, and property tax appeals. He represents property owners and managers, commercial tenants and landlords, and local governments. Paul litigates cases in state and federal court, as well as in private arbitrations, and he also has experience assisting clients in matters involving securities laws, noncompetition agreements, False Claims Act, and shareholder class action and derivative lawsuits.

Scott Van Hoff, Senior Floodplain Management Specialist, FEMA, Bothell, WA.

John VanLandingham, Lane County Legal Aid/Oregon Law Center, Eugene. Mr. VanLandingham’s practice focuses on representing tenants in Lane County and legislative advocacy at the state and local levels on tenant rights and affordable housing. He serves as facilitator of two coalitions of landlord and tenant advocates, the General Landlord/Tenant Coalition and the Manufactured Housing Landlord/Tenant Coalition, which negotiate and draft bills that have been adopted in most of the Oregon legislative sessions since 1983. He is also past chair of the Oregon Land Conservation and Development Commission.

Christen White, Radler White Parks & Alexander LLP, Portland. Ms. White is a member of the firm’s Land Use and Real Estate practice groups. She guides clients through the entire lifespan of a development project, from the initial planning and strategy phase through entitlement to the defense of approvals on appeal if necessary. Her project experience includes condominium towers, office buildings, hotels, mixed-use developments, institutional expansion, public infrastructure, and resorts. She was appointed by the Governor to serve on the Urban Growth Boundary Task Force charged with rewriting the rules for UGB amendments and is on the Urban Land Institute Local Chapter Project Council. Ms. White speaks regularly to client groups, other lawyers, and consultants on a wide array of topics, including successful permitting strategies, density transfers, constitutional limitations on exactions, and updates on legal developments in land use.
Chapter 1A

Local Ordinances Relating to Rent Increases
and No-Cause Termination Notices
Andrew Hahs
Bittner & Hahs PC
Lake Oswego, Oregon

Contents
ORS 90.427, Termination of Periodic Tenancies; Landlord Remedies for Tenant Holdover .  .  .  .  .  1A–1
ORS 91.225, Local Rent Control Prohibited; Exclusions; Exceptions  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  . 1A–2
B-Engrossed HB 4143 .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  1A–5
State of Oregon Legislative Counsel Committee Memo Re Local Authority to Enact and
Enforce an Ordinance Prohibiting Landlords from Terminating Month-to-Month Rental
Agreements Without Cause .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  . 1A–11
Exhibit A, Portland Code 30.01.085, Portland Renter Additional Protections  .  .  .  .  .  .  .  .  .  .  .  . 1A–15
City of Milwaukie Ordinance No. 2118, Relating to Renter Protections, Establishing New
Code Chapter 5.60, and Declaring an Emergency .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  1A–17
Bend Ordinance NS-2283, Amending the Bend Code to Add Chapter 5.60, Additional Tenant
Protections .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  .  1A–21


90.427 Termination of periodic tenancies; landlord remedies for tenant holdover. (1) As used in this section, “first year of occupancy” includes all periods in which any of the tenants has resided in the dwelling unit for one year or less.

(2) If a tenancy is a week-to-week tenancy, the landlord or the tenant may terminate the tenancy by a written notice given to the other at least 10 days before the termination date specified in the notice.

(3) If a tenancy is a month-to-month tenancy:

(a) At any time during the tenancy, the tenant may terminate the tenancy by giving the landlord notice in writing not less than 30 days prior to the date designated in the notice for the termination of the tenancy.

(b) At any time during the first year of occupancy, the landlord may terminate the tenancy by giving the tenant notice in writing not less than 30 days prior to the date designated in the notice for the termination of the tenancy.

(c) At any time after the first year of occupancy, the landlord may terminate the tenancy by giving the tenant notice in writing not less than 60 days prior to the date designated in the notice for the termination of the tenancy.

(4) If the tenancy is for a fixed term of at least one year and by its terms becomes a month-to-month tenancy after the fixed term:

(a) At any time during the fixed term, notwithstanding subsection (3) of this section, the landlord or the tenant may terminate the tenancy without cause by giving the other notice in writing not less than 30 days prior to the specified ending date for the fixed term or not less than 30 days prior to the date designated in the notice for the termination of the tenancy, whichever is later.

(b) After the specified ending date for the fixed term, at any time during the month-to-month tenancy, the landlord may terminate the tenancy without cause only by giving the tenant notice in writing not less than 60 days prior to the date designated in the notice for the termination of the tenancy.

(5) Notwithstanding subsections (3)(c) and (4)(b) of this section, the landlord may terminate a month-to-month tenancy at any time by giving the tenant notice in writing not less than 30 days prior to the date designated in the notice for the termination of the tenancy if:

(a) The dwelling unit is purchased separately from any other dwelling unit;

(b) The landlord has accepted an offer to purchase the dwelling unit from a person who intends in good faith to occupy the dwelling unit as the person’s primary residence; and

(c) The landlord has provided the notice, and written evidence of the offer to purchase the dwelling unit, to the tenant not more than 120 days after accepting the offer to purchase.

(6) The tenancy shall terminate on the date designated and without regard to the expiration of the period for which, by the terms of the tenancy, rents are to be paid. Unless otherwise agreed, rent is uniformly apportionable from day to day.

(7) If the tenant remains in possession without the landlord’s consent after expiration of the term of the rental agreement or its termination, the landlord may bring an action for possession. In addition, the landlord may recover from the tenant any actual damages resulting from the tenant holding over, including the value of any rent accruing from the expiration or termination of the rental agreement until the landlord knows or should know that the tenant has relinquished possession to the landlord. If the landlord consents to the tenant’s continued occupancy, ORS 90.220 (7) applies.
(8)(a) A notice given to terminate a tenancy under subsection (2) or (3) of this section need not state a reason for the termination.

(b) Notwithstanding paragraph (a) of this subsection, a landlord or tenant may include in a notice of termination given under subsection (2) or (3) of this section an explanation of the reason for the termination without having to prove the reason. An explanation does not give the person receiving the notice of termination a right to cure the reason if the notice states that:

(A) The notice is given without stated cause;
(B) The recipient of the notice does not have a right to cure the reason for the termination; and
(C) The person giving the notice need not prove the reason for the termination in a court action.

(9) Subsections (2) to (5) of this section do not apply to a month-to-month tenancy subject to ORS 90.429 or other tenancy created by a rental agreement subject to ORS 90.505 to 90.850.

91.225 Local rent control prohibited; exclusions; exceptions. (1) The Legislative Assembly finds that there is a social and economic need to insure an adequate supply of affordable housing for Oregonians. The Legislative Assembly also finds that the imposition of general restrictions on housing rents will disrupt an orderly housing market, increase deferred maintenance of existing housing stock, lead to abandonment of existing rental units and create a property tax shift from rental-owned to owner-occupied housing. Therefore, the Legislative Assembly declares that the imposition of rent control on housing in the State of Oregon is a matter of statewide concern.

(2) Except as provided in subsections (3) to (5) of this section, a city or county shall not enact any ordinance or resolution which controls the rent that may be charged for the rental of any dwelling unit.

(3) This section does not impair the right of any state agency, city, county or urban renewal agency as defined by ORS 457.035 to reserve to itself the right to approve rent increases, establish base rents or establish limitations on rents on any residential property for which it has entered into a contract under which certain benefits are applied to the property for the expressed purpose of providing reduced rents for low income tenants. Such benefits include, but are not limited to, property tax exemptions, long-term financing, rent subsidies, code enforcement procedures and zoning density bonuses.

(4) Cities and counties are not prohibited from including in condominium conversion ordinances a requirement that, during the notification period specified in ORS 100.305, the owner or developer may not raise the rents of any affected tenant except by an amount established by ordinance that does not exceed the limit imposed by ORS 90.493.

(5) Cities, counties and state agencies may impose temporary rent controls when a natural or man-made disaster that materially eliminates a significant portion of the rental housing supply occurs, but must remove the controls when the rental housing supply is restored to substantially normal levels.

(6) As used in this section, “dwelling unit” and “rent” have the meaning given those terms in ORS 90.100.

(7) This section is applicable throughout this state and in all cities and counties therein. The electors or the governing body of a city or county shall not enact, and the governing body shall
not enforce, any ordinance, resolution or other regulation that is inconsistent with this section.
[1985 c.335 §2; 2007 c.705 §3]
Chapter 1A—Local Ordinances Relating to Rent Increases and No-Cause Termination Notices

B-Engrossed

House Bill 4143

Ordered by the House February 19
Including House Amendments dated February 11 and February 19

Sponsored by Representative GORSEK; Representatives BUEHLER, GALLEGOS, GILLIAM, PILUSO (Presession filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Prohibits rent increases during first year of month-to-month tenancies. Lengthens required notice periods for rent increases [and termination] of certain periodic tenancies.

Limits fee charged to tenants for second or subsequent noncompliance with written nonsmoking rules and policies to $250.

Modifies provisions requiring landlord to provide emergency exits from bedrooms.

 Declares emergency, effective on passage.

A BILL FOR AN ACT

Relating to housing; creating new provisions; amending ORS 90.220, 90.302 and 90.460; and declaring
an emergency.

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

SECTION 1. Section 2 of this 2016 Act is added to and made a part of ORS chapter 90.

SECTION 2. (1) If a tenancy is a week-to-week tenancy, the landlord may not increase the rent without giving the tenant written notice at least seven days prior to the effective date of the rent increase.

(2) If a tenancy is a month-to-month tenancy, the landlord may not increase the rent:

(a) During the first year after the tenancy begins.

(b) At any time after the first year of the tenancy without giving the tenant written notice at least 90 days prior to the effective date of the rent increase.

(3) The notices required under this section must specify:

(a) The amount of the rent increase;

(b) The amount of the new rent; and

(c) The date on which the increase becomes effective.

(4) This section does not apply to tenancies governed by ORS 90.505 to 90.850.

SECTION 3. ORS 90.220 is amended to read:

90.220. (1) A landlord and a tenant may include in a rental agreement terms and conditions not prohibited by this chapter or other rule of law including rent, term of the agreement and other provisions governing the rights and obligations of the parties.

(2) The terms of a fixed term tenancy, including the amount of rent, may not be unilaterally amended by the landlord or tenant.

(3) The landlord shall provide the tenant with a copy of any written rental agreement and all amendments and additions thereto.

NOTE: Matter in boldfaced type in an amended section is new; matter [italic and bracketed] is existing law to be omitted. New sections are in boldfaced type.
(4) Except as provided in this subsection, the rental agreement must include a disclosure of the smoking policy for the premises that complies with ORS 479.305. A disclosure of smoking policy is not required in a rental agreement subject to ORS 90.505 to 90.850 for space in a facility as defined in ORS 90.100.

(5) Notwithstanding ORS 90.245 (1), the parties to a rental agreement to which ORS 90.100 to 90.465 apply may include in the rental agreement a provision for informal dispute resolution.

(6) In absence of agreement, the tenant shall pay as rent the fair rental value for the use and occupancy of the dwelling unit.

(7) Except as otherwise provided by this chapter:
   (a) Rent is payable without demand or notice at the time and place agreed upon by the parties. Unless otherwise agreed, rent is payable at the dwelling unit, periodic rent is payable at the beginning of any term of one month or less and otherwise in equal monthly or weekly installments at the beginning of each month or week, depending on whether the tenancy is month-to-month or week-to-week. Rent may not be considered to be due prior to the first day of each rental period. [Rent may not be increased without a 30-day written notice thereof in the case of a month-to-month tenancy or a seven-day written notice thereof in the case of a week-to-week tenancy.] Rent increases must comply with the provisions of section 2 of this 2016 Act.
   (b) If a rental agreement does not create a week-to-week tenancy, as defined in ORS 90.100, or a fixed term tenancy, the tenancy shall be a month-to-month tenancy.
   (8) Except as provided by ORS 90.427 (7), a tenant is responsible for payment of rent until the earlier of:
      (a) The date that a notice terminating the tenancy expires;
      (b) The date that the tenancy terminates by its own terms;
      (c) The date that the tenancy terminates by surrender;
      (d) The date that the tenancy terminates as a result of the landlord failing to use reasonable efforts to rent the dwelling unit to a new tenant as provided under ORS 90.410 (3);
      (e) The date when a new tenancy with a new tenant begins;
      (f) Thirty days after delivery of possession without prior notice of termination of a month-to-month tenancy; or
      (g) Ten days after delivery of possession without prior notice of termination of a week-to-week tenancy.
   (9)(a) Notwithstanding a provision in a rental agreement regarding the order of application of tenant payments, a landlord shall apply tenant payments in the following order:
      (A) Outstanding rent from prior rental periods;
      (B) Rent for the current rental period;
      (C) Utility or service charges;
      (D) Late rent payment charges; and
      (E) Fees or charges owed by the tenant under ORS 90.302 or other fees or charges related to damage claims or other claims against the tenant.
      (b) This subsection does not apply to rental agreements subject to ORS 90.505 to 90.850.

SECTION 4. ORS 90.302 is amended to read:
90.302. (1) A landlord may not charge a fee at the beginning of the tenancy for an anticipated landlord expense and may not require the payment of any fee except as provided in this section. A fee must be described in a written rental agreement.
(2) A landlord may charge a tenant a fee for each occurrence of the following:
(a) A late rent payment, pursuant to ORS 90.260.

(b) A dishonored check, pursuant to ORS 30.701 (5). The amount of the fee may not exceed the
amount described in ORS 30.701 (5) plus any amount that a bank has charged the landlord for pro-
cessing the dishonored check.

(c) Removal or tampering with a properly functioning smoke alarm, smoke detector or carbon
monoxide alarm, as provided in ORS 90.325 (2). The landlord may charge a fee of up to $250 unless
the State Fire Marshal assesses the tenant a civil penalty for the conduct under ORS 479.990 or
under ORS 105.836 to 105.842 and 476.725.

(d) The violation of a written pet agreement or of a rule relating to pets in a facility, pursuant
to ORS 90.530.

(e) The abandonment or relinquishment of a dwelling unit during a fixed term tenancy without
cause. The fee may not exceed one and one-half times the monthly rent. A landlord may not assess
a fee under this paragraph if the abandonment or relinquishment is pursuant to ORS 90.453 (2),
90.472 or 90.475. If the landlord assesses a fee under this paragraph:

(A) The landlord may not recover unpaid rent for any period of the fixed term tenancy beyond
the date that the landlord knew or reasonably should have known of the abandonment or
relinquishment;

(B) The landlord may not recover damages related to the cost of renting the dwelling unit to a
new tenant; and

(C) ORS 90.410 (3) does not apply to the abandonment or relinquishment.

(3)(a) A landlord may charge a tenant a fee under this subsection for a second noncompliance
or for a subsequent noncompliance with written rules or policies that describe the prohibited con-
duct and the fee for a second noncompliance, and for any third or subsequent noncompliance, that
occurs within one year after a written warning notice described in subparagraph (A) of this para-
graph. Except as provided in paragraph [(b)(H)] (b)(G) or (H) of this subsection, the fee may not
exceed $50 for the second noncompliance within one year after the warning notice for the same or
a similar noncompliance or $50 plus five percent of the rent payment for the current rental period
for a third or subsequent noncompliance within one year after the warning notice for the same or
a similar noncompliance. The landlord:

(A) Shall give a tenant a written warning notice that describes:

(i) A specific noncompliance before charging a fee for a second or subsequent noncompliance for
the same or similar conduct; and

(ii) The amount of the fee for a second noncompliance, and for any subsequent noncompliance,
that occurs within one year after the warning notice.

(B) Shall give a tenant a written notice describing the noncompliance when assessing a fee for
a second or subsequent noncompliance that occurs within one year after the warning notice.

(C) Shall give a warning notice for a noncompliance or assess a fee for a second or subsequent
noncompliance within 30 days after the act constituting noncompliance.

(D) May terminate a tenancy for a noncompliance consistent with this chapter instead of as-
sessing a fee under this subsection, but may not assess a fee and terminate a tenancy for the same
noncompliance.

(E) May not deduct a fee assessed pursuant to this subsection from a rent payment for the
current or a subsequent rental period.

(b) A landlord may charge a tenant a fee for occurrences of noncompliance with written rules
or policies as provided in paragraph (a) of this subsection for the following types of noncompliance:
(A) The late payment of a utility or service charge that the tenant owes the landlord as described in ORS 90.315.
(B) Failure to clean up pet waste from a part of the premises other than the dwelling unit.
(C) Failure to clean up the waste of a service animal or a companion animal from a part of the premises other than the dwelling unit.
(D) Failure to clean up garbage, rubbish and other waste from a part of the premises other than the dwelling unit.
(E) Parking violations.
(F) The improper use of vehicles within the premises.
(G) Smoking in a clearly designated nonsmoking unit or area of the premises. The fee for a second or any subsequent noncompliance under this subparagraph may not exceed $250. A landlord may not assess this fee before 24 hours after the required warning notice to the tenant.
(H) Keeping on the premises an unauthorized pet capable of causing damage to persons or property, as described in ORS 90.405. The fee for a second or any subsequent noncompliance under this subparagraph may not exceed $250. A landlord may not assess this fee before 48 hours after the required warning notice to the tenant.

(4) A landlord may not be required to account for or return to the tenant any fee.
(5) Except as provided in subsection (2)(e) of this section, a landlord may not charge a tenant any form of liquidated damages, however designated.

(6) Nonpayment of a fee is not grounds for termination of a rental agreement for nonpayment of rent under ORS 90.394, but is grounds for termination of a rental agreement for cause under ORS 90.392 or 90.630 (1).

(7) This section does not apply to:
(a) Attorney fees awarded pursuant to ORS 90.255;
(b) Applicant screening charges paid pursuant to ORS 90.295;
(c) Charges for improvements or other actions that are requested by the tenant and are not required of the landlord by the rental agreement or by law, including the cost to replace a key lost by a tenant;
(d) Processing fees charged to the landlord by a credit card company and passed through to the tenant for the use of a credit card by the tenant to make a payment when:
   (A) The credit card company allows processing fees to be passed through to the credit card holder; and
   (B) The landlord allows the tenant to pay in cash or by check;
(e) A requirement by a landlord in a written rental agreement that a tenant obtain and maintain renter’s liability insurance pursuant to ORS 90.222; or
(f) Assessments, as defined in ORS 94.550 and 100.005, for a dwelling unit that is within a homeowners association organized under ORS 94.625 or an association of unit owners organized under ORS 100.405, respectively, if:
   (A) The assessments are imposed by the association on a landlord who owns a dwelling unit within the association and the landlord passes the assessments through to a tenant of the unit;
   (B) The assessments are imposed by the association on any person for expenses related to moving into or out of a unit located within the association;
   (C) The landlord sets forth the assessment requirement in the written rental agreement at the commencement of the tenancy; and
(D) The landlord gives a copy of the assessment the landlord receives from the association to the tenant before or at the time the landlord charges the tenant.

(8) If a landlord charges a tenant a fee in violation of this section, the tenant may recover twice the actual damages of the tenant or $300, whichever is greater. This penalty does not apply to fees described in subsection (2) of this section.

SECTION 5. ORS 90.460 is amended to read:

90.460. (1) As used in this section:

(a) “Bedroom” has the meaning given that term in ORS 90.262.

(b) “Building” means a dwelling unit or a structure containing a dwelling unit.

(2) A landlord shall provide at all times during the tenancy [a route of exit from a bedroom, other than the main entrance to the bedroom, for use during an emergency. The secondary route of exit must conform to applicable law.] a route or routes of exit from each bedroom and, if required, a secondary route of exit from each bedroom, for use during an emergency. The routes of exit must conform to applicable law in effect at the time of occupancy of the building or in effect after a renovation or change of use of the building, whichever is later.

(3)(a) If the landlord fails to comply with the requirements of this section, the tenant may recover actual damages, and the tenant may terminate the tenancy by providing the landlord actual notice and a description of the noncompliance 72 hours prior to the date of termination.

(b) If the landlord cures the noncompliance within the 72-hour period:

(A) The tenancy does not terminate; and

(B) The tenant may recover the tenant’s actual damages.

(c) If the landlord fails to cure the noncompliance within the 72-hour period:

(A) The tenancy terminates;

(B) The tenant may recover twice the tenant’s actual damages or twice the periodic rent, whichever is greater; and

(C) The landlord must return all security deposits and prepaid rent owed to the tenant under ORS 90.300 within four days after the termination.

SECTION 6. Section 2 of this 2016 Act and the amendments to ORS 90.220 by section 3 of this 2016 Act apply to increases in rent occurring on or after the 30th day after the effective date of this 2016 Act.

SECTION 7. The amendments to ORS 90.302 by section 4 of this 2016 Act apply to fees for occurrences of noncompliance with written rules or policies charged on or after the effective date of this 2016 Act.

SECTION 8. This 2016 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2016 Act takes effect on its passage.
STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

October 14, 2016

Re: Local Authority to Enact and Enforce an Ordinance Prohibiting Landlords from Terminating Month-to-Month Rental Agreements Without Cause

You have asked whether state law would preempt a hypothetical City of Portland ordinance that prohibits a landlord from terminating a month-to-month rental agreement without cause. We conclude that a local government, such as the City of Portland, does not have the authority to enact or enforce such an ordinance.

Overview of Termination of Month-to-Month Tenancies Under State Law

ORS chapters 90 and 105 govern residential month-to-month tenancies in this state. ORS 90.100 defines "month-to-month tenancy" as "a tenancy that automatically renews and continues for successive monthly periods on the same terms and conditions originally agreed to, or as revised by the parties, until terminated by one or both of the parties."¹ Because a month-to-month tenancy automatically renews every month, state law permits landlords to terminate a month-to-month tenancy for cause² or without cause.³

Under ORS 90.427, a landlord may terminate a month-to-month tenancy without cause, provided that the landlord gives the tenant notice in writing not less than a specified number of days prior to the date designated in the notice for the termination of the tenancy. During the first year of occupancy, a landlord may terminate a month-to-month tenancy upon giving the tenant "notice in writing not less than 30 days prior to the date designated in the notice for the termination of the tenancy."⁴ To terminate the tenancy after the first year of occupancy, a landlord is required to provide the tenant "notice in writing not less than 60 days prior to the date designated in the notice for the termination of the tenancy."⁵ If a fixed-term tenancy of at least one year, by its terms, becomes a month-to-month tenancy after the fixed term, after the specified ending date for the fixed term, at any time during the month-to-month tenancy, the landlord may terminate

¹ ORS 90.100 (30).
² Generally speaking, a landlord may terminate a rental agreement for cause if a tenant materially violates the rental agreement, fails to perform certain duties of a tenant, fails to pay rent or creates certain health or safety concerns. See ORS 90.325, 90.392, 90.394, 90.396, 90.398.
³ ORS 90.427.
⁴ ORS 90.427 (3)(b).
⁵ ORS 90.427 (3)(c).
the tenancy without cause only by giving the tenant notice in writing not less than 60 days prior to the date designated in the notice for the termination of the tenancy.\textsuperscript{6}

However, for a month-to-month tenancy that would otherwise require 60 days' written notice for termination, a landlord may terminate the tenancy by giving the tenant not less than 30 days' written notice if the landlord sells the dwelling unit separately from any other dwelling unit to a purchaser who intends to use the dwelling unit as the purchaser's primary residence and the landlord, not more than 120 days after accepting the offer to purchase the dwelling unit, has provided the tenant with the notice and specific documentation regarding the dwelling unit sale.\textsuperscript{7}

Preemption of City Ordinance by State Law

All Oregon cities have adopted home rule charters, and thus may exercise legislative authority over matters of city concern.\textsuperscript{8} By adopting a charter, city voters grant home rule authority to the city. Home rule authority permits the governing body of a city to enact ordinances that are consistent with the city charter without the need for further statutory authorization from the Legislative Assembly.\textsuperscript{9} A city enactment usually cannot be modified by the Legislative Assembly if the enactment involves the structure and procedures of the city.\textsuperscript{10} However, in certain circumstances, a city enactment may be preempted by state law. The Oregon courts have articulated the standards for limitation of home rule powers by statutory preemption in a series of cases.\textsuperscript{11} In City of La Grande/City of Astoria v. Public Employees Retirement Board, the Supreme Court declared:

\textit{[A] general law addressed primarily to substantive social, economic, or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if it is clearly intended to do so, unless the law is shown to be irreconcilable with the local community's freedom to choose its own political form. In that case, such a state law must yield in those particulars necessary to preserve that freedom of local organization.}\textsuperscript{12}

Therefore, the validity of any proposed city ordinance must be determined on a case-by-case basis and will depend on whether or not the ordinance is inconsistent with or expressly preempted by state law.

Courts engage in a two-step process to determine whether state law preempts a local ordinance. The first step of inquiry is determining whether "the legislature meant its law to be

\textsuperscript{6} ORS 90.427 (4)(b).
\textsuperscript{7} ORS 90.427 (5).
\textsuperscript{8} Article XI, section 2, Oregon Constitution.
\textsuperscript{9} City of La Grande/City of Astoria v. Public Employees Retirement Board, 281 Or. 137, 142 (1978).
\textsuperscript{10} La Grande/Astoria, 281 Or. at 156.
\textsuperscript{12} La Grande/Astoria, 231 Or. at 156.
exclusive."13 A legislative intention to preempt local regulation "is apparent if it is expressly or otherwise clearly manifested in the language of the statute."14

If a court finds no evidence of express preemption, the second step of inquiry is examining the city ordinance to determine whether the ordinance conflicts with state law.15 An ordinance conflicts with a state law if it "prohibits what the state legislation permits or permits what the state legislation prohibits."16 In determining whether a conflict exists, a court will not assume that, because state law is silent on a particular subject, the Legislative Assembly intended to permit the conduct that the city ordinance prohibits or otherwise regulates.17 Instead, the court will determine the conduct the ordinance prohibits and look to see whether state law permits the conduct and, if so, whether the conduct is permitted "by an express legislative decision, by a decision apparent in the legislative history, or otherwise."18

The Hypothetical Ordinance Conflicts with State Law

In considering the first step of the preemption analysis described above, we did not find any language in ORS chapter 90 or 105 that expressly preempts, or otherwise clearly manifests a legislative intention to preempt, local regulation of month-to-month tenancies. Therefore, we do not believe that the month-to-month tenancy termination provisions of ORS 90.427, or any provisions of ORS chapter 90 or 105, indicate that the Legislative Assembly clearly intended to preempt all city ordinances regulating termination of month-to-month tenancies.

In the second step of the preemption analysis, however, we find it likely that a court would find that this hypothetical ordinance conflicts with state law. Because ORS 90.427 permits landlords to terminate month-to-month tenancies without cause if the landlord timely provides the tenant with the statutorily required written notice, a city ordinance barring landlords from terminating month-to-month tenancies without cause would prohibit an act that is expressly permitted by statute. Such a regulation "cannot operate concurrently" with state law.19 Moreover, because month-to-month tenancies automatically renew every month, the hypothetical ordinance would also have the effect of forcing a landlord to remain bound to the rental agreement in perpetuity or until the tenant terminates or materially violates the rental agreement.

Conclusion

While ORS chapters 90 and 105 do not explicitly proscribe a local government from prohibiting termination of a residential month-to-month tenancy without cause, state law clearly permits landlords to terminate month-to-month tenancies without cause after providing adequate written notice to the tenant. A city ordinance prohibiting landlords from terminating residential month-to-month tenancies without cause would directly conflict with ORS 90.427 and eliminate a permission expressly granted to landlords under state law. Therefore, we conclude that a local government does not have the authority to prohibit termination of residential month-to-month tenancies without cause.

13 Id. at 148.
14 Ashland Drilling, 168 Or. App. at 634.
15 La Grande/Astoria, 281 Or. at 148.
16 Ashland Drilling, 168 Or. App. at 635.
17 Id., citing Portland v. Jackson, 318 Or. at 149.
18 Portland v. Jackson, 316 Or. at 151.
19 Id. at 148.
Please note that, because your question is based on the hypothetical ordinance that may be under consideration by the City of Portland, we did not have the opportunity to examine the ordinance in the course of preparing this analysis. Rather, this opinion provides an analysis of the interaction of the broader legal principles relevant to your question.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

DEXTER A. JOHNSON
Legislative Counsel

By

Emily M. Maass
Deputy Legislative Counsel
30.01.085 Portland Renter Additional Protections.
(Added by Ordinance No. 187380, effective November 13, 2015.)

A. In addition to the protections set forth in the Residential Landlord and Tenant Act, the following additional protections apply to Tenants that have a Rental Agreement for a Dwelling Unit covered by the Act. For purposes of this chapter, capitalized terms have the meaning set forth in the Residential Landlord and Tenant Act.

B. A Landlord may terminate a Rental Agreement without a cause specified in the Act only by delivering a written notice of termination (the “Termination Notice”) to the Tenant of (a) not less than 90 days before the termination date designated in that notice as calculated under the Act; or (b) the time period designated in the Rental Agreement, whichever is longer. Not less than 45 days prior to the termination date provided in the Termination Notice, a Landlord shall pay to the Tenant, as relocation assistance, a payment (“Relocation Assistance”) in the amount that follows: $2,900 for a studio or single room occupancy (“SRO”) Dwelling Unit, $3,300 for a one-bedroom Dwelling Unit, $4,200 for a two-bedroom Dwelling Unit, and $4,500 for a three-bedroom or larger Dwelling Unit. The requirements of this Subsection does not apply to Rental Agreements for week-to-week tenancies, or to Landlord who rents out or leases out only one Dwelling Unit in the City of Portland, or to a Landlord who temporarily rents out the Landlord’s principal residence during the Landlord’s absence of not more than 3 years, or to Tenants that occupy the same Dwelling Unit as the Landlord. For purposes of the exception provided in this Subsection, “Dwelling Unit” is defined by PCC 33.910, and not by ORS 90.100. For purposes of this Subsection, a Landlord that declines to renew or replace an expiring fixed-term lease on substantially the same terms except for the amount of Rent or Associated Housing Costs terminates the Rental Agreement and is subject to the provisions of this Subsection.

C. A Landlord may not increase a Tenant’s Rent or Associated Housing Costs by 5 percent or more over a 12 month period unless the Landlord gives notice in writing (the “Increase Notice”) to each affected Tenant: (a) at least 90 days prior to the effective date of the rent increase; or (b) the time period designated in the Rental Agreement, whichever is longer. Such notice must specify the amount of the increase, the amount of the new Rent or Associated Housing Costs and the date, as calculated under the Act, when the increase becomes effective. If, within 14 days after a Tenant receives an Increase Notice indicating a Rent increase of 10 percent or more within a 12 month period and a Tenant provides written notice to the Landlord of the Tenant’s intent to terminate the Rental Agreement (the “Tenant’s Notice”), then, within 14 days of receiving the Tenant’s Notice, the Landlord shall pay to the Tenant Relocation Assistance in the amount that follows: $2,900 for a studio or SRO Dwelling Unit, $3,300 for a one-bedroom Dwelling Unit, $4,200 for a two-bedroom Dwelling Unit, and $4,500 for a three-bedroom or larger dwelling unit. For purposes of this Subsection, a Landlord that conditions the renewal or replacement of an expiring lease on the Tenant’s agreement to pay an increase in
the Rent or Associated Housing Costs increases the Tenant’s Rent, and is subject to the provisions of this Subsection. The requirements of this Subsection do not apply to Rental Agreements for week-to-week tenancies, or to a Landlord who rents out only one Dwelling Unit in the City of Portland, or to a Landlord who temporarily rents out the Landlord’s principal residence during the Landlord’s absence of not more than 3 years, or to Tenants that occupy the same Dwelling Unit, as defined in Subsection B. of this Section, as the Landlord.

D. A Landlord that fails to comply with any of the requirements set forth in this Section 30.01.085 shall be liable to the Tenant for an amount up to three months Rent as well as actual damages, Relocation Assistance, reasonable attorney fees and costs (collectively, "Damages"). Any Tenant claiming to be aggrieved by a Landlord's noncompliance with the foregoing has a cause of action in any court of competent jurisdiction for Damages and such other remedies as may be appropriate.

E. The provisions of this Section 30.01.085 concerning Relocation Assistance shall be in effect for the duration of the Housing Emergency declared by Council on October 7, 2015 by Ordinance 187371 and extended for a period of 1 year to October 6, 2017 by Ordinance 187973, and shall apply to all notices of termination and to all notices of increases of a Tenant’s Rent or Associated Housing Costs pending as of the effective date of those provisions, subject to the following provisions:

1. If, as of the effective date of the Relocation Assistance provisions of this Section, a Landlord has given notice of termination, but the termination has not yet occurred, the Landlord, within 30 days of the effective date of these provisions, either shall notify the Tenant in writing that the Landlord has rescinded the notice of termination, or shall pay the Relocation Assistance provided for in Subsection B. of this Section.

2. If, as of the effective date of the Relocation Assistance provisions of this Section, a Landlord has given notice of an increase of a Tenant’s Rent or Associated Housing Costs that triggers the obligation to pay Relocation Assistance under Subsection C. of this Section, the Tenant shall have the right, within 14 days of the effective date, to notify the Landlord that the Tenant is terminating the Rental Agreement, and the Landlord shall have 14 days thereafter within which to give written notice to the Tenant either that the Landlord has rescinded the increase or has reduced it below the level that triggers the obligation to pay Relocation Assistance, or, in the alternative, to pay the Relocation Assistance.
AN ORDINANCE OF THE CITY OF MILWAUKIE, OREGON, RELATING TO RENTER PROTECTIONS, ESTABLISHING NEW CODE CHAPTER 5.60 AND DECLARING AN EMERGENCY

WHEREAS, the Portland metropolitan region had the lowest residential vacancy rate in the nation as of the fourth quarter of 2015, estimated at 2.4%; and

WHEREAS, the region's low vacancy rate has resulted in significant rent increases over the last several years, including a 11.3% yearly increase as of the fourth quarter of 2015; and

WHEREAS, Milwaukie's proximity to Portland has resulted in increased gentrification and displacement of residents in recent years; and

WHEREAS, the combination of high rents and low vacancy rates has resulted in heightened housing uncertainty for many Milwaukie residents; and

WHEREAS, in recognition of the impact of the low residential vacancy rates and increasing rents, the Milwaukie City Council has declared a housing emergency; and

WHEREAS, the Milwaukie City Council has authority under Ordinance No. 2117 to take legislative action to provide adequate written notice of a no cause termination; and

WHEREAS, the Residential Landlord and Tenant Act (ORS Chapter 90) allows for no-cause terminations of month-to-month rental agreements with 30 days' notice during the first year of a tenant's occupancy, and with 60 days' notice after the first year of occupancy; and

WHEREAS, the Milwaukie City Council has determined that 30 or 60 days is not adequate time for displaced tenants to find and secure new rental housing; and

WHEREAS, in order to provide tenants enough time to find and secure a new rental unit, the minimum written notice of a no cause termination of tenancy should be 90 days.

Now, Therefore, the City of Milwaukie does ordain as follows:

Section 1. A new Chapter 5.60 is adopted and added to the Municipal Code of Milwaukie which will read as follows:

5.60 Milwaukie Renter Additional Protections
5.60.010 Purpose and Intent. The purpose of this Section is to provide residential renters in the City of Milwaukie with adequate protections in the event that they are served with a no cause eviction.

5.60.020 Definitions.

Act – the Residential Landlord and Tenant Act, codified in Chapter 90 of the Oregon Revised Statutes. For the purposes of Chapter 5.60, capitalized terms have the meaning set forth in the Act.

5.60.030 Applicability. The following apply to Tenants of Dwelling Units within the boundaries of the City of Milwaukie, which are in addition to the requirements and protections set forth in the Act:

A. A Landlord may terminate a Rental Agreement without a cause specified in the Act ("no cause eviction") only by delivering a written notice of termination to the Tenant of (a) not less than 90 days before the termination designated in that notice as calculated under the Act; or (b) the time period designated in the Rental Agreement, whichever is longer. This requirement does not apply to Rental Agreements for Week-to-week tenancies or to Tenants that occupy the same Dwelling Unit as the Landlord.

B. A Landlord that fails to comply with any of the requirements set forth in this Section 5.60.030 shall be liable to the Tenant for an amount up to three months' Rent as well as actual damages, reasonable attorney fees and costs (collectively, “Damages”). Any Tenant claiming to be aggrieved by a Landlord’s noncompliance with the foregoing has a cause of action in any court of competent jurisdiction for Damages and such other remedies as may be appropriate.

Section 2. The Milwaukie City Council shall reconsider the protections herein if the Portland metropolitan region’s residential vacancy rate rises above 4%, or after one year, whichever occurs first.

Section 3. Emergency. With increasing housing uncertainty and fear of homelessness for city residents, this Ordinance is necessary for the immediate protection of public health, safety and general welfare; therefore an emergency is declared to exist and this Ordinance shall become effective upon the date of its adoption.

Read the first time on 4/19/16, and moved to second reading by 5:0 vote of the City Council.

Read the second time and adopted by the City Council on 4/19/16.

Signed by the Mayor on 4/19/16.
Chapter 1A—Local Ordinances Relating to Rent Increases and No-Cause Termination Notices

APPROVED: Approved by Milwaukie City Council on 4/19/16.

Mark Gamba, Mayor

ATTEST:

Pat DuVal, City Recorder

APPROVED AS TO FORM:

Jordan Ramis PC

City Attorney

Page 3 of 3 – Ordinance No. 2118
ORDINANCE NS- 2283

AN ORDINANCE AMENDING THE BEND CODE TO ADD CHAPTER 5.60,
ADDITIONAL TENANT PROTECTIONS

Findings:

A. Bend and Central Oregon face a residential vacancy rate that has been less than 1.5% for the past four years.¹

B. The regional low vacancy rate has coincided with significant rent increases and increasing home prices.²

C. High rents and low vacancy rates contribute to housing instability and insecurity for many residents.

D. The Residential Landlord and Tenant Act (ORS Chapter 90) allows for no-cause terminations of month-to-month rental agreements with 30 days written notice during the first year of tenant occupancy, and with 60 days written notice after the first year of occupancy.

E. The Bend City Council received many emails on this issue from citizens, tenants and landlords of varying views, and heard a useful and persuasive presentation from Affordable Housing Committee members.

F. Council has determined that many tenants would benefit from having more time to find and secure new rental housing in the current market, and desires to enact a modest increase in the time for no cause eviction notices.

G. In order to provide tenants with more time to find and secure new housing, the minimum written notice of a no-cause termination of tenancy should be 90 days following the first year of occupancy.

H. Council believes that leaving the amount of required notice unchanged during the first year of occupancy reflects a reasonable compromise between the interests of tenants and landlords, and may mitigate against some unintended consequences to tenants that might result from imposing a blanket 90 day notice requirement during the first year of occupancy.

I. With increasing housing insecurity and instability for many city residents, this ordinance is necessary for the immediate protection of public health, safety, and general welfare, and this ordinance shall become effective upon the date of adoption.

Based on these findings, the City of Bend ordains as follows:

**Section 1.** Chapter 5.60 is added to the Bend Code:

**Chapter 5.60 Additional Tenant Protections**

**5.60.005 Purpose and Scope**

The protections of this chapter are intended to provide tenants in the city of Bend with protections that supplement the Oregon Residential Landlord and Tenant Act (the Act). The provisions of this chapter apply to residential dwelling units within the City of Bend that are subject to a month-to-month rental agreement covered by the Act where the tenant has occupied the dwelling for more than one year, but do not change the amount of notice required by state law where the dwelling unit is being sold to a purchaser who intends to occupy the dwelling unit as their primary residence.

**5.60.010 90 Day Notice Required**

A. When a tenant has occupied a dwelling for more than one year, a landlord may terminate a rental agreement without cause specified in the Act only by delivering a written notice of termination to the tenant: (a) not less than 90 days before the termination date designated in that notice as calculated under the Act; or (b) the time period designated in the rental agreement, whichever is longer. This requirement does not apply to rental agreements for week-to-week tenancy or to tenants that occupy the same dwelling unit as the landlord.

B. A landlord that fails to comply with any of the requirements set forth in this chapter shall be liable to the tenant for an amount up to three months rent as well as actual damages, reasonable attorney fees, and costs. Any tenant claiming to be aggrieved by a landlord’s noncompliance with the foregoing has a cause of action in any court of competent jurisdiction for these damages and such other remedies as may be appropriate.

**Section 2.** All other provisions of the Bend Code remain unchanged and in full effect.
Chapter 1A—Local Ordinances Relating to Rent Increases and No-Cause Termination Notices

First Reading Date: December 7, 2016
Second Reading Date: December 21, 2016
Adopted by roll call vote on: December 21, 2016

YES:  Jim Clinton, Mayor
      Doug Knight
      Nathan Boddie
      Barb Campbell

NO:    Casey Roats
       Sally Russell

ATTEST:

Jim Clinton, Mayor

Robyn Christie, City Recorder
Mary Winters, City Attorney
Chapter 1B

The Rental Housing Crisis: Proposed State Legislation

JOHN VANLANDINGHAM
Lane County Legal Aid/Oregon Law Center
Eugene, Oregon

Contents

HB 2004—A-Engrossed .............................................................. 1B–1
SB 277—Introduced ................................................................. 1B–17
Adopted Amendments to SB 277 .............................................. 1B–23
HB 2008—Introduced ............................................................... 1B–33
Proposed Amendments to HB 2008 .......................................... 1B–45
HB 3331—Introduced ............................................................... 1B–59
Chapter 1B—The Rental Housing Crisis: Proposed State Legislation

79th OREGON LEGISLATIVE ASSEMBLY--2017 Regular Session

A-Engrossed

House Bill 2004

Ordered by the House March 31
Including House Amendments dated March 31

Sponsored by Representatives GORSEK, PILUSO, POWER, HERNANDEZ; Representatives ALONSO LEON, DOHERTY, HOLVEY, KENY-GUYER, MALSTROM, MCLAIN, NOSSE, RAYFIELD, SANCHEZ, SMITH WARNER, Senator MONNES ANDERSON (Presession filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Prohibits landlord from terminating month-to-month tenancy without cause after first six months of occupancy except under certain circumstances with 90 days' written notice and payment of relocation expenses amount equal to one month's periodic rent. Provides exception for certain tenancies for occupancy of dwelling unit in building or on property occupied by landlord as primary residence. Makes violation defense against action for possession by landlord.

Requires fixed term tenancy to become month-to-month tenancy upon reaching specific ending date, unless tenant elects to renew or terminate tenancy. Requires landlord to make tenant offer to renew fixed term tenancy.

Repeals statewide prohibition on city and county ordinances controlling rents. Permits city or county to implement rent stabilization program for rental of dwelling units.

Declares emergency, effective on passage.

A BILL FOR AN ACT

Relating to residential tenancies; creating new provisions; amending ORS 90.100, 90.220, 90.427, 91.225, 105.124 and 197.309; and declaring an emergency.

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

SECTION 1. ORS 90.427 is amended to read:

90.427. (1) As used in this section:

(a) "First year of occupancy" includes all periods in which any of the tenants has resided in the dwelling unit for one year or less.

(b) "Immediate family" means:

(A) An adult person related by blood, adoption, marriage or domestic partnership, as defined in ORS 106.310, or as defined or described in similar law in another jurisdiction;

(B) An unmarried parent of a joint child;

(C) A child, grandchild, foster child, ward or guardian; or

(D) A child, grandchild, foster child, ward or guardian of any person listed in subparagraph (A) or (B) of this paragraph.

(2) If a tenancy is a week-to-week tenancy, the landlord or the tenant may terminate the tenancy by a written notice given to the other at least 10 days before the termination date specified in the notice.

[3] If a tenancy is a month-to-month tenancy:

(3) Except as provided in subsection (9) of this section, if a tenancy is a month-to-month tenancy:

NOTE: Matter in boldfaced type in an amended section is new; matter [italic and bracketed] is existing law to be omitted. New sections are in boldfaced type.

LC 2988
(a) At any time during the tenancy, the tenant may terminate the tenancy by giving the landlord notice in writing not less than 30 days prior to the date designated in the notice for the termination of the tenancy.

(b) At any time during the first [year] six months of occupancy, the landlord may terminate the tenancy by giving the tenant notice in writing not less than 30 days prior to the date designated in the notice for the termination of the tenancy.

(c) At any time after the first year of occupancy, the landlord may terminate the tenancy by giving the tenant notice in writing not less than 60 days prior to the date designated in the notice for the termination of the tenancy.

(4) If the tenancy is for a fixed term of at least one year and by its terms becomes a month-to-month tenancy after the fixed term:

(a) At any time during the fixed term, notwithstanding subsection (3) of this section, the landlord or the tenant may terminate the tenancy without cause by giving the other notice in writing not less than 30 days prior to the specified ending date for the fixed term or not less than 30 days prior to the date designated in the notice for the termination of the tenancy, whichever is later.

(b) After the specified ending date for the fixed term, at any time during the month-to-month tenancy, the landlord may terminate the tenancy without cause only by giving the tenant notice in writing not less than 60 days prior to the date designated in the notice for the termination of the tenancy.

(c) At any time after the first six months of occupancy, the landlord may terminate the tenancy only:

(A) For cause and with notice as described in ORS 86.782 (6)(c), 90.380 (5), 90.392, 90.394, 90.396, 90.398, 90.405, 90.440 or 90.445; or

(B) Under an exception and with notice as described in subsection (5) of this section.

(4) Except as provided in subsection (9) of this section, if a tenancy is a fixed term tenancy:

(a) The landlord may terminate the tenancy only for cause and with notice as described in ORS 86.782 (6)(c), 90.380 (5), 90.392, 90.394, 90.396, 90.398, 90.405, 90.440 or 90.445.

(b) At any time during the fixed term, the tenant may terminate the tenancy without cause by giving the landlord notice in writing not less than 30 days prior to the specified ending date for the fixed term or not less than 30 days prior to the date designated in the notice for the termination of the tenancy, whichever is later.

(c) Not less than 90 days prior to the specified ending date for the fixed term, the landlord shall make the tenant an offer in writing to renew the tenancy for a fixed term that is at least equal in duration to the existing fixed term. The tenant may renew the tenancy by giving the landlord notice in writing not less than 30 days prior to the specified ending date for the fixed term. A landlord that qualifies for an exception and gives notice as described in subsection (5) of this section is not required to make the tenant an offer to renew the tenancy under this paragraph.

(d) Unless the tenant accepts an offer to renew or gives notice to terminate the tenancy, the fixed term tenancy becomes a month-to-month tenancy without requiring further notice upon reaching a specific ending date.

(e) If the landlord fails to make the tenant an offer to renew the tenancy as required under paragraph (e) of this subsection, the fixed term tenancy becomes a month-to-month tenancy without requiring further notice upon reaching a specific ending date.
Chapter 1B—The Rental Housing Crisis: Proposed State Legislation

A-Eng. HB 2004

(5) [Notwithstanding subsections (3)(c) and (4)(b) of this section,] The landlord may terminate a month-to-month tenancy under subsection (3)(c)(B) of this section at any time, or may avoid making the tenant an offer to renew a fixed term tenancy under subsection (4)(c) of this section, by giving the tenant notice in writing not less than [30] 90 days prior to the date designated in the notice for the termination of the month-to-month tenancy or the specified ending date for the fixed term if:

(a) The dwelling unit is purchased separately from any other dwelling unit;

(b) The landlord has accepted an offer to purchase the dwelling unit from a person who intends in good faith to occupy the dwelling unit as the person's primary residence; and

(c) The landlord has provided the notice, and written evidence of the offer to purchase the dwelling unit, to the tenant not more than 120 days after accepting the offer to purchase.

(a) The landlord intends in good faith to undertake repairs or renovations that will cause the dwelling unit to be unsafe or unfit for occupancy during the repairs or renovations;

(b) The landlord intends in good faith to convert the dwelling unit to a use other than a residential use within a reasonable time;

(c) The landlord intends in good faith to demolish the dwelling unit within a reasonable time;

(d) The dwelling unit is unsafe or unfit for occupancy and the landlord intends in good faith to undertake repairs within a reasonable time to correct the condition of the dwelling unit;

(e) The landlord has:

(A) Accepted an offer to purchase the dwelling unit separately from any other dwelling unit from a person who intends in good faith to occupy the dwelling unit as the person's primary residence; and

(B) Provided the notice, and written evidence of the offer to purchase the dwelling unit, to the tenant not more than 120 days after accepting the offer to purchase; or

(f)(A) The landlord intends in good faith for the landlord or a member of the landlord's immediate family to occupy the dwelling unit as a primary residence; and

(B) The landlord does not own a comparable unit in the same building that is available for occupancy at the same time that the tenant receives notice to terminate the tenancy.

(6) If a landlord terminates a tenancy pursuant to subsection (5)(a) or (d) of this section, after the repairs or renovations are complete and the dwelling unit is safe and lawful to occupy, the landlord must offer the tenant the option to enter into a new rental agreement before offering the dwelling unit for rent to any other person.

(7)(a) A landlord that terminates a tenancy under an exception described in subsection (5) of this section shall:

(A) State in the notice given to terminate the tenancy the exception under which the tenancy is terminated and facts supporting the exception; and

(B) At the time the landlord gives the tenant the notice to terminate the tenancy, pay the tenant an amount equal to one month's periodic rent.

(b) The requirements of paragraph (a)(B) of this subsection do not apply to a landlord of four or fewer dwelling units.

(8)(a) A notice given to terminate a tenancy under subsection (2), (3)(a) or (b), (4)(b) or (9) of this section need not state a reason for the termination.

(b) Notwithstanding paragraph (a) of this subsection, a landlord or tenant may include
in a notice of termination given under subsection (2), (3)(a) or (b), (4)(b) or (9) of this section 
an explanation of the reason for the termination without having to prove the reason. An 
explanation does not give the person receiving the notice of termination a right to cure the 
reason if the notice states that:

(A) The notice is given without stated cause;
(B) The recipient of the notice does not have a right to cure the reason for the termin-
ation; and
(C) The person giving the notice need not prove the reason for the termination in a court 
action.

(9) If the tenancy is for occupancy in a dwelling unit that is located in the same building 
or on the same property as the landlord's primary residence, and the building or the property 
contains not more than two dwelling units, the landlord may terminate the tenancy:

(a) At any time during the first year of occupancy by giving the tenant notice in writing 
not less than 30 days prior to the date designated in the notice for the termination of the 
tenancy.

(b) At any time after the first year of occupancy by giving the tenant notice in writing 
not less than 60 days prior to the date designated in the notice for the termination of the 
tenancy.

(10)(a) If a landlord terminates a tenancy in violation of subsection (3)(c)(B), (4)(c), (5), 
(6) or (7) of this section:

(A) The landlord shall be liable to the tenant in an amount equal to three months' rent 
in addition to actual damages suffered by the tenant as a result of the tenancy termination; 
and

(B) The tenant has a defense to an action for possession by the landlord.

(b) A tenant is entitled to recovery under paragraph (a) of this subsection if the tenant 
commences an action asserting the claim within one year after the tenant knew or should 
have known that the landlord terminated the tenancy in violation of this section.

(11) The tenancy shall terminate on the date designated and without regard to the expira-
tion of the period for which, by the terms of the tenancy, rents are to be paid. Unless otherwise 
agreed, rent is uniformly apportionable from day to day.

(12) If the tenant remains in possession without the landlord's consent after expiration of 
the term of the rental agreement or its termination, the landlord may bring an action for possession. 
In addition, the landlord may recover from the tenant any actual damages resulting from the tenant 
holding over, including the value of any rent accruing from the expiration or termination of the 
rental agreement until the landlord knows or should know that the tenant has relinquished pos-
session to the landlord. If the landlord consents to the tenant's continued occupancy, ORS 90.220 (7) 
applies.

(a) A notice given to terminate a tenancy under subsection (2) or (3) of this section need not 
state a reason for the termination.
(b) Notwithstanding paragraph (a) of this subsection, a landlord or tenant may include in a notice 
of termination given under subsection (2) or (3) of this section an explanation of the reason for the 
termination without having to prove the reason. An explanation does not give the person receiving the 
otice of termination a right to cure the reason if the notice states that:

(A) The notice is given without stated cause;

(B) The recipient of the notice does not have a right to cure the reason for the termination; and]
[(C) The person giving the notice need not prove the reason for the termination in a court action.]

[(9)(13) Subsections (2) to (5) (10) of this section do not apply to a month-to-month tenancy subject to ORS 90.429 or other tenancy created by a rental agreement subject to ORS 90.505 to 90.850.

SECTION 2. ORS 91.225 is amended to read:

91.225. [(1) The Legislative Assembly finds that there is a social and economic need to insure an adequate supply of affordable housing for Oregonians. The Legislative Assembly also finds that the imposition of general restrictions on housing rents will disrupt an orderly housing market, increase deferred maintenance of existing housing stock, lead to abandonment of existing rental units and create a property tax shift from rental-owned to owner-occupied housing. Therefore, the Legislative Assembly declares that the imposition of rent control on housing in the State of Oregon is a matter of statewide concern.]

[(2) Except as provided in subsections (3) to (5) of this section, a city or county shall not enact any ordinance or resolution which controls the rent that may be charged for the rental of any dwelling unit.]

(1) The governing body of a city or a county may adopt an ordinance or resolution that implements a rent stabilization program for the rental of dwelling units within the jurisdiction of the city or the county, provided that the program:

(a) Provides landlords with a fair rate of return for the rental of dwelling units, as determined by the city or the county;

(b) Provides a process for a landlord to petition for permission to increase rent in excess of the increase allowed under the program when necessary for the landlord to achieve a fair rate of return, as described in paragraph (a) of this subsection; and

(c) Provides an exemption from the program for any new residential development for a period of five years from the date of issuance of the first certificate of occupancy.

[(3)] (2) This section does not impair the right of any state agency, city, county or urban renewal agency as defined by ORS 457.035 to reserve to itself the right to approve rent increases, establish base rents or establish limitations on rents on any residential property for which it has entered into a contract under which certain benefits are applied to the property for the expressed purpose of providing reduced rents for low income tenants. Such benefits include, but are not limited to, property tax exemptions, long-term financing, rent subsidies, code enforcement procedures and zoning density bonuses.

[(4)] (3) Cities and counties may include in condominium conversion ordinances a requirement that, during the notification period specified in ORS 100.305, the owner or developer may not raise the rents of any affected tenant except by an amount established by ordinance that does not exceed the limit imposed by ORS 90.493.

[(5)] (4) Cities, counties and state agencies may impose temporary rent controls when a natural or man-made disaster that materially eliminates a significant portion of the rental housing supply occurs, but must remove the controls when the rental housing supply is restored to substantially normal levels.

[(6)] (5) As used in this section, “dwelling unit” and “rent” have the meaning given those terms in ORS 90.100.

[(7)] (6) This section is applicable throughout this state and in all cities and counties therein.

The electors or the governing body of a city or county may not enact, and the governing body may not enforce, any ordinance, resolution or other regulation that is inconsistent with
SECTION 3. ORS 90.100 is amended to read:

90.100. As used in this chapter, unless the context otherwise requires:

1. “Accessory building or structure” means any portable, demountable or permanent structure, including but not limited to cabanas, ramadas, storage sheds, garages, awnings, carports, decks, steps, ramps, piers and pilings, that is:
   a. Owned and used solely by a tenant of a manufactured dwelling or floating home; or
   b. Provided pursuant to a written rental agreement for the sole use of and maintenance by a tenant of a manufactured dwelling or floating home.

2. “Action” includes recoupment, counterclaim, setoff, suit in equity and any other proceeding in which rights are determined, including an action for possession.

3. “ Applicant screening charge” means any payment of money required by a landlord of an applicant prior to entering into a rental agreement with that applicant for a residential dwelling unit, the purpose of which is to pay the cost of processing an application for a rental agreement for a residential dwelling unit.

4. “Building and housing codes” includes any law, ordinance or governmental regulation concerning fitness for habitation, or the construction, maintenance, operation, occupancy, use or appearance of any premises or dwelling unit.

5. “Carbon monoxide alarm” has the meaning given that term in ORS 105.836.

6. “Carbon monoxide source” has the meaning given that term in ORS 105.836.

7. “Conduct” means the commission of an act or the failure to act.

8. “DBH” means the diameter at breast height, which is measured as the width of a standing tree at four and one-half feet above the ground on the uphill side.

9. “Dealer” means any person in the business of selling, leasing or distributing new or used manufactured dwellings or floating homes to persons who purchase or lease a manufactured dwelling or floating home for use as a residence.

10. “Domestic violence” means:
   a. Abuse between family or household members, as those terms are defined in ORS 107.705; or
   b. Abuse, as defined in ORS 107.705, between partners in a dating relationship.

11. “Drug and alcohol free housing” means a dwelling unit described in ORS 90.243.

12. “Dwelling unit” means a structure or the part of a structure that is used as a home, residence or sleeping place by one person who maintains a household or by two or more persons who maintain a common household. “Dwelling unit” regarding a person who rents a space for a manufactured dwelling or recreational vehicle or regarding a person who rents moorage space for a floating home as defined in ORS 830.700, but does not rent the home, means the space rented and not the manufactured dwelling, recreational vehicle or floating home itself.

13. “Essential service” means:
   a. For a tenancy not consisting of rental space for a manufactured dwelling, floating home or recreational vehicle owned by the tenant and not otherwise subject to ORS 90.505 to 90.850:
      A. Heat, plumbing, hot and cold running water, gas, electricity, light fixtures, locks for exterior doors, latches for windows and any cooking appliance or refrigerator supplied or required to be supplied by the landlord; and
      B. Any other service or habitability obligation imposed by the rental agreement or ORS 90.320, the lack or violation of which creates a serious threat to the tenant’s health, safety or property or makes the dwelling unit unfit for occupancy.
(b) For a tenancy consisting of rental space for a manufactured dwelling, floating home or recreational vehicle owned by the tenant or that is otherwise subject to ORS 90.505 to 90.850:

(A) Sewage disposal, water supply, electrical supply and, if required by applicable law, any drainage system; and

(B) Any other service or habitability obligation imposed by the rental agreement or ORS 90.730, the lack or violation of which creates a serious threat to the tenant’s health, safety or property or makes the rented space unfit for occupancy.

(14) “Facility” means a manufactured dwelling park or a marina.

(15) “Fee” means a nonrefundable payment of money.

(16) “First class mail” does not include certified or registered mail, or any other form of mail that may delay or hinder actual delivery of mail to the recipient.

(17) “Fixed term tenancy” means a tenancy that has a fixed term of existence, continuing to a specific ending date and terminating on that date without requiring further notice to effect the termination.

(18) “Floating home” has the meaning given that term in ORS 830.700. “Floating home” includes an accessory building or structure.

(19) “Good faith” means honesty in fact in the conduct of the transaction concerned.

(20) “Hazard tree” means a tree that:

(a) Is located on a rented space in a manufactured dwelling park;

(b) Measures at least eight inches DBH; and

(c) Is considered, by an arborist licensed as a landscape construction professional pursuant to ORS 671.560 and certified by the International Society of Arboriculture, to pose an unreasonable risk of causing serious physical harm or damage to individuals or property in the near future.

(21) “Hotel or motel” means “hotel” as that term is defined in ORS 699.005.

(22) “Informal dispute resolution” means, but is not limited to, consultation between the landlord or landlord’s agent and one or more tenants, or mediation utilizing the services of a third party.

(23) “Landlord” means the owner, lessor or sublessor of the dwelling unit or the building or premises of which it is a part. “Landlord” includes a person who is authorized by the owner, lessor or sublessor to manage the premises or to enter into a rental agreement.

(24) “Landlord’s agent” means a person who has oral or written authority, either express or implied, to act for or on behalf of a landlord.

(25) “Last month’s rent deposit” means a type of security deposit, however designated, the primary function of which is to secure the payment of rent for the last month of the tenancy.

(26) “Manufactured dwelling” means a residential trailer, a mobile home or a manufactured home as those terms are defined in ORS 446.003. “Manufactured dwelling” includes an accessory building or structure. “Manufactured dwelling” does not include a recreational vehicle.

(27) “Manufactured dwelling park” means a place where four or more manufactured dwellings are located, the primary purpose of which is to rent space or keep space for rent to any person for a charge or fee.

(28) “Marina” means a moorage of contiguous dwelling units that may be legally transferred as a single unit and are owned by one person where four or more floating homes are secured, the primary purpose of which is to rent space or keep space for rent to any person for a charge or fee.

(29) “Marina purchase association” means a group of three or more tenants who reside in a marina and have organized for the purpose of eventual purchase of the marina.

(30) “Month-to-month tenancy” means a tenancy that automatically renews and continues for
successive monthly periods on the same terms and conditions originally agreed to, or as revised by
the parties, until terminated by one or both of the parties.

(31) “Organization” includes a corporation, government, governmental subdivision or agency,
business trust, estate, trust, partnership or association, two or more persons having a joint or com-
mon interest, and any other legal or commercial entity.

(32) “Owner” includes a mortgagee in possession and means one or more persons, jointly or se-
verally, in whom is vested:
(a) All or part of the legal title to property; or
(b) All or part of the beneficial ownership and a right to present use and enjoyment of the
premises.

(33) “Person” includes an individual or organization.

(34) “Premises” means:
(a) A dwelling unit and the structure of which it is a part and facilities and appurtenances
therein;
(b) Grounds, areas and facilities held out for the use of tenants generally or the use of which
is promised to the tenant; and
(c) A facility for manufactured dwellings or floating homes.

(35) “Prepaid rent” means any payment of money to the landlord for a rent obligation not yet
due. In addition, “prepaid rent” means rent paid for a period extending beyond a termination date.

(36) “Recreational vehicle” has the meaning given that term in ORS 446.003.

(37) “Rent” means any payment to be made to the landlord under the rental agreement, periodic
or otherwise, in exchange for the right of a tenant and any permitted pet to occupy a dwelling unit
to the exclusion of others and to use the premises. “Rent” does not include security deposits, fees
or utility or service charges as described in ORS 90.315 (4) and 90.532.

(38) “Rental agreement” means all agreements, written or oral, and valid rules and regulations
adopted under ORS 90.262 or 90.510 (6) embodying the terms and conditions concerning the use and
occupancy of a dwelling unit and premises. “Rental agreement” includes a lease. A rental agreement
shall be either a week-to-week tenancy, month-to-month tenancy or fixed term tenancy.

(39) “Roomer” means a person occupying a dwelling unit that does not include a toilet and ei-
ther a bathtub or a shower and a refrigerator, stove and kitchen, all provided by the landlord, and
where one or more of these facilities are used in common by occupants in the structure.

(40) “Screening or admission criteria” means a written statement of any factors a landlord
considers in deciding whether to accept or reject an applicant and any qualifications required for
acceptance. “Screening or admission criteria” includes, but is not limited to, the rental history,
character references, public records, criminal records, credit reports, credit references and incomes
or resources of the applicant.

(41) “Security deposit” means a refundable payment or deposit of money, however designated,
the primary function of which is to secure the performance of a rental agreement or any part of a
rental agreement. “Security deposit” does not include a fee.

(42) “Sexual assault” has the meaning given that term in ORS 147.450.

(43) “Squatter” means a person occupying a dwelling unit who is not so entitled under a rental
agreement or who is not authorized by the tenant to occupy that dwelling unit. “Squatter” does
not include a tenant who holds over as described in ORS 90.427 [(7)] (12).

(44) “Stalking” means the behavior described in ORS 163.732.

(45) “Statement of policy” means the summary explanation of information and facility policies
Chapter 1B—The Rental Housing Crisis: Proposed State Legislation

A-Eng. HB 2004

to be provided to prospective and existing tenants under ORS 90.510.

(46) “Surrender” means an agreement, express or implied, as described in ORS 90.148 between a landlord and tenant to terminate a rental agreement that gave the tenant the right to occupy a dwelling unit.

(47) “Tenant”:
(a) Except as provided in paragraph (b) of this subsection:
(A) Means a person, including a roofer, entitled under a rental agreement to occupy a dwelling unit to the exclusion of others, including a dwelling unit owned, operated or controlled by a public housing authority.
(B) Means a minor, as defined and provided for in ORS 109.697.
(b) For purposes of ORS 90.505 to 90.850, means only a person who owns and occupies as a residence a manufactured dwelling or a floating home in a facility and persons residing with that tenant under the terms of the rental agreement.
(c) Does not mean a guest or temporary occupant.

(48) “Transient lodging” means a room or a suite of rooms.

(49) “Transient occupancy” means occupancy in transient lodging that has all of the following characteristics:
(a) Occupancy is charged on a daily basis and is not collected more than six days in advance;
(b) The lodging operator provides maid and linen service daily or every two days as part of the regularly charged cost of occupancy; and
(c) The period of occupancy does not exceed 30 days.

(50) “Vacation occupancy” means occupancy in a dwelling unit, not including transient occupancy in a hotel or motel, that has all of the following characteristics:
(a) The occupant rents the unit for vacation purposes only, not as a principal residence;
(b) The occupant has a principal residence other than at the unit; and
(c) The period of authorized occupancy does not exceed 45 days.

(51) “Victim” means:
(a) The person against whom an incident related to domestic violence, sexual assault or stalking is perpetrated; or
(b) The parent or guardian of a minor household member against whom an incident related to domestic violence, sexual assault or stalking is perpetrated, unless the parent or guardian is the perpetrator.

(52) “Week-to-week tenancy” means a tenancy that has all of the following characteristics:
(a) Occupancy is charged on a weekly basis and is payable no less frequently than every seven days;
(b) There is a written rental agreement that defines the landlord’s and the tenant’s rights and responsibilities under this chapter; and
(c) There are no fees or security deposits, although the landlord may require the payment of an applicant screening charge, as provided in ORS 90.295.

SECTION 4. ORS 90.220, as amended by section 3, chapter 53, Oregon Laws 2016, is amended to read:

90.220. (1) A landlord and a tenant may include in a rental agreement terms and conditions not prohibited by this chapter or other rule of law including rent, term of the agreement and other provisions governing the rights and obligations of the parties.

(2) The terms of a fixed term tenancy, including the amount of rent, may not be unilaterally
(3) The landlord shall provide the tenant with a copy of any written rental agreement and all amendments and additions thereto.

(4) Except as provided in this subsection, the rental agreement must include a disclosure of the smoking policy for the premises that complies with ORS 479.305. A disclosure of smoking policy is not required in a rental agreement subject to ORS 90.505 to 90.850 for space in a facility as defined in ORS 90.100.

(5) Notwithstanding ORS 90.245 (1), the parties to a rental agreement to which ORS 90.100 to 90.465 apply may include in the rental agreement a provision for informal dispute resolution.

(6) In absence of agreement, the tenant shall pay as rent the fair rental value for the use and occupancy of the dwelling unit.

(7) Except as otherwise provided by this chapter:

(a) Rent is payable without demand or notice at the time and place agreed upon by the parties. Unless otherwise agreed, rent is payable at the dwelling unit, periodic rent is payable at the beginning of any term of one month or less and otherwise in equal monthly or weekly installments at the beginning of each month or week, depending on whether the tenancy is month-to-month or week-to-week. Rent may not be considered to be due prior to the first day of each rental period. Rent increases must comply with the provisions of section 2, chapter 53, Oregon Laws 2016.

(b) If a rental agreement does not create a week-to-week tenancy, as defined in ORS 90.100, or a fixed term tenancy, the tenancy shall be a month-to-month tenancy.

(8) Except as provided by ORS 90.427 [(7)] (12), a tenant is responsible for payment of rent until the earlier of:

(a) The date that a notice terminating the tenancy expires;

(b) The date that the tenancy terminates by its own terms;

(c) The date that the tenancy terminates by surrender;

(d) The date that the tenancy terminates as a result of the landlord failing to use reasonable efforts to rent the dwelling unit to a new tenant as provided under ORS 90.410 (3);

(e) The date when a new tenancy with a new tenant begins;

(f) Thirty days after delivery of possession without prior notice of termination of a month-to-month tenancy; or

(g) Ten days after delivery of possession without prior notice of termination of a week-to-week tenancy.

(9)(a) Notwithstanding a provision in a rental agreement regarding the order of application of tenant payments, a landlord shall apply tenant payments in the following order:

(A) Outstanding rent from prior rental periods;

(B) Rent for the current rental period;

(C) Utility or service charges;

(D) Late rent payment charges; and

(E) Fees or charges owed by the tenant under ORS 90.302 or other fees or charges related to damage claims or other claims against the tenant.

(b) This subsection does not apply to rental agreements subject to ORS 90.505 to 90.850.

SECTION 5. ORS 197.309, as amended by section 1, chapter 59, Oregon Laws 2016, 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 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 a particular class or group of purchasers or renters.

(3) The provisions of subsection (2) of this section do not limit the authority of a metropolitan service district to:

(a) Adopt or enforce a use regulation, provision or requirement creating or implementing an incentive, contract commitment, density bonus or other voluntary regulation, provision or 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 6. ORS 105.124 is amended to read:

105.124. For a complaint described in ORS 105.123, if ORS chapter 90 applies to the dwelling unit:

1. The complaint must be in substantially the following form and be available from the clerk of the court:

IN THE CIRCUIT COURT
FOR THE COUNTY OF

No. ______

RESIDENTIAL EVICTION COMPLAINT

PLAINTIFF (Landlord or agent):

________________________________________

Address: __________________________

City: __________________________

State: ___________ Zip: _________

Telephone: ______________

vs.

DEFENDANT (Tenants/Occupants):

________________________________________

________________________________________

MAILING ADDRESS: _________________

City: __________________________

State: ___________ Zip: _________

Telephone: ______________

1. Tenants are in possession of the dwelling unit, premises or rental property described above or located at:

________________________________________

2. Landlord is entitled to possession of the property because of:

____ 24-hour notice for personal
injury, substantial damage, extremely outrageous act or unlawful occupant.
ORS 90.396 or 90.403.

24-hour or 48-hour notice for
violation of a drug or alcohol
program. ORS 90.398.

24-hour notice for perpetratting
domestic violence, sexual assault or
stalking. ORS 90.445.

72-hour or 144-hour notice for
nonpayment of rent. ORS 90.394.

7-day notice with stated cause in
a week-to-week tenancy. ORS 90.392 (6).

10-day notice for a pet violation,
a repeat violation in a month-to-month
tenancy or without stated cause in a
week-to-week tenancy. ORS 90.392 (5),
90.405 or 90.427 (2).

20-day notice for a repeat violation.
ORS 90.630 (4).

30-day, 60-day or 180-day notice without
stated cause in a month-to-month
tenancy. ORS 90.427 (9) [(3) or (4)] or 90.429.

90-day notice with stated exception.
ORS 90.427 (5).

30-day notice with stated cause.
ORS 90.392, 90.630 or 90.632.

Notice to bona fide tenants after
foreclosure sale or termination of
fixed term tenancy after foreclosure
sale. ORS 86.782 (6)(c).

Other notice

No notice (explain)

A COPY OF THE NOTICE RELIED UPON, IF ANY, IS ATTACHED

If the landlord uses an attorney, the case goes to trial and the landlord wins in court, the
landlord can collect attorney fees from the defendant pursuant to ORS 90.255 and 105.137 (3).

Landlord requests judgment for possession of the premises, court costs, disbursements and at-
torney fees.

I certify that the allegations and factual assertions in this complaint are true to the best of my
knowledge.
Signature of landlord or agent.

(2) The complaint must be signed by the plaintiff or an attorney representing the plaintiff as provided by ORCP 17, or verified by an agent or employee of the plaintiff or an agent or employee of an agent of the plaintiff.

(3) A copy of the notice relied upon, if any, must be attached to the complaint.

SECTION 7. The amendments to ORS 90.427 by section 1 of this 2017 Act apply to:

(1) Fixed term tenancies entered into or renewed on or after the effective date of this 2017 Act; and

(2) Terminations of month-to-month tenancies occurring on or after the 30th day after the effective date of this 2017 Act.

SECTION 8. This 2017 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2017 Act takes effect on its passage.
Senate Bill 277

Sponsored by Senator ROBLAN, Representative HELM; Senators RILEY, STEINER HAYWARD, Representative MCKEOWN (Presession filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Increases notice period for termination of rental agreement and removal of manufactured dwelling or floating home. Requires landlord to notify tenant of specific disrepair or deterioration causing termination and describe repairs necessary to avoid termination. Defines terms.

Declares emergency, effective on passage.

A BILL FOR AN ACT

Relating to rental space for certain types of dwellings in facilities; amending ORS 90.505, 90.632 and 105.124; and declaring an emergency.

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

SECTION 1. ORS 90.505 is amended to read:

90.505. (1) As used in ORS 90.505 to 90.850:
(a) “Deterioration”:
(A) Includes a collapsing or failing staircase or railing, one or more holes in a wall or roof, an inadequately supported window air conditioning unit, peeling paint or falling gutters, siding or skirting.
(B) Does not include aesthetic or cosmetic concerns.
(b) “Disrepair” means the state of being in need of repair because a component is broken, collapsing, creating a safety hazard or generally in need of maintenance.
(c) “Rent a space for a manufactured dwelling or floating home,” or similar wording, means a transaction creating a rental agreement in which the owner of a manufactured dwelling or floating home secures the right to locate the dwelling or home on the real property of another in a facility for use as a residence in return for value, and in which the owner of the manufactured dwelling or floating home retains no interest in the real property at the end of the transaction.
(2) Unless otherwise provided, ORS 90.100 to 90.465 apply to rental agreements that are subject to ORS 90.505 to 90.850. However, to the extent of inconsistency, the applicable provisions of ORS 90.505 to 90.850 control over the provisions of ORS 90.100 to 90.465.

SECTION 2. ORS 90.632 is amended to read:

90.632. (1) A landlord may terminate a month-to-month or fixed term rental agreement and require the tenant to remove a manufactured dwelling or floating home from a facility, due to the physical condition of the manufactured dwelling or floating home, only by complying with this section and ORS 105.105 to 105.168. A termination shall include removal of the dwelling or home.
(2) A landlord may not require removal of a manufactured dwelling or floating home, or consider a dwelling or home to be in disrepair or deteriorated, because of the age, size, style or original construction material of the dwelling or home or because the dwelling or home was built prior to adoption of the National Manufactured Housing Construction and Safety Standards Act of 1974 (42

NOTE: Matter in boldfaced type in an amended section is new; matter [italic and bracketed] is existing law to be omitted. New sections are in boldfaced type.

LC 1297
U.S.C. 5403), in compliance with the standards of that Act in effect at that time or in compliance
with the state building code as defined in ORS 455.010.

(3) Except as provided in subsection (5) of this section, if the tenant’s dwelling or home is in
disrepair or is deteriorated, a landlord may terminate a rental agreement and require the removal
of a dwelling or home by giving to the tenant not less than 30 days’ written notice before the
date designated in the notice for termination.

(4) The notice required by subsection (3) of this section must:
  (a) State facts sufficient to notify the tenant of the [causes or reasons] specific disrepair or
deterioration that is the cause or reason for termination of the tenancy and removal of the
dwelling or home;
  (b) State that the tenant can avoid termination and removal by correcting the cause for termi-
nation and removal within the notice period;
  (c) Describe [what is] specifically what repairs are required to correct the disrepair or de-
terioration that is the cause for termination;
  (d) Describe the tenant’s right to give the landlord a written notice of correction, where to give
the notice and the deadline for giving the notice in order to ensure a response by the landlord, all
as provided by subsection (6) of this section; and
  (e) Describe the tenant’s right to have the termination and correction period extended as pro-
vided by subsection (7) of this section.

(5) The tenant may avoid termination of the tenancy by correcting the cause within the period
specified. However, if substantially the same condition that constituted a prior cause for termination
of which notice was given recurs within 12 months after the date of the notice, the landlord may
terminate the tenancy and require the removal of the dwelling or home upon at least 30 days’
written notice specifying the violation and the date of termination of the tenancy.

(6) During the termination notice or extension period, the tenant may give the landlord written
notice that the tenant has corrected the cause for termination. Within a reasonable time after the
tenant’s notice of correction, the landlord shall respond to the tenant in writing, stating whether the
landlord agrees that the cause has been corrected. If the tenant’s notice of correction is given at
least 14 days prior to the end of the termination notice or extension period, failure by the landlord
to respond as required by this subsection is a defense to a termination based upon the landlord’s
notice for termination.

(7) Except when the disrepair or deterioration creates a risk of imminent and serious harm to
other dwellings, homes or persons within the facility, the [30-day] 60-day period provided for the
tenant to correct the cause for termination and removal shall be extended by at least:
  (a) An additional 60 days if:
    (A) The necessary correction involves exterior painting, roof repair, concrete pouring or similar
work and the weather prevents that work during a substantial portion of the [30-day] 60-day period;
    or
    (B) The nature or extent of the correction work is such that it cannot reasonably be completed
within [30] 60 days because of factors such as the amount of work necessary, the type and com-
plexity of the work and the availability of necessary repair persons; or
  (b) An additional six months if the disrepair or deterioration has existed for more than the
preceding 12 months with the landlord’s knowledge or acceptance as described in ORS 90.412.

(8) In order to have the period for correction extended as provided in subsection (7) of this
section, a tenant must give the landlord written notice describing the necessity for an extension in

order to complete the correction work. The notice must be given a reasonable amount of time prior
to the end of the notice for termination period.

(9) A tenancy terminates on the date designated in the notice and without regard to the expi-
ration of the period for which, by the terms of the rental agreement, rents are to be paid. Unless
otherwise agreed, rent is uniformly apportionable from day to day.

(10) This section does not limit a landlord’s right to terminate a tenancy for nonpayment of rent
under ORS 90.394 or for other cause under ORS 90.380 (5)(b), 90.396, 90.398 or 90.630 by complying
with ORS 105.105 to 105.168.

(11) A landlord may give a copy of the notice for termination required by this section to any
lienholder of the dwelling or home, by first class mail with certificate of mailing or by any other
method allowed by ORS 90.150 (2) and (3). A landlord is not liable to a tenant for any damages in-
curred by the tenant as a result of the landlord giving a copy of the notice in good faith to a
lienholder.

(12) When a tenant has been given a notice for termination pursuant to this section and has
subsequently abandoned the dwelling or home as described in ORS 90.675, any lienholder shall have
the same rights as provided by ORS 90.675, including the right to correct the cause of the notice,
within the 90-day period provided by ORS 90.675 (20) notwithstanding the expiration of the notice
period provided by this section for the tenant to correct the cause.

SECTION 3. ORS 105.124 is amended to read:

105.124. For a complaint described in ORS 105.123, if ORS chapter 90 applies to the dwelling
unit:

(1) The complaint must be in substantially the following form and be available from the clerk
of the court:

IN THE CIRCUIT COURT
FOR THE COUNTY OF

No. _____

RESIDENTIAL EVICTION COMPLAINT

PLAINTIFF (Landlord or agent):

__________________________________________

__________________________________________

Address: _____________

City: _______________

State: ____________ Zip: _________

Telephone: ____________

vs.

DEFENDANT (Tenants/Occupants):

__________________________________________

__________________________________________
1. Tenants are in possession of the dwelling unit, premises or rental property described above or located at:

2. Landlord is entitled to possession of the property because of:

   90.396 or 90.403.

   ORS 90.398.

   ORS 90.445.

   ORS 90.394.

   ORS 90.392, 90.630 or 90.632.

   ORS 90.632.

   ORS 90.392, 90.630 or 90.632] or 90.630.

   ORS 90.632.

   Notice to bona fide tenants after foreclosure sale or termination of

   fixed term tenancy after foreclosure
A COPY OF THE NOTICE RELIED UPON, IF ANY, IS ATTACHED

If the landlord uses an attorney, the case goes to trial and the landlord wins in court, the landlord can collect attorney fees from the defendant pursuant to ORS 90.255 and 105.137 (3).

Landlord requests judgment for possession of the premises, court costs, disbursements and attorney fees.

I certify that the allegations and factual assertions in this complaint are true to the best of my knowledge.

______________________________
Signature of landlord or agent.

(2) The complaint must be signed by the plaintiff or an attorney representing the plaintiff as provided by ORCP 17, or verified by an agent or employee of the plaintiff or an agent or employee of an agent of the plaintiff.

(3) A copy of the notice relied upon, if any, must be attached to the complaint.

SECTION 4. The amendments to ORS 90.505 and 90.632 by sections 1 and 2 of this 2017 Act apply to:

(1) Rental agreements for fixed term tenancies entered into or renewed on or after the effective date of this 2017 Act; and

(2) Rental agreements for month-to-month tenancies in effect on or after the effective date of this 2017 Act.

SECTION 5. This 2017 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2017 Act takes effect on its passage.
PROPOSED AMENDMENTS TO
SENATE BILL 277

On page 1 of the printed bill, line 2, before “and” insert “, 90.680”.
In line 9, delete “peeling paint or”.
In line 10, after “skirting” insert “, or paint that is peeling or faded as
to threaten the useful life or integrity of the siding”.
Delete lines 12 and 13 and insert:
“(b) ‘Disrepair’:
“(A) Means the state of being in need of repair because a component is
broken, collapsing, creating a safety hazard or generally in need of mainte-
nance.
“(B) Includes the need to correct a failure to conform with applicable
building and housing codes at the time of:
“(i) Installation of the manufactured dwelling or floating home on the
site.
“(ii) Making improvements to the manufactured dwelling or floating home
following installation.”.
In line 25, after “the” insert “exterior of the”.
On page 2, delete line 3 and insert:
“(3) Except as provided in subsections (4) and (6) of this section, if the
exterior of the tenant’s dwelling or home is in”.
Delete line 7 and insert:
“(4) If the disrepair or deterioration of the manufactured dwelling or
floating home creates a risk of imminent and serious harm to dwellings, homes or persons within the facility, a landlord may terminate a rental agreement and require the removal of the dwelling or home by giving to the tenant not less than 30 days’ written notice before the date designated in the notice for termination. The notice shall describe the risk of harm.

“(5) The notice required by subsections (3) and (4) of this section must.”

In line 13, after “(c)” insert “If reasonably known by the landlord, ”.

In line 17, delete “(6)” and insert “(7)”.

In line 19, delete “(7)” and insert “(8)”.

In line 20, delete “(5)” and insert “(6)”.

In line 25, delete “(6)” and insert “(7)”.

In line 32, delete “(7)” and insert “(8)”.

In line 33, delete “other”.

In line 44, delete “(8)” and insert “(9)” and delete “(7)” and insert “(8)”.

On page 3, line 3, delete “(9)” and insert “(10)”.

In line 6, delete “(10)” and insert “(11)”.

In line 9, delete “(11)” and insert “(12)”.

In line 14, delete “(12)” and insert “(13)”.

After line 18, insert:

“SECTION 3. ORS 90.680 is amended to read:

“90.680. (1) As used in this section, ‘consignment’ means an agreement in which a tenant authorizes a landlord to sell a manufactured dwelling or floating home on behalf of the tenant who owns the dwelling or home in a facility that is owned by the landlord and for which the landlord receives compensation.

“(2) A landlord may not deny any manufactured dwelling or floating home space tenant the right to sell a manufactured dwelling or floating home on a rented space or require the tenant to remove the dwelling or home from the space solely on the basis of the sale.

“(3) A landlord may not require, as a condition of a tenant’s occupancy,
“(4)(a) A landlord may sell a tenant’s manufactured dwelling or floating home on consignment only if:

“(A) The sale involves a dwelling in a facility and the landlord is licensed to sell dwellings under ORS 446.661 to 446.756. The license may be held by a person that differs from the person that owns the facility and is the landlord, if there is common ownership between the two.

“(B) The landlord and tenant first enter into a written consignment contract that specifies at a minimum:

“(i) The duration of the contract, which, unless extended in writing, may not exceed 180 days;

“(ii) The estimated square footage of the dwelling or home, and the make, model, year, vehicle identification number and license plate number, if known;

“(iii) The price offered for sale of the dwelling or home;

“(iv) Whether lender financing is permitted and the amount, if any, of the earnest money deposit;

“(v) Whether the transaction is intended to be closed through a state-licensed escrow;

“(vi) All liens, taxes and other charges known to be in existence against the dwelling or home that must be removed before the tenant can convey marketable title to a prospective buyer;

“(vii) The method of marketing the sale of a dwelling or home to the public, such as signs posted at the facility or through advertisements posted on the Internet or published in newspapers or in other publications;

“(viii) The form and amount of compensation to the landlord, such as a fixed fee, a percentage of the gross sale price or another similar arrangement. If the form of compensation is a fixed fee, the contract shall state the amount; and

“(ix) For the purpose of determining the net sale proceeds that are paya-
ble to the tenant, the manner and order by which the gross sale proceeds
will be applied to liens, taxes, actual costs of sale, landlord compensation
and other closing costs.

“(C) Within 10 days after a sale, the landlord pays to the tenant the
tenant’s share of the sale proceeds and provides to the tenant a written ac-
tcounting for the sale proceeds.

“(b) The landlord may not exact a commission or fee, however designated,
or retain a portion of any sale proceeds for the sale of a manufactured
dwelling or floating home on a rented space unless the landlord has acted
as representative for the seller pursuant to a written consignment contract.

“(5)(a) The landlord may not deny the tenant the right to place a ‘for
sale’ sign on or in a manufactured dwelling or floating home owned by the
tenant. The size, placement and character of such signs shall be subject to
reasonable rules of the landlord.

“(b) If the landlord advertises a manufactured dwelling or floating home
for sale within the facility, the tenant may advertise the sale of the tenant’s
dwelling or home by posting a sign in a similar manner and similar location.

“(6) A landlord may not knowingly make false statements to a prospective
 purchaser about the quality of a tenant’s manufactured dwelling or floating
 home.

“(7) Nothing in this section prevents a landlord from selling to a pro-
spective purchaser a manufactured dwelling or floating home owned by the
landlord at a price or on terms, including space rent, that are more favorable
than the price and terms offered for dwellings or homes that are for sale by
a tenant.

“(8) If the prospective purchaser of a manufactured dwelling or floating
 home desires to leave the dwelling or home on the rented space and become
a tenant, the landlord may require in the rental agreement:

“(a) Except when a termination or abandonment occurs, that a tenant
give not more than 10 days’ notice in writing prior to the sale of the dwelling
or home on a rented space;

“(b) That prior to the sale, the prospective purchaser submit to the landlord a complete and accurate written application for occupancy of the dwelling or home as a tenant after the sale is finalized and that a prospective purchaser may not occupy the dwelling or home until after the prospective purchaser is accepted by the landlord as a tenant;

“(c) That a tenant give notice to any lienholder, prospective purchaser or person licensed to sell dwellings or homes of the requirements of paragraphs (b) and (d) of this subsection, the location of all properly functioning smoke alarms and any other rules and regulations of the facility such as those described in ORS 90.510 (5)(b), (f), (g), (i) and (j); and

“(d) If the sale is not by a lienholder, that the prospective purchaser pay in full all rents, fees, deposits or charges owed by the tenant as authorized under ORS 90.140 and the rental agreement, prior to the landlord’s acceptance of the prospective purchaser as a tenant.

“(9)(a) If a landlord requires a prospective purchaser to submit an application for occupancy as a tenant under subsection (8) of this section, the landlord shall provide, upon request from the purchaser, a copy of the application. At the time that the landlord gives the prospective purchaser an application the landlord shall also give the prospective purchaser:

“(A) Copies of the statement of policy, the rental agreement and the facility rules and regulations, including any conditions imposed on a subsequent sale, all as provided by ORS 90.510[.];

“(B) Copies of any outstanding notices given to the tenant under ORS 90.632;

“(C) A list of any disrepair or deterioration of the manufactured dwelling or floating home;

“(D) A list of any failures to maintain the space or to comply with any other provisions of the rental agreement, including aesthetic or cosmetic improvements; and
“(E) A statement that the landlord may require a prospective purchaser to complete repairs, maintenance and improvements as described in the notices and lists provided under subparagraphs (B) to (D) of this paragraph.

“(b) The terms of the statement, rental agreement and rules and regulations need not be the same as those in the selling tenant’s statement, rental agreement and rules and regulations.

“(c) Consistent with ORS 90.305 (4)(b), a landlord may require a prospective purchaser to pay a reasonable copying charge for the documents.

“(d) If a prospective purchaser agrees, a landlord may provide the documents in an electronic format.

“(10) The following apply if a landlord receives an application for tenancy from a prospective purchaser under subsection (8) of this section:

“(a) The landlord shall accept or reject the prospective purchaser’s application within seven days following the day the landlord receives a complete and accurate written application. An application is not complete until the prospective purchaser pays any required applicant screening charge and provides the landlord with all information and documentation, including any financial data and references, required by the landlord pursuant to ORS 90.510 (5)(i). The landlord and the prospective purchaser may agree to a longer time period for the landlord to evaluate the prospective purchaser’s application or to allow the prospective purchaser to address any failure to meet the landlord’s screening or admission criteria. If a tenant has not previously given the landlord the 10 days’ notice required under subsection (8)(a) of this section, the period provided for the landlord to accept or reject a complete and accurate written application is extended to 10 days.

“(b) When a landlord considers an application for tenancy from a prospective purchaser of a dwelling or home from a tenant, the landlord shall apply to the prospective purchaser credit and conduct screening criteria that are substantially similar to the credit and conduct screening criteria the
landlord applies to a prospective purchaser of a dwelling or home from the landlord.

“(c) The landlord may not unreasonably reject a prospective purchaser as a tenant. Reasonable cause for rejection includes, but is not limited to, failure of the prospective purchaser to meet the landlord’s conditions for approval as provided in ORS 90.510 (5)(i) or failure of the prospective purchaser’s references to respond to the landlord’s timely request for verification within the time allowed for acceptance or rejection under paragraph (a) of this subsection. Except as provided in paragraph (d) of this subsection, the landlord shall furnish to the seller and purchaser a written statement of the reasons for the rejection.

“(d) If a rejection under paragraph (c) of this subsection is based upon a consumer report, as defined in 15 U.S.C. 1681a for purposes of the federal Fair Credit Reporting Act, the landlord may not disclose the contents of the report to anyone other than the purchaser. The landlord shall disclose to the seller in writing that the rejection is based upon information contained within a consumer report and that the landlord may not disclose the information within the report.

“(11) The following apply if a landlord does not require a prospective purchaser to submit an application for occupancy as a tenant under subsection (8) of this section or if the landlord does not accept or reject the prospective purchaser as a tenant within the time required under subsection (10) of this section:

“(a) The landlord waives any right to bring an action against the tenant under the rental agreement for breach of the landlord’s right to establish conditions upon and approve a prospective purchaser of the tenant’s dwelling or home;

“(b) The prospective purchaser, upon completion of the sale, may occupy the dwelling or home as a tenant under the same conditions and terms as the tenant who sold the dwelling or home; and
“(c) If the prospective purchaser becomes a new tenant, the landlord may impose conditions or terms on the tenancy that are inconsistent with the terms and conditions of the seller’s rental agreement only if the new tenant agrees in writing.

“(12) A landlord may not, because of the age, size, style or original construction material of the dwelling or home or because the dwelling or home was built prior to adoption of the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5403), in compliance with the standards of that Act in effect at that time or in compliance with the state building code as defined in ORS 455.010:

“(a) Reject an application for tenancy from a prospective purchaser of an existing dwelling or home on a rented space within a facility; or

“(b) Require a prospective purchaser of an existing dwelling or home on a rented space within a facility to remove the dwelling or home from the rented space.

“(13) A tenant who has received a notice pursuant to ORS 90.632 may sell the tenant’s dwelling or home in compliance with this section during the notice period. The tenant shall provide a prospective purchaser with a copy of any outstanding notice given [pursuant] to the tenant under ORS 90.632 prior to a sale. [The landlord may also give any prospective purchaser a copy of any such notice. The landlord may require as a condition of tenancy that a prospective purchaser who desires to leave the dwelling or home on the rented space and become a tenant must comply with the notice within the notice period consistent with ORS 90.632.] If the tenancy has been terminated pursuant to ORS 90.632, or the notice period provided in ORS 90.632 has expired without a correction of cause or extension of time to correct, a prospective purchaser does not have a right to leave the dwelling or home on the rented space and become a tenant.

“(14) The following applies to a landlord that accepts a prospective purchaser as a tenant under subsection (10) of this section:
“(a) Notwithstanding any waiver given by the landlord to the previous tenant, the landlord may require the new tenant to complete the repairs, maintenance and improvements described in the notices provided under subsection (9)(a)(B) to (D) of this section.

“(b) Notwithstanding ORS 90.412, if the new tenant fails to complete the repairs, maintenance and improvements described in the notices provided under subsection (9)(a)(B) to (D) of this section within six months after the tenancy begins, the landlord may terminate the tenancy by giving the new tenant the notice required under ORS 90.630 or 90.632.

“[(14)] (15) Except as provided by subsection (13) of this section, after a tenancy has ended and during the period provided by ORS 90.675 (6) and (8), a former tenant retains the right to sell the tenant’s dwelling or home to a purchaser who wishes to leave the dwelling or home on the rented space and become a tenant as provided by this section, if the former tenant makes timely periodic payment of all storage charges as provided by ORS 90.675 (7)(b), maintains the dwelling or home and the rented space on which it is stored and enters the premises only with the written permission of the landlord. Payment of the storage charges or maintenance of the dwelling or home and the space does not create or reinstate a tenancy or create a waiver pursuant to ORS 90.412 or 90.417. A former tenant may not enter the premises without the written permission of the landlord, including entry to maintain the dwelling or home or the space or to facilitate a sale.

“[(15)] (16) A landlord or tenant who sells a manufactured dwelling or floating home shall deliver title to the dwelling or home to the purchaser within 25 business days after completion of the sale. If the sale by contract requires future payments, the landlord or tenant shall notify the county that the purchaser is responsible for property tax payments.”.

In line 19, delete “3” and insert “4”.

On page 4, line 40, restore the bracketed material and delete the boldfaced
material.

On page 5, line 23, delete “4” and insert “5” and delete “ORS 90.505 and 90.632 by sections 1 and 2” and insert “ORS 90.505, 90.632 and 90.680 by sections 1, 2 and 3”.

In line 29, delete “5” and insert “6”.

___________
**SUMMARY**

Requires landlord of manufactured dwelling park to pay tenant necessary relocation costs or applicable manufactured dwelling park closure penalty, as determined by Office of Manufactured Dwelling Park Community Relations, upon closure of park to convert to other use.

Requires owner of manufactured dwelling park to give notice of final sale to office upon sale of park.

Prohibits landlord from terminating without cause, unless under certain circumstances with 90 days' written notice, month-to-month tenancy consisting of rental of manufactured dwelling of floating home owned by landlord on space in facility.

Requires fixed term tenancy consisting of rental of manufactured dwelling or floating home owned by landlord on space in facility to become month-to-month tenancy upon reaching specific end date, unless tenant elects to renew or terminate tenancy. Requires landlord to make tenant offer to renew fixed term tenancy.

Requires office to produce materials to inform tenants of rights and adopt rules to require landlords to post materials in manufactured dwelling park public spaces.

Directs office to establish and administer landlord-tenant dispute resolution program. Requires office to submit annual report on progress of program to interim committees of Legislative Assembly related to housing and human services for five years.

Authorizes office to impose penalties for violations of landlord-tenant law against landlords of manufactured dwelling parks.

Declares emergency, effective on passage.

**SECTION 1.** ORS 90.645 is amended to read:

90.645. (1)(a) If a manufactured dwelling park, or a portion of the park that includes the space for a manufactured dwelling, is to be closed and the land or leasehold converted to a use other than as a manufactured dwelling park, and the closure is not required by the exercise of eminent domain or by order of federal, state or local agencies, the landlord may terminate a month-to-month or fixed term rental agreement for a manufactured dwelling park space:

[(a)] (A) By giving the tenant not less than 365 days’ notice in writing before the date designated in the notice for termination; and

[(b)] (B) By paying a tenant, for each space for which a rental agreement is terminated, [(one of the following amounts:) the greater of either:]

(i) The applicable manufactured dwelling park closure penalty, as determined by the Office of Manufactured Dwelling Park Community Relations; or

(ii) The necessary relocation costs incurred by a tenant that elects to relocate the manufactured dwelling, not to exceed $20,000.

[(A) $5,000 if the manufactured dwelling is a single-wide dwelling;]

[(B) $7,000 if the manufactured dwelling is a double-wide dwelling; or]

[(C) $9,000 if the manufactured dwelling is a triple-wide or larger dwelling.]

NOTE: Matter in **boldfaced** type in an amended section is new; matter in *italic and bracketed* is existing law to be omitted.
New sections are in **boldfaced** type.

**LC 2997**
(b) This subsection does not prohibit or limit a local government from enacting and enforcing an ordinance or resolution that requires a landlord of a manufactured dwelling park located within the jurisdiction of the local government to pay penalties or relocation costs to tenants in addition to, and not in lieu of, the payments to tenants required under paragraph (a) of this subsection.

(2) Notwithstanding subsection (1)(a) of this section, if a landlord closes a manufactured dwelling park under this section as a result of converting the park to a subdivision under ORS 92.830 to 92.845, the landlord:

(a) May terminate a rental agreement by giving the tenant not less than 180 days' notice in writing before the date designated in the notice for termination.

(b) Is not required to make a payment under subsection [(1)(b)] (1)(a)(B) of this section to a tenant who:

(A) Buys the space or lot on which the tenant's manufactured dwelling is located and does not move the dwelling; or

(B) Sells the manufactured dwelling to a person who buys the space or lot.

(3) A notice given under subsection (1) or (2) of this section shall, at a minimum:

(a) State that the landlord is closing the park, or a portion of the park, and converting the land or leasehold to a different use;

(b) Designate the date of closure; and

(c) Include the tax credit notice described in ORS 90.650.

[4] Except as provided in subsections (2) and (5) of this section, the landlord must pay a tenant the full amount required under subsection (1)(b) of this section regardless of whether the tenant relocates or abandons the manufactured dwelling. The landlord shall pay at least one-half of the payment amount to the tenant within seven days after receiving from the tenant the notice described in subsection (5)(a) of this section. The landlord shall pay the remaining amount no later than seven days after the tenant ceases to occupy the space.

(4) Except as provided in subsections (2) and (5) of this section, the landlord shall pay:

(a) The full amount required under subsection (1)(a)(B)(i) of this section no later than seven days after the tenant ceases to occupy the space; or

(b) The full amount required under subsection (1)(a)(B)(ii) of this section within seven days after receiving from the tenant a copy of records of the completed relocation sufficient to prove the amount of necessary relocation costs incurred by tenant.

(5) Notwithstanding subsection (1)(a) of this section:

(a) A landlord is not required to make a payment to a tenant as provided in subsection (1) of this section unless the tenant gives the landlord not less than 30 days' and not more than 60 days' written notice of the date within the 365-day period on which the tenant will cease tenancy, whether by relocation or abandonment of the manufactured dwelling.

(b) If the manufactured dwelling is abandoned:

(A) The landlord may condition the payment required by subsection (1)(a)(B) of this section upon the tenant waiving any right to receive payment under ORS 90.425 or 90.675.

(B) The landlord may not charge the tenant to store, sell or dispose of the abandoned manufactured dwelling.

(6)(a) A landlord may not charge a tenant any penalty, fee or unaccrued rent for moving out of the manufactured dwelling park prior to the end of the 365-day notice period.

(b) A landlord may charge a tenant for rent for any period during which the tenant occupies the
space and may deduct from the payment amount required by subsection (1) of this section any un-
paid moneys owed by the tenant to the landlord.

(7) A landlord may not increase the rent for a manufactured dwelling park space after giving a
notice of termination under this section to the tenant of the space.

(8) This section does not limit a landlord’s right to terminate a tenancy for nonpayment of rent
under ORS 90.394 or for other cause under ORS 90.380 (5)(b), 90.396, 90.398 or 90.632 by complying
with ORS 105.105 to 105.168.

(9) If a landlord is required to close a manufactured dwelling park by the exercise of eminent
domain or by order of a federal, state or local agency, the landlord shall notify the park tenants no
later than 15 days after the landlord receives notice of the exercise of eminent domain or of the
agency order. The notice to the tenants shall be in writing, designate the date of closure, state the
reason for the closure, describe the tax credit available under section 17, chapter 906, Oregon Laws
2007, and any government relocation benefits known by the landlord to be available to the tenants
and comply with any additional content requirements under ORS 90.650.

(10) As used in this section:

(a) “Install” includes assembling the manufactured dwelling, securing the manufactured
dwelling to a foundation and connecting the manufactured dwelling to utility services.

(b) “Necessary relocation costs” includes the total costs associated with repairing the
manufactured dwelling as needed to move the manufactured dwelling to the tenant’s new
space, hiring a service to move and install the manufactured dwelling at the tenant’s new
space and any insurance or permits required to complete the move and installation.

SECTION 2. ORS 90.645, as amended by section 2a, chapter 906, Oregon Laws 2007, is amended
to read:

90.645. (1)(a) If a manufactured dwelling park, or a portion of the park that includes the space
for a manufactured dwelling, is to be closed and the land or leasehold converted to a use other than
as a manufactured dwelling park, and the closure is not required by the exercise of eminent domain
or by order of federal, state or local agencies, the landlord may terminate a month-to-month or fixed
term rental agreement for a manufactured dwelling park space:

[A] (A) By giving the tenant not less than 365 days’ notice in writing before the date design-
nated in the notice for termination; and

[B] (B) By paying a tenant, for each space for which a rental agreement is terminated, [one of
the following amounts:] the greater of either:

(i) The applicable manufactured dwelling park closure penalty, as determined by the Of-
office of Manufactured Dwelling Park Community Relations; or

(ii) The necessary relocation costs incurred by a tenant that elected to relocate the
manufactured dwelling, not to exceed $20,000.

[A] $5,000 if the manufactured dwelling is a single-wide dwelling;

[B] $7,000 if the manufactured dwelling is a double-wide dwelling; or

[C] $9,000 if the manufactured dwelling is a triple-wide or larger dwelling.

(b) This subsection does not prohibit or limit a local government from enacting and en-
forcing an ordinance or resolution that requires a landlord of a manufactured dwelling park
located within the jurisdiction of the local government to pay penalties or relocation costs
to tenants in addition to, and not in lieu of, the payments to tenants required under para-
graph (a) of this subsection.

(2) Notwithstanding subsection (1)(a) of this section, if a landlord closes a manufactured dwell-
ing park under this section as a result of converting the park to a subdivision under ORS 92.830 to
92.845, the landlord:
   (a) May terminate a rental agreement by giving the tenant not less than 180 days’ notice in
writing before the date designated in the notice for termination.
   (b) Is not required to make a payment under subsection [(1)(b)] (1)(a)(B) of this section to a
tenant who:
   (A) Buys the space or lot on which the tenant’s manufactured dwelling is located and does not
move the dwelling; or
   (B) Sells the manufactured dwelling to a person who buys the space or lot.
   (3) A notice given under subsection (1) or (2) of this section shall, at a minimum:
   (a) State that the landlord is closing the park, or a portion of the park, and converting the land
or leasehold to a different use;
   (b) Designate the date of closure; and
   (c) Include the tax notice described in ORS 90.650.
   (4) Except as provided in subsections (2) and (5) of this section, the landlord must pay a tenant
the full amount required under subsection (1)(b) of this section regardless of whether the tenant relo-
cates or abandons the manufactured dwelling. The landlord shall pay at least one-half of the payment
amount to the tenant within seven days after receiving from the tenant the notice described in sub-
section (5)(a) of this section. The landlord shall pay the remaining amount no later than seven days
after the tenant ceases to occupy the space.
   (4) Except as provided in subsections (2) and (5) of this section, the landlord shall pay:
   (a) The full amount required under subsection (1)(a)(B)(i) of this section no later than
seven days after the tenant ceases to occupy the space; or
   (b) The full amount required under subsection (1)(a)(B)(ii) of this section within seven
days after receiving from the tenant a copy of records of the completed relocation sufficient

to prove the amount of necessary relocation costs incurred by tenant.
   (5) Notwithstanding subsection (1)(a) of this section:
   (a) A landlord is not required to make a payment to a tenant as provided in subsection (1) of
this section unless the tenant gives the landlord not less than 30 days’ and not more than 60 days’
written notice of the date within the 365-day period on which the tenant will cease tenancy, whether
by relocation or abandonment of the manufactured dwelling.
   (b) If the manufactured dwelling is abandoned:
   (A) The landlord may condition the payment required by subsection (1)(a)(B) of this section
upon the tenant waiving any right to receive payment under ORS 90.425 or 90.675.
   (B) The landlord may not charge the tenant to store, sell or dispose of the abandoned manufac-
tured dwelling.
   (6)(a) A landlord may not charge a tenant any penalty, fee or unaccrued rent for moving out of
the manufactured dwelling park prior to the end of the 365-day notice period.
   (b) A landlord may charge a tenant for rent for any period during which the tenant occupies the
space and may deduct from the payment amount required by subsection (1) of this section any un-
paid moneys owed by the tenant to the landlord.
   (7) A landlord may not increase the rent for a manufactured dwelling park space after giving a
notice of termination under this section to the tenant of the space.
   (8) This section does not limit a landlord’s right to terminate a tenancy for nonpayment of rent
under ORS 90.394 or for other cause under ORS 90.380 (5)(b), 90.396, 90.398 or 90.632 by complying
with ORS 105.105 to 105.168.

(9) If a landlord is required to close a manufactured dwelling park by the exercise of eminent
domain or by order of a federal, state or local agency, the landlord shall notify the park tenants no
later than 15 days after the landlord receives notice of the exercise of eminent domain or of the
agency order. The notice to the tenants shall be in writing, designate the date of closure, state the
reason for the closure, describe any government relocation benefits known by the landlord to be
available to the tenants and comply with any additional content requirements under ORS 90.650.

(10) The Office of Manufactured Dwelling Park Community Relations shall adopt rules estab-
lishing a sample form for the notice described in subsection (3) of this section.

(11) As used in this section:

(a) “Install” includes assembling the manufactured dwelling, securing the manufactured
dwelling to a foundation and connecting the manufactured dwelling to utility services.

(b) “Necessary relocation costs” includes the total costs associated with repairing the
manufactured dwelling as needed to move the manufactured dwelling to the tenant’s new
space, hiring a service to move and install the manufactured dwelling at the tenant’s new
space and any insurance or permits required to complete the move and installation.

SECTION 3. ORS 90.842 is amended to read:

90.842. (1) An owner of a manufactured dwelling park shall give written notice of the owner’s
interest in selling the park before the owner markets the park for sale or when the owner receives
an offer to purchase that the owner intends to consider, whichever occurs first.

(2) The owner shall give the notice required by subsection (1) of this section to:

(a) The Office of Manufactured Dwelling Park Community Relations; and

(b) All tenants of the park; or

A tenants committee, if there is an existing committee of tenants formed for purposes
including the purchase of the park and with which the owner has met in the 12-month period im-
mediately before delivery of the notice.

(3) The owner shall also give the notice required by subsection (1) of this section to the Office of
Manufactured Dwelling Park Community Relations of the Housing and Community Services Depart-
ment.

(4) The notice required by subsection (1) of this section must include the following in-
formation:

(a) The owner is considering selling the park.

(b) The tenants, through a tenants committee, have an opportunity to compete to purchase the
park.

(c) In order to compete to purchase the park, within 10 days after delivery of the notice, the
tenants must form or identify a single tenants committee for the purpose of purchasing the park and
notify the owner in writing of:

(A) The tenants’ interest in competing to purchase the park; and

(B) The name and contact information of the representative of the tenants committee with whom
the owner may communicate about the purchase.

(d) The representative of the tenants committee may request financial information described in
ORS 90.844 (2) from the owner within the 10-day period.

(e) Information about purchasing a manufactured dwelling park is available from the Office of
Manufactured Dwelling Park Community Relations [of the Housing and Community Services Depart-
ment].
(4) In addition to providing notice as required by subsection (1) of this section, upon sale of a manufactured dwelling park, the owner shall give notice of final sale to the Office of Manufactured Dwelling Park Community Relations stating:

(a) The number of vacant spaces and homes in the manufactured dwelling park;

(b) The final sale price of the manufactured dwelling park;

(c) The date the sale becomes final; and

(d) The name, address and telephone number of the purchaser.

SECTION 4. Sections 5 to 8 of this 2017 Act are added to and made a part of ORS 90.505 to 90.850.

SECTION 5. (1) If a month-to-month tenancy consists of a manufactured dwelling or floating home that is owned by the landlord and situated on a space in a facility, at any time during the tenancy:

(a) The tenant may terminate the tenancy by giving the landlord notice in writing not less than 30 days prior to the date designated in the notice for the termination of the tenancy.

(b) The landlord may terminate the tenancy only:

(A) For cause and with notice as described in ORS 86.782 (6)(c), 90.392, 90.394, 90.396, 90.398, 90.405, 90.440 or 90.445; or

(B) Under an exception and with notice as described in subsection (3) of this section.

(2) If a fixed term tenancy consists of a manufactured dwelling or floating home that is owned by the landlord and situated on a space in a facility:

(a) Upon reaching the specified ending date for the fixed term, unless the tenant gives notice to renew or terminate the tenancy, the tenancy shall become a month-to-month tenancy without requiring further notice.

(b) Not less than 90 days prior to the specified ending date for the fixed term, the landlord shall make the tenant an offer in writing to renew the tenancy for a fixed term that is at least equal in duration to the existing fixed term. The tenant may renew the tenancy by giving the landlord notice in writing not less than 30 days prior to the specified ending date for the fixed term.

(c) At any time during the fixed term, the tenant may terminate the tenancy without cause by giving the landlord notice in writing not less than 30 days prior to the specified ending date for the fixed term or, if the tenancy has become a month-to-month tenancy under paragraph (a) of this subsection, not less than 30 days prior to the date designated in the notice for the termination of the tenancy.

(3) The landlord may terminate a month-to-month tenancy under subsection (1)(b)(B) of this section at any time during the tenancy by giving the tenant notice in writing not less than 90 days prior to the date designated in the notice for the termination of the tenancy if:

(a) The property is scheduled to undergo repairs or renovations that will cause the manufactured dwelling or floating home to be unhabitable, as described in ORS 90.320, such that the manufactured dwelling or floating home will be unsafe or unfit to occupy;

(b) The landlord intends in good faith to demolish or remove the manufactured dwelling or floating home within a reasonable time;

(c) The manufactured dwelling or floating home is not in a habitable condition, as described in ORS 90.320, such that the manufactured dwelling or floating home is unsafe or unfit to occupy, and the landlord intends in good faith to undertake repairs within a rea-
sonable time to correct the condition of the manufactured dwelling or floating home;
(d) The landlord has:
   (A) Accepted an offer to purchase the manufactured dwelling or floating home separately
from any other manufactured dwelling or floating home from a person who intends in good
faith to occupy the manufactured dwelling or floating home as the person’s primary resi-
dence; and
   (B) Provided the notice, and written evidence of the offer to purchase the manufactured
dwelling or floating home, to the tenant not more than 120 days after accepting the offer to
purchase; or
(e) The landlord:
   (A) Intends in good faith for the landlord or a member of the landlord’s immediate family
to occupy the manufactured dwelling or floating home as a primary residence; and
   (B) Does not own a comparable manufactured dwelling or floating home in the same fa-
cility that is available for occupancy at the same time as the tenant receives notice to ter-
minate the tenancy.
(4) A landlord that terminates a tenancy under an exception described in subsection (3)
of this section shall state in the notice given to terminate the tenancy the exception under
which the tenancy is terminated.
(5) The provisions of this section do not apply to a tenancy that consists of a recreational
vehicle that is owned by the landlord and situated on a space in a facility.
SECTION 6. (1) The Office of Manufactured Dwelling Park Community Relations shall
produce materials, including notices for posting in public spaces of manufactured dwelling
parks, to:
   (a) Inform tenants of manufactured dwelling parks of their rights under ORS 90.100 to
90.465 and 90.505 to 90.850;
   (b) Provide a toll free number and website where tenants can access additional informa-
tion; and
   (c) Provide instructions for a tenant to file a complaint with the office if the tenant be-
believes that a violation has occurred.
(2) The office shall:
   (a) Distribute the materials produced pursuant to subsection (1) of this section to all
manufactured dwelling parks in this state;
   (b) Adopt requirements for landlords of manufactured dwelling parks to post the notices
in visible, public locations throughout the manufactured dwelling park and distribute any
other materials to tenants within a reasonable period of time, as determined by the office
by rule; and
   (c) Verify landlord compliance with the requirements adopted under paragraph (b) of this
subsection through visual inspection by a representative of the office.
(3)(a) In addition to any other liability or penalty provided by law, the office may impose
a civil penalty against a landlord for failure to comply with a notice requirement adopted by
the office pursuant to subsection (2)(b) of this section, not to exceed $10,000 per violation.
   (b) The office shall determine by rule the amount of the civil penalty authorized by par-
agraph (a) of this subsection.
   (c) A civil penalty under this section must be imposed in the manner provided by ORS
183.745.
(d) The office shall use all penalties recovered under this section to fund the dispute resolution program established under section 7 of this 2017 Act.

SECTION 7. (1) In addition to and not in lieu of the dispute resolution procedures provided by ORS 105.138 and 446.515 to 446.547, the Office of Manufactured Dwelling Park Community Relations shall establish and administer a landlord-tenant dispute resolution program to provide manufactured dwelling park tenants and landlords with an efficient process to resolve disputes arising from alleged violations of ORS 90.100 to 90.465 and 90.505 to 90.850.

(2) The program shall include procedures to:

(a) Conduct investigations;
(b) Determine whether a violation has occurred;
(c) Impose penalties pursuant to section 8 of this 2017 Act in response to a determination that a violation has occurred; and
(d) Perform any other activities necessary to administer the dispute resolution program.

(3) The office shall adopt rules to implement and administer the program.

SECTION 8. In addition to any other liability or penalty provided by law, the Office of Manufactured Dwelling Park Community Relations may impose civil penalties against an owner of a manufactured dwelling park for a violation of any provision of ORS 90.100 to 90.465 or 90.505 to 90.850, not to exceed $10,000 per violation.

SECTION 9. ORS 446.543 is amended to read:

446.543. (1) An Office of Manufactured Dwelling Park Community Relations is established in the Housing and Community Services Department.

(2) The Director of the Housing and Community Services Department shall, through the use of office personnel or by other means:

(a) Undertake, participate in or cooperate with persons and agencies in such conferences, inquiries, meetings or studies as might lead to improvements in manufactured dwelling park landlord and tenant relationships;

(b) Develop and implement a centralized resource referral program for tenants and landlords to encourage the voluntary resolution of disputes;

(c) Maintain a current list of manufactured dwelling parks in the state, indicating the total number of spaces;

(d) Maintain a database of complaints filed against manufactured dwelling parks in the state, including:

(A) A list of complaints received against each manufactured dwelling park;

(B) The alleged violation for each complaint; and

(C) The dispute resolution or other outcome of each complaint;

[(d)] (e) Not be directly affiliated, currently or previously, in any way with a manufactured dwelling park within the preceding two years; and

[(e)] (f) Take other actions or perform such other duties as the director deems necessary or appropriate, including but not limited to coordinating or conducting tenant resource fairs, providing tenant counseling and service referrals related to park closures and providing outreach services to educate tenants regarding tenant rights and responsibilities and the availability of services.

(3) The office shall adopt rules to administer ORS 90.645 and 90.655 and sections 6, 7 and 8 of this 2017 Act.

SECTION 10. ORS 90.643 is amended to read:

90.643. (1) A manufactured dwelling park may be converted to a planned community subdivision
of manufactured dwellings pursuant to ORS 92.830 to 92.845. When a manufactured dwelling park is
converted pursuant to ORS 92.830 to 92.845:

(a) Conversion does not require closure of the park pursuant to ORS 90.645 or termination of
any tenancy on any space in the park or any lot in the planned community subdivision of manufac-
tured dwellings.

(b) After approval of the tentative plan under ORS 92.830 to 92.845, the manufactured dwelling
park ceases to exist, notwithstanding the possibility that four or more lots in the planned community
subdivision may be available for rent.

(2) If a park is converted to a subdivision under ORS 92.830 to 92.845, and the landlord closes
the park as a result of the conversion, ORS 90.645 applies to the closure.

(3) If a park is converted to a subdivision under ORS 92.830 to 92.845, but the landlord does not
close the park as a result of the conversion:

(a) A tenant who does not buy the space occupied by the tenant’s manufactured dwelling may
terminate the tenancy and move. If the tenant terminates the tenancy after receiving the notice
required by ORS 92.839 and before the expiration of the 60-day period described in ORS 92.840 (2),
the landlord shall pay the tenant as provided in ORS 90.645 (1)(b)(i).

(b) If the landlord and the tenant continue the tenancy on the lot created in the planned com-
munity subdivision, the tenancy is governed by ORS 90.100 to 90.465, except that the following pro-
visions apply and, in the case of a conflict, control:

(A) ORS 90.510 (4) to (7) applies to a rental agreement and rules and regulations concerning the
use and occupancy of the subdivision lot until the declarant turns over administrative control of the
planned community subdivision of manufactured dwellings to a homeowners association pursuant to
ORS 94.600 and 94.604 to 94.621. The landlord shall provide each tenant with a copy of the bylaws,
rules and regulations of the homeowners association at least 60 days before the turnover meeting
described in ORS 94.609.

(B) ORS 90.530 applies regarding pets.

(C) ORS 90.545 applies regarding the extension of a fixed term tenancy.

(D) ORS 90.600 (1) to (4) applies to an increase in rent.

(E) ORS 90.620 applies to a termination by a tenant.

(F) ORS 90.630 applies to a termination by a landlord for cause. However, the sale of a lot in
the planned community subdivision occupied by a tenant to someone other than the tenant is a good
cause for termination under ORS 90.630 that the tenant cannot cure or correct and for which the
landlord must give written notice of termination that states the cause of termination at least 180
days before termination.

(G) ORS 90.632 applies to a termination of tenancy by a landlord due to the physical condition
of the manufactured dwelling.

(H) ORS 90.634 applies to a lien for manufactured dwelling unit rent.

(I) ORS 90.680 applies to the sale of a manufactured dwelling occupying a lot in the planned
community subdivision. If the intention of the buyer of the manufactured dwelling is to leave the
dwelling on the lot, the landlord may reject the buyer as a tenant if the buyer does not buy the lot
also.

(J) ORS 90.710 applies to a cause of action for a violation of ORS 90.510 (4) to (7), 90.630, 90.680
or 90.765.

(K) ORS 90.725 applies to landlord access to a rented lot in a planned community subdivision.

(L) ORS 90.730 (2), (3), (4) and (7) apply to the duty of a landlord to maintain a rented lot in a
habitable condition.

(M) ORS 90.750 applies to the right of a tenant to assemble or canvass.

(N) ORS 90.755 applies to the right of a tenant to speak on political issues and to post political signs.

(O) ORS 90.765 applies to retaliatory conduct by a landlord.

(P) ORS 90.771 applies to the confidentiality of information provided to the Office of Manufactured Dwelling Park Community Relations of the Housing and Community Services Department about disputes.

SECTION 11. ORS 90.660 is amended to read:

90.660. Except as provided in ORS 90.645 (1)(b), a local government may not enforce an ordinance, rule or other local law regulating manufactured dwelling park closures or partial closures adopted by the local government on or after July 1, 2007, or amended on or after January 1, 2010. An ordinance, rule or other local law regulating manufactured dwelling park closures or partial closures may not be applied to reduce the rights provided to a park tenant under ORS 90.645 or 90.655.

SECTION 12. ORS 90.844 is amended to read:

90.844. (1) Within 10 days after delivery of the notice described in ORS 90.842 (1), if the tenants choose to compete to purchase the manufactured dwelling park in which the tenants reside, the tenants must notify the owner in writing of:

(a) The tenants’ interest in competing to purchase the park;

(b) The formation or identification of a single tenants committee formed for the purpose of purchasing the park; and

(c) The name and contact information of the representative of the tenants committee with whom the owner may communicate about the purchase.

(2) During the 10-day period, in order to perform a due diligence evaluation of the opportunity to compete to purchase the park, the representative of the tenants committee may make a written request for the kind of financial information that a seller of a park would customarily provide to a prospective purchaser.

(3) Of the financial information described in subsection (2) of this section, the owner shall provide the following information within seven days after delivery of the request by the tenants committee for the information:

(a) The asking price, if any, for the park;

(b) The total income collected from the park and related profit centers, including storage and laundry, in the 12-month period immediately before delivery of the notice required by ORS 90.842 (1);

(c) The cost of all utilities for the park that were paid by the owner in the 12-month period immediately before delivery of the notice required by ORS 90.842 (1);

(d) The annual cost of all insurance policies for the park that were paid by the owner, as shown by the most recent premium;

(e) The number of homes in the park owned by the owner; and

(f) The number of vacant spaces and homes in the park.

(4) The owner may:

(a) Designate all or part of the financial information provided pursuant to this section as confidential.

(b) If the owner designates financial information as confidential, establish, in cooperation with
the representative of the tenants committee, a list of persons with whom the tenants may share the
information, including any of the following persons that are either seeking to purchase the park on
behalf of the tenants committee or assisting the tenants committee in evaluating or purchasing the
park:
(A) A nonprofit organization or a housing authority.
(B) An attorney or other licensed professional or adviser.
(C) A financial institution.
(c) Require that persons authorized to receive the confidential information:
(A) Sign a confidentiality agreement before receiving the information;
(B) Refrain from copying any of the information; and
(C) Return the information to the owner when the negotiations to purchase the park are com-
pleted or terminated.
(5) Within 15 days after delivery of the financial information described in subsection (3) of this
section, or within 15 days after the end of the 10-day period described in subsection (1) of this sec-
tion when the representative of the tenants committee does not request financial information under
subsection (2) of this section, if the tenants choose to continue competing to purchase the park, the
tenants committee must:
(a) Form a corporate entity under ORS chapter 60, 62 or 65 that is legally capable of purchasing
real property or associate with a nonprofit corporation or housing authority that is legally capable
of purchasing real property or that is advising the tenants about purchasing the park in which the
tenants reside.
(b) Submit to the owner a written offer to purchase the park, in the form of a proposed purchase
and sale agreement, and either a copy of the articles of incorporation of the corporate entity or
other evidence of the legal capacity of the formed or associated corporate entity to purchase real
property.
(6)(a) The owner may accept the offer to purchase in the tenants committee's purchase and sale
agreement, reject the offer or submit a counteroffer.
(b) If the parties reach agreement on the purchase, the purchase and sale agreement must
specify the price, due diligence duties, schedules, timelines, conditions and any extensions.
(c) If the tenants do not act as required within the time periods described in this section and
ORS 90.842, if the tenants violate the confidentiality agreement described in this section or if the
parties do not reach agreement on a purchase, the owner is not obligated to take additional action
under ORS 90.842 to 90.850.

SECTION 13. ORS 90.846 is amended to read:
90.846. (1) During the process described in ORS 90.842 to 90.850, the parties shall act in a
commercially reasonable manner.
(2) Except as provided in ORS 90.848, before selling a manufactured dwelling park to an entity
that is not formed by or associated with the tenants, the owner of the park must give the notice
required by ORS 90.842 (1) and comply with the requirements of ORS 90.844.
(3) A minor error in providing the notice required by ORS 90.842 (1) or in providing the finan-
cial information required by ORS 90.844 does not prevent the owner from selling the park to an
entity that is not formed by or associated with the tenants and does not cause the owner to be liable
to the tenants for damages or a penalty.
(4) During the process described in ORS 90.842 to 90.850, the owner may seek, or negotiate with,
potential purchasers other than the tenants or an entity formed by or associated with the tenants.

[11]
(5) If the owner does not comply with requirements of this section and ORS 90.842 and 90.844, in a substantial way that prevents the tenants from competing to purchase the park, the tenants may:

(a) Obtain injunctive relief to prevent a sale or transfer to an entity that is not formed by or associated with the tenants when the owner has not caused an affidavit to be recorded before the sale or transfer pursuant to ORS 90.850.

(b) Recover actual damages or twice the rent from the owner for each tenant, whichever is greater.

(6) If a tenant misuses or discloses, in a substantial way, confidential information in violation of a confidentiality agreement described in ORS 90.844, the owner may recover actual damages from the tenant.

(7) The Office of Manufactured Dwelling Park Community Relations [of the Housing and Community Services Department] shall prepare and make available information for tenants about purchasing a manufactured dwelling park.

SECTION 14. The Office of Manufactured Dwelling Park Community Relations shall submit a report, in the manner provided in ORS 192.245, on the progress of the dispute resolution program established under section 7 of this 2017 Act to the interim committees of the Legislative Assembly related to housing and human services annually for five consecutive years. The office shall submit the first annual report not later than September 15, 2018.

SECTION 15. The amendments to ORS 90.645 and 90.842 by sections 1, 2 and 3 of this 2017 Act apply to manufactured dwelling park closures for which notice is given to tenants on or after the effective date of this 2017 Act.

SECTION 16. The Office of Manufactured Dwelling Park Community Relations may impose penalties under section 6, 7 or 8 of this 2017 Act only for violations occurring on or after the effective date of this 2017 Act.

SECTION 17. Section 5 of this 2017 Act applies to:

(1) Rental agreements for fixed term tenancies entered into or renewed on or after the effective date of this 2017 Act; and

(2) Rental agreements for month-to-month tenancies in effect on or after the effective date of this 2017 Act.

SECTION 18. This 2017 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2017 Act takes effect on its passage.
PROPOSED AMENDMENTS TO
HOUSE BILL 2008

On page 1 of the printed bill, line 2, after “provisions;” delete the rest of the line and delete line 3 and insert “amending ORS 62.809, 62.813, 90.643 and 90.645; and declaring an emergency.”.

Delete lines 5 through 21 and delete pages 2 through 12 and insert:

“SECTION 1. ORS 90.645 is amended to read:

“90.645. (1)(a) If a manufactured dwelling park, or a portion of the park that includes the space for a manufactured dwelling, is to be closed and the land or leasehold converted to a use other than as a manufactured dwelling park, and the closure is not required by the exercise of eminent domain or by order of federal, state or local agencies, the landlord may terminate a month-to-month or fixed term rental agreement for a manufactured dwelling park space:

“[(a)] (A) By giving the tenant not less than 365 days’ notice in writing before the date designated in the notice for termination; and

“[(b)] (B) By paying a tenant, for each space for which a rental agreement is terminated, one of the following amounts:

“[(A)] (i) [$5,000] $6,000 if the manufactured dwelling is a single-wide dwelling;

“[(B)] (ii) [$7,000] $8,000 if the manufactured dwelling is a double-wide dwelling; or

“[(C)] (iii) [$9,000] $10,000 if the manufactured dwelling is a triple-wide
or larger dwelling.

“(b) The Office of Manufactured Dwelling Park Community Relations of the Housing and Community Services Department shall establish by rule a process to annually recalculate the amounts described in paragraph (a) of this subsection to reflect inflation.

“(2) Notwithstanding subsection (1) of this section, if a landlord closes a manufactured dwelling park under this section as a result of converting the park to a subdivision under ORS 92.830 to 92.845, the landlord:

“(a) May terminate a rental agreement by giving the tenant not less than 180 days’ notice in writing before the date designated in the notice for termination.

“(b) Is not required to make a payment under subsection [(1)(b)] (1) of this section to a tenant who:

“(A) Buys the space or lot on which the tenant’s manufactured dwelling is located and does not move the dwelling; or

“(B) Sells the manufactured dwelling to a person who buys the space or lot.

“(3) A notice given under subsection (1) or (2) of this section shall, at a minimum:

“(a) State that the landlord is closing the park, or a portion of the park, and converting the land or leasehold to a different use;

“(b) Designate the date of closure; and

“(c) Include the tax credit notice described in ORS 90.650.

“(4) Except as provided in subsections (2) and (5) of this section, the landlord must pay a tenant the full amount required under subsection [(1)(b)] (1) of this section regardless of whether the tenant relocates or abandons the manufactured dwelling. The landlord shall pay at least one-half of the payment amount to the tenant within seven days after receiving from the tenant the notice described in subsection (5)(a) of this section. The landlord shall pay the remaining amount no later than seven days after the
tenant ceases to occupy the space.

“(5) Notwithstanding subsection (1) of this section:

“(a) A landlord is not required to make a payment to a tenant as provided in subsection (1) of this section unless the tenant gives the landlord not less than 30 days’ and not more than 60 days’ written notice of the date within the 365-day period on which the tenant will cease tenancy, whether by relocation or abandonment of the manufactured dwelling.

“(b) If the manufactured dwelling is abandoned:

“(A) The landlord may condition the payment required by subsection (1) of this section upon the tenant waiving any right to receive payment under ORS 90.425 or 90.675.

“(B) The landlord may not charge the tenant to store, sell or dispose of the abandoned manufactured dwelling.

“(6)(a) A landlord may not charge a tenant any penalty, fee or unaccrued rent for moving out of the manufactured dwelling park prior to the end of the 365-day notice period.

“(b) A landlord may charge a tenant for rent for any period during which the tenant occupies the space and may deduct from the payment amount required by subsection (1) of this section any unpaid moneys owed by the tenant to the landlord.

“(7) A landlord may not increase the rent for a manufactured dwelling park space after giving a notice of termination under this section to the tenant of the space.

“(8) This section does not limit a landlord’s right to terminate a tenancy for nonpayment of rent under ORS 90.394 or for other cause under ORS 90.380 (5)(b), 90.396, 90.398 or 90.632 by complying with ORS 105.105 to 105.168.

“(9) If a landlord is required to close a manufactured dwelling park by the exercise of eminent domain or by order of a federal, state or local agency, the landlord shall notify the park tenants no later than 15 days after the
landlord receives notice of the exercise of eminent domain or of the agency
order. The notice to the tenants shall be in writing, designate the date of
closure, state the reason for the closure, describe the tax credit available
under section 17, chapter 906, Oregon Laws 2007, and any government relo-
cation benefits known by the landlord to be available to the tenants and
comply with any additional content requirements under ORS 90.650.

“SECTION 2. ORS 90.645, as amended by section 2a, chapter 906, Oregon
Laws 2007, is amended to read:

90.645. (1) (a) If a manufactured dwelling park, or a portion of the park
that includes the space for a manufactured dwelling, is to be closed and the
land or leasehold converted to a use other than as a manufactured dwelling
park, and the closure is not required by the exercise of eminent domain or
by order of federal, state or local agencies, the landlord may terminate a
month-to-month or fixed term rental agreement for a manufactured dwelling
park space:

[(a)] (A) By giving the tenant not less than 365 days’ notice in writing
before the date designated in the notice for termination; and

[(b)] (B) By paying a tenant, for each space for which a rental agreement
is terminated, one of the following amounts:

[(A)] (i) [$5,000] $6,000 if the manufactured dwelling is a single-wide
dwelling;

[(B)] (ii) [$7,000] $8,000 if the manufactured dwelling is a double-wide
dwelling; or

[(C)] (iii) [$9,000] $10,000 if the manufactured dwelling is a triple-wide
or larger dwelling.

(b) The Office of Manufactured Dwelling Park Community Re-
lations of the Housing and Community Services Department shall es-
tablish by rule a process to annually recalculate the amounts described
in paragraph (a) of this subsection to reflect inflation.

(2) Notwithstanding subsection (1) of this section, if a landlord closes a
manufactured dwelling park under this section as a result of converting the
park to a subdivision under ORS 92.830 to 92.845, the landlord:

“(a) May terminate a rental agreement by giving the tenant not less than
180 days’ notice in writing before the date designated in the notice for ter-
mination.

“(b) Is not required to make a payment under subsection [(1)(b)] (1) of this
section to a tenant who:

“(A) Buys the space or lot on which the tenant’s manufactured dwelling
is located and does not move the dwelling; or

“(B) Sells the manufactured dwelling to a person who buys the space or
lot.

“(3) A notice given under subsection (1) or (2) of this section shall, at a
minimum:

“(a) State that the landlord is closing the park, or a portion of the park,
and converting the land or leasehold to a different use;

“(b) Designate the date of closure; and

“(c) Include the tax notice described in ORS 90.650.

“(4) Except as provided in subsections (2) and (5) of this section, the
landlord must pay a tenant the full amount required under subsection
[(1)(b)] (1) of this section regardless of whether the tenant relocates or
abandons the manufactured dwelling. The landlord shall pay at least one-half
of the payment amount to the tenant within seven days after receiving from
the tenant the notice described in subsection (5)(a) of this section. The
landlord shall pay the remaining amount no later than seven days after the
tenant ceases to occupy the space.

“(5) Notwithstanding subsection (1) of this section:

“(a) A landlord is not required to make a payment to a tenant as provided
in subsection (1) of this section unless the tenant gives the landlord not less
than 30 days’ and not more than 60 days’ written notice of the date within
the 365-day period on which the tenant will cease tenancy, whether by relo-
Chapter 1B—The Rental Housing Crisis: Proposed State Legislation

Section 206

(1) A landlord may not charge a tenant any penalty, fee or unaccrued rent for moving out of the manufactured dwelling park prior to the end of the 365-day notice period.

(2) A landlord may charge a tenant for rent for any period during which the tenant occupies the space and may deduct from the payment amount required by subsection (1) of this section any unpaid moneys owed by the tenant to the landlord.

(3) A landlord may not increase the rent for a manufactured dwelling park space after giving a notice of termination under this section to the tenant of the space.

(4) This section does not limit a landlord’s right to terminate a tenancy for nonpayment of rent under ORS 90.394 or for other cause under ORS 90.380 (5)(b), 90.396, 90.398 or 90.632 by complying with ORS 105.105 to 105.168.

(5) If a landlord is required to close a manufactured dwelling park by the exercise of eminent domain or by order of a federal, state or local agency, the landlord shall notify the park tenants no later than 15 days after the landlord receives notice of the exercise of eminent domain or of the agency order. The notice to the tenants shall be in writing, designate the date of closure, state the reason for the closure, describe any government relocation benefits known by the landlord to be available to the tenants and comply with any additional content requirements under ORS 90.650.

(6) The Office of Manufactured Dwelling Park Community Relations

HB 2008-5 4/12/17
Proposed Amendments to HB 2008 Page 6
shall adopt rules establishing a sample form for the notice described in sub-
section (3) of this section.

“SECTION 3. ORS 90.643 is amended to read:

“90.643. (1) A manufactured dwelling park may be converted to a planned
community subdivision of manufactured dwellings pursuant to ORS 92.830 to
92.845. When a manufactured dwelling park is converted pursuant to ORS
92.830 to 92.845:

“(a) Conversion does not require closure of the park pursuant to ORS
90.645 or termination of any tenancy on any space in the park or any lot in
the planned community subdivision of manufactured dwellings.

“(b) After approval of the tentative plan under ORS 92.830 to 92.845, the
manufactured dwelling park ceases to exist, notwithstanding the possibility
that four or more lots in the planned community subdivision may be avail-
able for rent.

“(2) If a park is converted to a subdivision under ORS 92.830 to 92.845, and
the landlord closes the park as a result of the conversion, ORS 90.645
applies to the closure.

“(3) If a park is converted to a subdivision under ORS 92.830 to 92.845, but
the landlord does not close the park as a result of the conversion:

“(a) A tenant who does not buy the space occupied by the tenant’s man-
ufactured dwelling may terminate the tenancy and move. If the tenant ter-
minates the tenancy after receiving the notice required by ORS 92.839 and
before the expiration of the 60-day period described in ORS 92.840 (2), the
landlord shall pay the tenant as provided in ORS 90.645 [(1)(b)] (1).

“(b) If the landlord and the tenant continue the tenancy on the lot created
in the planned community subdivision, the tenancy is governed by ORS
90.100 to 90.465, except that the following provisions apply and, in the case
of a conflict, control:

“(A) ORS 90.510 (4) to (7) applies to a rental agreement and rules and
regulations concerning the use and occupancy of the subdivision lot until the
declarant turns over administrative control of the planned community subdivision of manufactured dwellings to a homeowners association pursuant to ORS 94.600 and 94.604 to 94.621. The landlord shall provide each tenant with a copy of the bylaws, rules and regulations of the homeowners association at least 60 days before the turnover meeting described in ORS 94.609.

“(B) ORS 90.530 applies regarding pets.

“(C) ORS 90.545 applies regarding the extension of a fixed term tenancy.

“(D) ORS 90.600 (1) to (4) applies to an increase in rent.

“(E) ORS 90.620 applies to a termination by a tenant.

“(F) ORS 90.630 applies to a termination by a landlord for cause. However, the sale of a lot in the planned community subdivision occupied by a tenant to someone other than the tenant is a good cause for termination under ORS 90.630 that the tenant cannot cure or correct and for which the landlord must give written notice of termination that states the cause of termination at least 180 days before termination.

“(G) ORS 90.632 applies to a termination of tenancy by a landlord due to the physical condition of the manufactured dwelling.

“(H) ORS 90.634 applies to a lien for manufactured dwelling unit rent.

“(I) ORS 90.680 applies to the sale of a manufactured dwelling occupying a lot in the planned community subdivision. If the intention of the buyer of the manufactured dwelling is to leave the dwelling on the lot, the landlord may reject the buyer as a tenant if the buyer does not buy the lot also.

“(J) ORS 90.710 applies to a cause of action for a violation of ORS 90.510 (4) to (7), 90.630, 90.680 or 90.765.

“(K) ORS 90.725 applies to landlord access to a rented lot in a planned community subdivision.

“(L) ORS 90.730 (2), (3), (4) and (7) apply to the duty of a landlord to maintain a rented lot in a habitable condition.

“(M) ORS 90.750 applies to the right of a tenant to assemble or canvass.

“(N) ORS 90.755 applies to the right of a tenant to speak on political is-
sues and to post political signs.

“(O) ORS 90.765 applies to retaliatory conduct by a landlord.

“(P) ORS 90.771 applies to the confidentiality of information provided to the Office of Manufactured Dwelling Park Community Relations of the Housing and Community Services Department about disputes.

“SECTION 4. Section 5 of this 2017 Act is added to and made a part of ORS 90.842 to 90.850.

“SECTION 5. In addition to providing notice as required by ORS 90.842, upon sale of a manufactured dwelling park under ORS 90.842 to 90.850 or upon any sale, transfer, exchange or other conveyance of a manufactured dwelling park described in ORS 90.848, the owner shall give notice of the conveyance to the Office of Manufactured Dwelling Park Community Relations stating:

“(1) The number of vacant spaces and homes in the manufactured dwelling park;

“(2) If applicable, the final sale price of the manufactured dwelling park;

“(3) The date the conveyance became final; and

“(4) The name, address and telephone number of the new owner.

“SECTION 6. ORS 62.809 is amended to read:

“62.809. (1) A person may become a member of a manufactured dwelling park nonprofit cooperative if the person:

“(a) Is a natural person;

“(b) Owns a manufactured dwelling that is, or is to be, located in a manufactured dwelling park of the cooperative and occupied by the person;

“(c) Pays the membership fee required by the cooperative; and

“(d) Meets any additional membership qualifications established in the articles of incorporation or bylaws of the cooperative.

“(2) A manufactured dwelling park nonprofit cooperative shall accept as a member any person who meets the qualifications described in subsection
“(3) Membership in a manufactured dwelling park nonprofit cooperative entitles the member to rent space for a manufactured dwelling in a manufactured dwelling park of the cooperative and to occupy the manufactured dwelling.

“(4) The total number of memberships available for issuance by a manufactured dwelling park nonprofit cooperative may not exceed the number of manufactured dwelling spaces in the manufactured dwelling park of the cooperative. A cooperative shall create or issue one membership for each manufactured dwelling that is, or is to be, located in a manufactured dwelling park of the cooperative and occupied by the dwelling owner. A person may not own more than one membership in the same cooperative. A membership may not be issued to a person unless the person meets the qualifications for membership described in subsection (1) of this section.

“(5) A cooperative shall issue memberships for a fee determined by the directors of the cooperative. The directors may periodically adjust the fee amount as provided in the articles of incorporation or bylaws of the cooperative. Except for periodic adjustments, the membership fee charged by the cooperative shall be the same for all members.

“(6) A member may sell or redeem membership in the cooperative only to the cooperative. A member may not sell or redeem membership to the cooperative for more than the price the member paid for the membership.

“(7) Except as provided in this section, the articles of incorporation or bylaws of the cooperative shall establish the methods for accepting and terminating membership and for the sale or redemption of a membership.

“(8)(a) A member may sell to another person the member’s manufactured dwelling located in the manufactured dwelling park of a cooperative. The member selling the manufactured dwelling must arrange to sell or redeem the membership to the cooperative as described in subsection (6) of this section.

“(b) A person that buys a manufactured dwelling located in the park of
a cooperative from any person may apply to become a member of the cooperative.

“(c) Except as provided in paragraph (d) of this subsection:

“(A) If a member of the cooperative transfers title to a manufactured dwelling located in the park of the cooperative to a person other than a lienholder, and [no buyer] a new owner of the manufactured dwelling [from the member or from another person becomes] does not become a member of the cooperative within six months after the member transfers title, the owner of the manufactured dwelling must remove the manufactured dwelling from the park of the cooperative.

“(B) If title to a manufactured dwelling located in the park of a cooperative is transferred to a lienholder, and [no] a buyer of the manufactured dwelling from the lienholder or from a person that acquired title from the lienholder [becomes] does not become a member of the cooperative within 12 months after title is transferred to the lienholder, the owner of the manufactured dwelling must remove the manufactured dwelling from the park of the cooperative.

“(d) An owner of a manufactured dwelling is not required to remove the manufactured dwelling as described in paragraph (c) of this subsection if the cooperative agrees with the owner in writing to:

“(A) Waive or extend the deadline by which the buyer or subsequent buyer must remove the manufactured dwelling; or

“(B) Store the manufactured dwelling on the space for a specified period of time.

“(c) Notwithstanding ORS 446.626, if a manufactured dwelling located in a manufactured dwelling park of a cooperative was recorded in the county deed records before title to the manufactured dwelling was transferred from the record owner of the manufactured dwelling, the county shall continue to list the manufactured dwelling in the deed records until the earlier of:
“(A) Twelve months after title is transferred from the record owner to a person other than a lienholder shown on the deed record for the manufactured dwelling, unless the county is notified that a subsequent buyer of the manufactured dwelling has become a member of the cooperative;

“(B) Twelve months after title is transferred to a lienholder shown on the deed record for the manufactured dwelling, unless the county is notified that a subsequent buyer of the manufactured dwelling has become a member of the cooperative; or

“(C) Issuance of a trip permit under ORS 446.631 for moving the dwelling.

“(9) If a newly created manufactured dwelling park originates as a manufactured dwelling park nonprofit cooperative, a manufactured dwelling owner must become a member of the cooperative before residing in the park.

“SECTION 7. ORS 62.813 is amended to read:

“62.813. (1) If a lienholder provides a manufactured dwelling park nonprofit cooperative with a written request for notification regarding a manufactured dwelling on which the lienholder has a lien, the cooperative shall provide the lienholder with written notice of a termination of occupancy or membership if:

“(a) A member of the cooperative who is identified in the lienholder request for notification terminates occupancy in the manufactured dwelling park of the cooperative and the cooperative knows of the termination;

“(b) A member of the cooperative who is identified in the lienholder request for notification terminates membership in the cooperative; or

“(c) The cooperative terminates, or gives notice of cause for terminating, the occupancy or membership of a member of the cooperative who is identified in the lienholder request for notification.

“(2) If a member or the cooperative terminates the member’s occupancy in the park or membership in the cooperative, and the member fails to move or sell the manufactured dwelling, a lienholder that has foreclosed on the lien on the manufactured dwelling may:
“(a) Remove the manufactured dwelling from the park after satisfying any
obligation to the cooperative;
“(b) Subject to subsection (3) of this section, sell the manufactured
dwelling; or
“(c) Require the cooperative to enter into a storage agreement that allows
the lienholder to store the manufactured dwelling on the space for up to 12
months if the lienholder pays the space rent and reasonably maintains the
manufactured dwelling and space.
“(3) The buyer of a manufactured dwelling sold by a lienholder under
subsection (2)(b) of this section takes possession of the manufactured dwell-
ing subject to ORS 62.809 (8) and any obligation to the cooperative. During
the term of a storage agreement described in subsection (2)(c) of this section,
the lienholder may remove or sell the manufactured dwelling as provided in
subsection (2)(a) or (b) of this section.
“(4) A lienholder and a cooperative that are subject to a storage
agreement under subsection (2)(c) of this section may agree in writing
to extend the term of the agreement beyond 12 months.
“(4) (5) If the member of the cooperative terminated occupancy in the
park without terminating membership in the cooperative, an application for
membership by the buyer or moving of the manufactured dwelling shall act
to transfer the membership of the terminating owner to the cooperative.

SECTION 8. (1) Section 5 of this 2017 Act and the amendments to
ORS 90.643 and 90.645 by sections 1 to 3 of this 2017 Act apply to man-
ufactured dwelling park closures for which notice is given to tenants
on or after the effective date of this 2017 Act.
“(2) The amendments to ORS 62.809 and 62.813 by sections 6 and 7
of this 2017 Act apply to transfers of title and termination of cooper-
ative memberships occurring on or after the effective date of this 2017
Act.

SECTION 9. This 2017 Act being necessary for the immediate
preservation of the public peace, health and safety, an emergency is declared to exist, and this 2017 Act takes effect on its passage.”.
Summary

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor’s brief statement of the essential features of the measure as introduced.

Directs Office of Manufactured Dwelling Park Community Relations to establish and administer landlord-tenant dispute resolution program for disputes arising from notices of certain rent increases.

A BILL FOR AN ACT

Relating to dispute resolution of proposed rent increase.

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

SECTION 1. Section 2 of this 2017 Act is added to and made a part of ORS 90.505 to 90.850.

SECTION 2. (1) In addition to and not in lieu of the dispute resolution procedures provided by ORS 105.138 and 446.515 to 446.547, the Office of Manufactured Dwelling Park Community Relations shall establish and administer a landlord-tenant dispute resolution program to provide manufactured dwelling park landlords and tenants with an efficient process to resolve disputes arising from notices of rent increase given from landlords to tenants under ORS 90.600. The office shall adopt rules to establish and administer the program.

(2) The landlord-tenant dispute resolution program established under this section is available to tenants of manufactured dwelling parks if:

(a) The landlord of the manufactured dwelling park gives the tenants notice of a rent increase under ORS 90.600;

(b) The proposed rent increase is more than one percentage point above the OR-WA Consumer Price Index for All Urban Consumers for Housing as published by the Bureau of Labor Statistics of the United States Department of Labor; and

(c) At least a majority of tenants in the manufactured dwelling park agree to dispute the rent increase.

(3) Within 15 days of receiving a notice of rent increase from the landlord under ORS 90.600, tenants of a manufactured dwelling park may initiate the dispute resolution process under this section by giving the landlord and the office notice in writing of the tenants’ intent to dispute the proposed rent increase. The notice shall include:

(a) The names, addresses and signatures of the tenants disputing the rent increase;

(b) The name of the tenant or person designated to represent the tenants disputing the rent increase; and

(c) A statement that the tenants dispute the rent increase and request dispute resolution from the office.

(4) Within 10 days of receiving the notice under subsection (3) of this section, the office shall provide mediation services to the tenants and the landlord.

(5) Not more than five days prior to the initial mediation session, the landlord shall...
submit to the office all information and documentation necessary to support the proposed
rent increase. The office may request additional information or documentation for the pur-
poses of the dispute resolution process.

(6) The landlord shall have the burden of proving that the proposed rent increase is
necessary and reasonable.

(7) If the dispute is resolved:
(a) The resolution shall include an agreement regarding the amount and effective date
of the rent.
(b) The office may not require the landlord to provide additional notice of the rent in-
crease.

(8) Not less than 10 days before the effective date of the proposed rent increase, the
mediator shall conclude the mediation process and issue a report to the parties stating the
outcome of the dispute resolution process.
Chapter 2
Is It a Lot, Parcel, or Legal Lot, and Why Do We Care?

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Contents

I. The Importance of Terminology .................................................. 2–1
   A. Statutory Definitions .......................................................... 2–1
   B. Other Relevant Statutes ...................................................... 2–2
   C. Local Codes .................................................................... 2–3

II. Legal Significance—Consequences of Status as an “Illegal” Lot ........... 2–3

III. How Does the Problem Develop? .............................................. 2–4

IV. Possible Solutions If You Discover You Have an Unlawfully Created Unit of Land ........................................... 2–4
   A. The “Go Back and Fix It” Scenarios .................................... 2–4
   B. Legislative Fixes—Validation of Unit of Land ..................... 2–5
   C. Effect of Prior Foreclosure? .............................................. 2–6

V. Specific Issues ....................................................................... 2–7

VI. Property Line Adjustments (PLA) ............................................. 2–8
   A. Purposes for Using a PLA .................................................. 2–8
   B. Issues ............................................................................. 2–8

Pointers on Four Questions That Matter ........................................ 2–11
1. What Risks Are Associated with Illegal Lots? ......................... 2–11
2. What Are Cautionary Flags of Illegal Lots? ............................ 2–11
3. What Protections Come with Title Insurance? ......................... 2–11
4. What Resources Are Available from Title Companies and Local and State Government? .......................... 2–12

References .............................................................................. 2–12

ALTA Endorsement 26-06 (Subdivision) (Not Available in Oregon) .................. 2–27
Selected Statutes from Chapter 92 of Oregon Revised Statutes (2015 Edition) .... 2–29
Multnomah County Land Division Ordinance 11.45.117, Creation of Lots and Parcels That Were Unlawfully Divided. ..................................................... 2–35
I. The Importance of Terminology

A. Statutory Definitions

1. ORS Chapter 92 – Subdivisions and Partitions

   • **Lot**—“Lot” means a single unit of land that is created by a subdivision. ORS 92.010(4).

   • **Parcel**—“Parcel” means a single unit of land that is created by a partition of land. ORS 92.010(6).

   • **Lawfully established unit of land**—“Lawfully established unit of land” means:

     (A) A lot or parcel created pursuant to ORS 92.010 to 92.192; or

     (B) Another unit of land created:

        (i) In compliance with all applicable planning, zoning and subdivision or partition ordinances and regulations; or

        (ii) By deed or land sales contract, if there were no applicable planning, zoning or subdivision or partition ordinances or regulations.

     **It does not mean** -- a unit of land created solely to establish a separate tax account. ORS 92.010(3)(a)-(b).

   • **Partition**—“Partition” means either an action of partition land or an area or tract of land partitioned. ORS 92.010(7).

   • **Partitioning land**—“Partitioning land” means dividing land to create not more than three parcels of land within a calendar year, but does not include:

     (a) Dividing land as a result of a lien foreclosure, foreclosure of a recorded contract for the sale of real property or the creation of cemetery lots;

     (b) Adjusting a property line as property line is adjustment is defined in this section;
Chapter 2—Is It a Lot, Parcel, or Legal Lot, and Why Do We Care?

(c) Dividing land as a result of the recording of a subdivision or condominium plat. ORS 92.010(9)(a)-(c) (omitting (d)-(e)).

- **Subdivision**—“Subdivision” means either an act of subdividing land or an area or a tract of land subdivided. ORS 92.010(17).

- **Subdivide land**—“Subdivide land” means to divide land to create four or more lots within a calendar year. ORS 92.010(16).

- **Property line adjustment**—“Property line adjustment” means a relocation or elimination of all or a portion of the common property line between abutting properties that does not create an additional lot or parcel. ORS 92.010(12).

- **Replat**—“Replat” means the act of platting the lots, parcels and easements in a recorded subdivision or partition plat to achieve a reconfiguration of the existing subdivision or partition plat or to increase or decrease the number of lots in the subdivision. (ORS 92.010(13))

2. ORS Chapter 215 – County Planning

- **Parcel**—As used in this chapter: (1) The terms defined in ORS 92.010 shall have the meanings given therein, except that “parcel”:

  (a) Includes a unit of land created:

      (A) By partitioning land as defined in ORS 92.010;

      (B) In compliance with all applicable planning, zoning and partitioning ordinances and regulations; or

      (C) By deed or land sales contract, if there were no applicable planning, zoning or partitioning ordinances or regulations.

  (b) Does not include a unit of land created solely to establish a separate tax account. ORS 215.010(1).

B. Other Relevant Statutes

- **ORS 92.012**—“No land may be subdivided or partitioned except in accordance with ORS 92.010 to 92.192.”
Chapter 2—Is It a Lot, Parcel, or Legal Lot, and Why Do We Care?

• **ORS 92.017**—“A lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel ones are vacated or the lot or parcel is further divided by law.”

• **ORS 92.190(3)**—“The governing body of a city or county may use procedures other than replatting procedures in ORS 92.180 and 92.185 to adjust property lines as described in ORS 92.010(12), as long as those procedures include the recording, with the county clerk, of conveyances conforming to the approved property line adjustment as surveyed in accordance with ORS 92.060(7).”

NB: THE TERM “LEGAL LOT” IS FOUND NOWHERE IN THE OREGON REVISED STATUTES

NB: THE TERM “LOT OF RECORD” IS NOT DEFINED IN ORS CHAPTER 92 OR CHAPTER 215.

• **ORS 215.705** - provides the criteria for authorizing what has come to be known as a “lot of record dwelling,”

  • The lot or parcel (zoned farm or forest) on which the dwelling will be sited was lawfully created and acquired by owner prior to January 1, 1985 or (2) by devise or intestate succession by someone who died.

  • The subject “tract” does not already include a dwelling.

  • Not located on high-value farmland.

  • Other requirements.

C. **Local Codes** – Local Codes contain their own definitions and often provide definitions for “legal lots” and “lots of record,” which only adds to the confusion.

II. Legal Significance – Consequences of status as an “illegal” lot.

A. Salability

  • **ORS 92.016 (1)** - No person shall sell any lot in any subdivision with respect to which approval is required by any ordinance or regulation adopted under ORS 92.044 and 92.048 until such approval is obtained. No person shall negotiate to sell any lot in a subdivision until a tentative plan has been approved.
Chapter 2—Is It a Lot, Parcel, or Legal Lot, and Why Do We Care?

- Use of Disclosures?

B. Damages or Remedies - sue the predecessors in interest.

**ORS 92.018** - (1) If a person buys a unit of land that is not a lawfully established unit of land, the person may bring an individual action against the seller in an appropriate court to recover damages or to obtain equitable relief. The court shall award reasonable attorney fees to the prevailing party in an action under this section.

(2) If the seller of a unit of land that was not lawfully established is a county that involuntarily acquired the unit of land by means of foreclosure under ORS chapter 312 of delinquent tax liens, the person who purchases the unit of land is not entitled to damages or equitable relief.

C. Ability to Obtain Permits

- Potential limited exception – sewer/water.

D. Local Code Enforcement Measures

E. Ability to Obtain Land Use Approval

III. How does the problem develop? Examples:

A. Land use applications

B. Properties previously flagged

C. Code enforcement disputes

IV. Possible Solutions if You Discover You Have an Unlawfully Created Unit of Land

A. The “Go Back and Fix It” Scenarios:

1. Correction Deeds

2. Re-Transfers

3. Property Line Adjustments

4. Serial Property Line Adjustments—*See Bowerman v. Lane County, ___*  
Or LUBA ___ (LUBA No. 2016-008, January 26, 2017), argued at the
Court of Appeals earlier this month; see also recently introduced SB 1048.

B. **Legislative Fixes - Validation of Unit of Land**

1. **ORS 92.176** –
   
   (1) A county or city may approve an application to validate a unit of land that was created by a sale that did not comply with the applicable criteria for creation of a unit of land if the unit of land:

   (a) Is not a lawfully established unit of land; and

   (b) Could have complied with the applicable criteria for the creation of a lawfully established unit of land in effect when the unit of land was sold.

   (2) Notwithstanding subsection (1)(b) of this section, a county or city may approve an application to validate a unit of land under this section if the county or city approved a permit, as defined in ORS 215.402 or 227.160, respectively, for the construction or placement of a dwelling or other building on the unit of land after the sale. If the permit was approved for a dwelling, the county or city must determine that the dwelling qualifies for replacement under the criteria set forth in ORS 215.755 (1)(a) to (e).

   (3) A county or city may approve an application for a permit, as defined in ORS 215.402 or 227.160, respectively, or a permit under the applicable state or local building code for the continued use of a dwelling or other building on a unit of land that was not lawfully established if:

   (a) The dwelling or other building was lawfully established prior to January 1, 2007; and

   (b) The permit does not change or intensify the use of the dwelling or other building.

   (4) An application to validate a unit of land under this section is an application for a permit, as defined in ORS 215.402 or 227.160. An application to a county under this section is not subject to the minimum lot or parcel sizes established by ORS 215.780.

   (5) A unit of land becomes a lawfully established parcel when the county or city validates the unit of land under this section if the owner of the unit of
land causes a partition plat to be recorded within 90 days after the date the county or city validates the unit of land.

(6) A county or city may not approve an application to validate a unit of land under this section if the unit of land was unlawfully created on or after January 1, 2007.

(7) Development or improvement of a parcel created under subsection (5) of this section must comply with the applicable laws in effect when a complete application for the development or improvement is submitted as described in ORS 215.427(3)(a) or 227.178(3)(a).

2. Local Codes Governing Applications to “Validate” a Unit of Land Under ORS 92.176— Couple examples:

- MCC 11.45.117 – Provides a mechanism to review and “approve certain unlawfully divided lots or parcels.” “For the purposes of this section, an ‘unlawfully divided’ lot or parcel means a lot or parcel that, when divided, did not satisfy all applicable zoning and land division laws.”

- Lot of Record Determination under MCC 36.2675.

C. Effect of Prior Foreclosure??

- Argument in Favor:

ORS 92.010-(9)(a) exempts lots/tracts created as a result of a lien foreclosure from the requirements that are otherwise necessary to create a "legal" partition. As used in ORS 92.010 to 92.192, unless the context requires otherwise: (9) "Partitioning land" means dividing land to create not more than three parcels of land within a calendar year, but does not include: (a) Dividing land as a result of a lien foreclosure, foreclosure of a recorded contract for the sale of real property or the creation of cemetery lots… .

In turn, ORS 92.027 implicitly recognizes lots created by lien foreclosures as valid based on the requirement to indicate on the face of the deed the recording or other information as to its creation.
Chapter 2—Is It a Lot, Parcel, or Legal Lot, and Why Do We Care?

ORS 92.027: Deed reference to creation of unit of land. A person who conveys or contracts to convey fee title to a lot or parcel, or another unit of land resulting from a lien foreclosure or foreclosure of a recorded contract for the sale of real property, created or established on or after January 1, 2008, must include in the deed or other instrument conveying or contracting to convey fee title:

1. A reference to the recorded subdivision plat or partition plat for the lot or parcel;

2. A reference to or exhibit of the final land use decision that approved the subdivision or partition if a subdivision plat or partition plat is not required by law; or

3. A reference to or exhibit of a final judgment or other document that evidences a lien foreclosure or a foreclosure of a recorded contract for the sale of the real property."

Lastly, ORS 92.017 indicates that, once created a lot remains a discrete lot until vacated or further divided.

ORS 92.017: When lawfully created lot or parcel remains discrete lot or parcel. A lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law."

Under the above, after a foreclosure, the property remains a discrete lot.

- But see, Curtis N. Perkins v. Umatilla County, et al, LUBA No. 2003-098

V. Specific Issues

A. Do you need a legal lot prior to filing a land use application?

1. McKay Creek Valley Assoc. v. Washington County, 118 Or App 543, 848 P2d 624 (1993)—Case could be read to suggest that a local government is
required to evaluate the legal lot status of property that is part of an
application to develop the property only if the development approval
criteria being applied expressly require a legal or lawfully created lot or
parcel.

2. Maxwell v. Lane County, 178 Or App 210, 35 P3d 1128 (2001), adh’d to as
modified on recon., 179 Or App 409, 40 P3d 532 (2002)—Local regulations do not need to expressly require that the property be a legal
lot. The requirement that the property be lawfully created may be derived
from the text in context and applicable purpose and policy of the regulation.

723, 250 P3d 992 (2011)—Once the local government has approved a
partition or subdivision, those lots and parcels are legal lots. You cannot go
back and question the legal status of those lots for purposes of subsequent
land use approvals or development permits.

VI. Property Line Adjustments (PLA)

A. Purposes for using a PLA:

1. Rectify an unlawfully created unit of land;

2. Correct a setback violation;

3. Move property lines around to qualify a unit of land for a dwelling;

4. Move property lines around to make one unit of land large enough to
further partition.

B. Issues

1. Serial Property Line Adjustments

   • Bowerman v. Lane County, ___ Or LUBA ___ (LUBA No. 2016-
008, January 26, 2017). Holding that, because ORS 92.190(3)
requires a property line adjustment for property within a platted
partition or subdivision to be recorded where replat provisions are
avoided, a subsequent property line adjustment cannot be approved
until the previous PLA deed has been recorded. Dissenting opinion.
• *Kipfer v. Jackson County* (2009)—Following legislative changes in 2005, a local government may approve more than one property line adjustment in one decision.

2. When is a PLA a “land use decision?”

• *Jewett v. City of Bend, 48 Or LUBA 16 (2004)*—where a PLA does *not* require interpretation or exercise of policy or legal judgment, it is not a land use decision.

• *South v. City of Portland, 48 Or LUBA 555 (2005)*—PLA that merely relocates or eliminates a common property line does not involve the proposed development of land, and is not a statutory “permit,” even if it is discretionary.

• *Fraser v. City of Joseph, 28 Or LUBA 217 (1994)*—PLA is a land use decision if it significantly impacts the use of land (significant impact land use decision).

3. **ORS 215.780**—You can’t use a PLA to shrink an already nonconforming (with regard to size) EFU parcel to create another lot that is over 80 acres in order to qualify the larger parcel for a dwelling—*Phillips v. Polk County, 213 Or App 498, 1162 P3d 338 (2007).*
Pointers on Four Questions That Matter
C. Cleveland Abbe

1. What risks are associated with illegal lots?
   A. Criminal code sanctions.
      (1) Violation of subdivision and partition statutes is Class C misdemeanor. ORS 92.012, 92.990.
      (2) Including prohibition of sale or negotiation to sell lot or parcel – conditions differ between subdivision lot and partition parcel. ORS 92.016.
      (3) Including prohibition of sale of lot or parcel prior to recordation of plat. ORS 92.025.
   C. Civil remedies: Buyer’s remedy against seller, with recovery of attorney fees.

2. What are cautionary flags of illegal lots?
   A. Legal description is not a subdivision lot or a partition parcel.
   B. Legal description does not contain a reference to its creation as a lawful unit of land. ORS 92.027.
   C. Tax account contains a warning note.
   D. Land is unimproved.
   E. Tax lot enumeration discloses historical land division.

3. What protections come with title insurance?
   A. Covered risks and exclusions from coverage.
   B. ALTA Endorsement 26-06 (Subdivision) is not available in Oregon.
4. What resources are available from title companies and local and state government?
   A. Title company builder and developer services department.
   B. Title company customer service department.
   C. Title company informational reports.
   D. Local government procedures for validation of unit of land not lawfully established. ORS 92.176.
   E. Local government procedures for property line adjustments. ORS 92.010, 92.060(7) to (9), 92.190(4).
   F. Land use overlays available through city or county.
   G. County surveyor records.
   H. Oregon Dept. of Revenue’s ORMAP.

References

“Partitions, Subdivisions, and Legal Lots of Record” by Robert W. Wilkinson, Damien R. Hall and Amy Heverly, in 1 OREGON REAL ESTATE DESKBOOK, Chapter 10 (OSB Legal Pubs 2015).

“Land Divisions” by Brenda L. Braden and Douglas R. Holbrook, in 2 LAND USE, Chapter 16 (OSB Legal Pubs 2010).

Attachments


ALTA Endorsement 26-06 (Subdivision). Not available in Oregon.

OWNER’S POLICY OF TITLE INSURANCE

Issued by

Blank Title Insurance Company

Any notice of claim and any other notice or statement in writing required to be given to the Company under this Policy must be given to the Company at the address shown in Section 18 of the Conditions.

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, BLANK TITLE INSURANCE COMPANY, a Blank corporation (the “Company”) insures, as of Date of Policy and, to the extent stated in Covered Risks 9 and 10, after Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. Title being vested other than as stated in Schedule A.
2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from:
   (a) A defect in the Title caused by
      (i) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
      (ii) failure of any person or Entity to have authorized a transfer or conveyance;
      (iii) a document affecting Title not properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;
      (iv) failure to perform those acts necessary to create a document by electronic means authorized by law;
      (v) a document executed under a falsified, expired, or otherwise invalid power of attorney;
      (vi) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or
      (vii) a defective judicial or administrative proceeding.
   (b) The lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.
   (c) Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land
survey of the Land. The term "encroachment" includes encroachments of
existing improvements located on the Land onto adjoining land, and
encroachments onto the Land of existing improvements located on adjoining
land.

3. Unmarketable Title.

4. No right of access to and from the Land.

5. The violation or enforcement of any law, ordinance, permit, or governmental
regulation (including those relating to building and zoning) restricting, regulating,
prohibiting, or relating to
(a) the occupancy, use, or enjoyment of the Land;
(b) the character, dimensions, or location of any improvement erected on the Land;
(c) the subdivision of land; or
(d) environmental protection

if a notice, describing any part of the Land, is recorded in the Public Records setting
forth the violation or intention to enforce, but only to the extent of the violation or
enforcement referred to in that notice.

6. An enforcement action based on the exercise of a governmental police power not
covered by Covered Risk 5 if a notice of the enforcement action, describing any part
of the Land, is recorded in the Public Records, but only to the extent of the
enforcement referred to in that notice.

7. The exercise of the rights of eminent domain if a notice of the exercise, describing
any part of the Land, is recorded in the Public Records.

8. Any taking by a governmental body that has occurred and is binding on the rights of
a purchaser for value without Knowledge.

9. Title being vested other than as stated in Schedule A or being defective

(a) as a result of the avoidance in whole or in part, or from a court order providing an
alternative remedy, of a transfer of all or any part of the title to or any interest in
the Land occurring prior to the transaction vesting Title as shown in Schedule A
because that prior transfer constituted a fraudulent or preferential transfer under
federal bankruptcy, state insolvency, or similar creditors’ rights laws; or

(b) because the instrument of transfer vesting Title as shown in Schedule A
constitutes a preferential transfer under federal bankruptcy, state insolvency, or
similar creditors’ rights laws by reason of the failure of its recording in the Public
Records
   (i) to be timely, or
   (ii) to impart notice of its existence to a purchaser for value or to a judgment or
        lien creditor.

10. Any defect in or lien or encumbrance on the Title or other matter included in Covered
Risks 1 through 9 that has been created or attached or has been filed or recorded in
the Public Records subsequent to Date of Policy and prior to the recording of the
deed or other instrument of transfer in the Public Records that vests Title as shown
in Schedule A.
The Company will also pay the costs, attorneys' fees, and expenses incurred in defense of any matter insured against by this Policy, but only to the extent provided in the Conditions.

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

BY: PRESIDENT

BY: SECRETARY
EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:

1. (a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to
   (i) the occupancy, use, or enjoyment of the Land;
   (ii) the character, dimensions, or location of any improvement erected on the Land;
   (iii) the subdivision of land; or
   (iv) environmental protection;
   or the effect of any violation of these laws, ordinances, or governmental regulations. This Exclusion 1(a) does not modify or limit the coverage provided under Covered Risk 5.
   (b) Any governmental police power. This Exclusion 1(b) does not modify or limit the coverage provided under Covered Risk 6.

2. Rights of eminent domain. This Exclusion does not modify or limit the coverage provided under Covered Risk 7 or 8.

3. Defects, liens, encumbrances, adverse claims, or other matters
   (a) created, suffered, assumed, or agreed to by the Insured Claimant;
   (b) not Known to the Company, not recorded in the Public Records at Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy;
   (c) resulting in no loss or damage to the Insured Claimant;
   (d) attaching or created subsequent to Date of Policy (however, this does not modify or limit the coverage provided under Covered Risk 9 and 10); or
   (e) resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Title.

4. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction vesting the Title as shown in Schedule A, is
   (a) a fraudulent conveyance or fraudulent transfer; or
   (b) a preferential transfer for any reason not stated in Covered Risk 9 of this policy.

5. Any lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching between Date of Policy and the date of recording of the deed or other instrument of transfer in the Public Records that vests Title as shown in Schedule A.
Chapter 2—Is It a Lot, Parcel, or Legal Lot, and Why Do We Care?

American Land Title Association
ALTA Owner’s Policy (6-17-2006)

Oregon Title Insurance Rating Organization (OTIRO)
OTIRO No. PO-04

OTIRO Oregon Rating Manual
Page S3 – [5]

SCHEDULE A

[Name and Address of Title Insurance Company: ]

[File No.: ] Policy No.:  
[Address Reference: ]
Amount of Insurance: $ [Premium: $ ]
Date of Policy: [at a.m./p.m.]

1. Name of Insured:

2. The estate or interest in the Land that is insured by this policy is:

3. Title is vested in:

4. The Land referred to in this policy is described as follows:
SCHEDULE B

[File No. ] Policy No.

EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage, and the Company will not pay costs, attorneys' fees, or expenses that arise by reason of:

1. [Policy may include regional exceptions if so desired by the issuing Company.]
2. [Variable exceptions such as taxes, easements, CC&R's, etc., shown here]
1. DEFINITION OF TERMS

The following terms when used in this policy mean:

(a) "Amount of Insurance": The amount stated in Schedule A, as may be increased or decreased by endorsement to this policy, increased by Section 8(b), or decreased by Sections 11 and 12 of these Conditions.

(b) “Date of Policy”: The date designated as “Date of Policy” in Schedule A.

(c) “Entity”: A corporation, partnership, trust, limited liability company, or other similar legal entity.

(d) “Insured”: The Insured named in Schedule A.

(i) The term “Insured” also includes

(A) successors to the Title of the Insured by operation of law as distinguished from purchase, including heirs, devisees, survivors, personal representatives, or next of kin;

(B) successors to an Insured by dissolution, merger, consolidation, distribution, or reorganization;

(C) successors to an Insured by its conversion to another kind of Entity;

(D) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title

(1) if the stock, shares, memberships, or other equity interests of the grantee are wholly-owned by the named Insured,

(2) if the grantee wholly owns the named Insured,

(3) if the grantee is wholly-owned by an affiliated Entity of the named Insured, provided the affiliated Entity and the named Insured are both wholly-owned by the same person or Entity, or

(4) if the grantee is a trustee or beneficiary of a trust created by a written instrument established by the Insured named in Schedule A for estate planning purposes.

(ii) With regard to (A), (B), (C), and (D) reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor Insured.

(e) "Insured Claimant": An Insured claiming loss or damage.

(f) "Knowledge" or "Known": Actual knowledge, not constructive knowledge or notice that may be imputed to an Insured by reason of the Public Records or any other records that impart constructive notice of matters affecting the Title.

(g) "Land": The land described in Schedule A, and affixed improvements that by law constitute real property. The term "Land" does not include any property beyond the lines of the area described in Schedule A, nor any right, title, interest, estate, or easement in abutting streets, roads, avenues, alleys, lanes, ways, or
Chapter 2—Is It a Lot, Parcel, or Legal Lot, and Why Do We Care?

American Land Title Association  
Oregon Title Insurance Rating Organization (OTIRO)

ALTA Owner's Policy (6-17-2006)  
OTIRO No. PO-04

waterways, but this does not modify or limit the extent that a right of access to and from the Land is insured by this policy.

(h) "Mortgage": Mortgage, deed of trust, trust deed, or other security instrument, including one evidenced by electronic means authorized by law.

(i) "Public Records": Records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge. With respect to Covered Risk 5(d), "Public Records" shall also include environmental protection liens filed in the records of the clerk of the United States District Court for the district where the Land is located.

(j) "Title": The estate or interest described in Schedule A.

(k) "Unmarketable Title": Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title or lender on the Title to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title.

2. CONTINUATION OF INSURANCE

The coverage of this policy shall continue in force as of Date of Policy in favor of an Insured, but only so long as the Insured retains an estate or interest in the Land, or holds an obligation secured by a purchase money Mortgage given by a purchaser from the Insured, or only so long as the Insured shall have liability by reason of warranties in any transfer or conveyance of the Title. This policy shall not continue in force in favor of any purchaser from the Insured of either (i) an estate or interest in the Land, or (ii) an obligation secured by a purchase money Mortgage given to the Insured.

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT

The Insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 5(a) of these Conditions, (ii) in case Knowledge shall come to an Insured hereunder of any claim of title or interest that is adverse to the Title, as insured, and that might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if the Title, as insured, is rejected as Unmarketable Title. If the Company is prejudiced by the failure of the Insured Claimant to provide prompt notice, the Company's liability to the Insured Claimant under the policy shall be reduced to the extent of the prejudice.

4. PROOF OF LOSS

In the event the Company is unable to determine the amount of loss or damage, the Company may, at its option, require as a condition of payment that the Insured Claimant furnish a signed proof of loss. The proof of loss must describe the defect, lien, encumbrance, or other matter insured against by this policy that constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage.

5. DEFENSE AND PROSECUTION OF ACTIONS

(a) Upon written request by the Insured, and subject to the options contained in Section 7 of these Conditions, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an Insured in litigation in
which any third party asserts a claim covered by this policy adverse to the Insured. This obligation is limited to only those stated causes of action alleging matters insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those stated causes of action. It shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs, or expenses incurred by the Insured in the defense of those causes of action that allege matters not insured against by this policy.

(b) The Company shall have the right, in addition to the options contained in Section 7 of these Conditions, at its own cost, to institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the Title, as insured, or to prevent or reduce loss or damage to the Insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable to the Insured. The exercise of these rights shall not be an admission of liability or waiver of any provision of this policy. If the Company exercises its rights under this subsection, it must do so diligently.

(c) Whenever the Company brings an action or asserts a defense as required or permitted by this policy, the Company may pursue the litigation to a final determination by a court of competent jurisdiction, and it expressly reserves the right, in its sole discretion, to appeal any adverse judgment or order.

6. DUTY OF INSURED CLAIMANT TO COOPERATE

(a) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding and any appeals, the Insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, including the right to use, at its option, the name of the Insured for this purpose. Whenever requested by the Company, the Insured, at the Company's expense, shall give the Company all reasonable aid (i) in securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act that in the opinion of the Company may be necessary or desirable to establish the Title or any other matter as insured. If the Company is prejudiced by the failure of the Insured to furnish the required cooperation, the Company's obligations to the Insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

(b) The Company may reasonably require the Insured Claimant to submit to examination under oath by any authorized representative of the Company and to produce for examination, inspection, and copying, at such reasonable times and places as may be designated by the authorized representative of the Company, all records, in whatever medium maintained, including books, ledgers, checks, memoranda, correspondence, reports, e-mails, disks, tapes, and videos whether bearing a date before or after Date of Policy, that reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the Insured Claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect, and copy all of these records in the custody or control of a third party that reasonably pertain to
the loss or damage. All information designated as confidential by the Insured Claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the Insured Claimant to submit for examination under oath, produce any reasonably requested information, or grant permission to secure reasonably necessary information from third parties as required in this subsection, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

7. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY

In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance.

To pay or tender payment of the Amount of Insurance under this policy together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment or tender of payment and that the Company is obligated to pay.

Upon the exercise by the Company of this option, all liability and obligations of the Company to the Insured under this policy, other than to make the payment required in this subsection, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

(b) To Pay or Otherwise Settle With Parties Other Than the Insured or With the Insured Claimant.

(i) To pay or otherwise settle with other parties for or in the name of an Insured Claimant any claim insured against under this policy. In addition, the Company will pay any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay; or

(ii) To pay or otherwise settle with the Insured Claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in subsections (b)(i) or (ii), the Company's obligations to the Insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

8. DETERMINATION AND EXTENT OF LIABILITY

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy.

(a) The extent of liability of the Company for loss or damage under this policy shall not exceed the lesser of
(i) the Amount of Insurance; or

(ii) the difference between the value of the Title as insured and the value of the Title subject to the risk insured against by this policy.

(b) If the Company pursues its rights under Section 5 of these Conditions and is unsuccessful in establishing the Title, as insured,

(i) the Amount of Insurance shall be increased by 10%, and

(ii) the Insured Claimant shall have the right to have the loss or damage determined either as of the date the claim was made by the Insured Claimant or as of the date it is settled and paid.

(c) In addition to the extent of liability under (a) and (b), the Company will also pay those costs, attorneys' fees, and expenses incurred in accordance with Sections 5 and 7 of these Conditions.

9. LIMITATION OF LIABILITY

(a) If the Company establishes the Title, or removes the alleged defect, lien, or encumbrance, or cures the lack of a right of access to or from the Land, or cures the claim of Unmarketable Title, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused to the Insured.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals, adverse to the Title, as insured.

(c) The Company shall not be liable for loss or damage to the Insured for liability voluntarily assumed by the Insured in settling any claim or suit without the prior written consent of the Company.

10. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY

All payments under this policy, except payments made for costs, attorneys' fees, and expenses, shall reduce the Amount of Insurance by the amount of the payment.

11. LIABILITY NONCUMULATIVE

The Amount of Insurance shall be reduced by any amount the Company pays under any policy insuring a Mortgage to which exception is taken in Schedule B or to which the Insured has agreed, assumed, or taken subject, or which is executed by an Insured after Date of Policy and which is a charge or lien on the Title, and the amount so paid shall be deemed a payment to the Insured under this policy.

12. PAYMENT OF LOSS

When liability and the extent of loss or damage have been definitely fixed in accordance with these Conditions, the payment shall be made within 30 days.

13. RIGHTS OF RECOVERY UPON PAYMENT OR SETTLEMENT

(a) Whenever the Company shall have settled and paid a claim under this policy, it shall be subrogated and entitled to the rights of the Insured Claimant in the Title and all other rights and remedies in respect to the claim that the Insured
Claimant has against any person or property, to the extent of the amount of any loss, costs, attorneys' fees, and expenses paid by the Company. If requested by the Company, the Insured Claimant shall execute documents to evidence the transfer to the Company of these rights and remedies. The Insured Claimant shall permit the Company to sue, compromise, or settle in the name of the Insured Claimant and to use the name of the Insured Claimant in any transaction or litigation involving these rights and remedies.

If a payment on account of a claim does not fully cover the loss of the Insured Claimant, the Company shall defer the exercise of its right to recover until after the Insured Claimant shall have recovered its loss.

(b) The Company’s right of subrogation includes the rights of the Insured to indemnities, guaranties, other policies of insurance, or bonds, notwithstanding any terms or conditions contained in those instruments that address subrogation rights.

14. ARBITRATION

Either the Company or the Insured may demand that the claim or controversy shall be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association ("Rules"). Except as provided in the Rules, there shall be no joinder or consolidation with claims or controversies of other persons. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the Insured arising out of or relating to this policy, any service in connection with its issuance or the breach of a policy provision, or to any other controversy or claim arising out of the transaction giving rise to this policy. All arbitrable matters when the Amount of Insurance is $2,000,000 or less shall be arbitrated at the option of either the Company or the Insured. All arbitrable matters when the Amount of Insurance is in excess of $2,000,000 shall be arbitrated only when agreed to by both the Company and the Insured. Arbitration pursuant to this policy and under the Rules shall be binding upon the parties. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court of competent jurisdiction.

15. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT

(a) This policy together with all endorsements, if any, attached to it by the Company is the entire policy and contract between the Insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage that arises out of the status of the Title or by any action asserting such claim shall be restricted to this policy.

(c) Any amendment of or endorsement to this policy must be in writing and authenticated by an authorized person, or expressly incorporated by Schedule A of this policy.

(d) Each endorsement to this policy issued at any time is made a part of this policy and is subject to all of its terms and provisions. Except as the endorsement expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsement, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance.
16. SEVERABILITY

In the event any provision of this policy, in whole or in part, is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision or such part held to be invalid, but all other provisions shall remain in full force and effect.

17. CHOICE OF LAW; FORUM

(a) Choice of Law: The Insured acknowledges the Company has underwritten the risks covered by this policy and determined the premium charged therefor in reliance upon the law affecting interests in real property and applicable to the interpretation, rights, remedies, or enforcement of policies of title insurance of the jurisdiction where the Land is located.

Therefore, the court or an arbitrator shall apply the law of the jurisdiction where the Land is located to determine the validity of claims against the Title that are adverse to the Insured and to interpret and enforce the terms of this policy. In neither case shall the court or arbitrator apply its conflicts of law principles to determine the applicable law.

(b) Choice of Forum: Any litigation or other proceeding brought by the Insured against the Company must be filed only in a state or federal court within the United States of America or its territories having appropriate jurisdiction.

18. NOTICES, WHERE SENT

Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at [fill in].

NOTE: Bracketed [ ] material optional
[THIS ENDORSEMENT IS NOT AVAILABLE IN OREGON]

ENDORSEMENT
Attached to Policy No. _________
Issued by
BLANK TITLE INSURANCE COMPANY

The Company insures against loss or damage sustained by the Insured by reason of the failure of the Land to constitute a lawfully created parcel according to the subdivision statutes and local subdivision ordinances applicable to the Land.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

By: ______________________________
    Authorized Signatory
OREGON REVISED STATUTES

Chapter 92 — Subdivisions and Partitions

2015 EDITION

[SELECTED STATUTES]

* * *

92.010 Definitions for ORS 92.010 to 92.192. As used in ORS 92.010 to 92.192, unless the context requires otherwise:

(1) “Declarant” means the person who files a declaration under ORS 92.075.
(2) “Declaration” means the instrument described in ORS 92.075 by which the subdivision or partition plat was created.
(3)(a) “Lawfully established unit of land” means:
(A) A lot or parcel created pursuant to ORS 92.010 to 92.192; or
(B) Another unit of land created:
   (i) In compliance with all applicable planning, zoning and subdivision or partition ordinances and regulations; or
   (ii) By deed or land sales contract, if there were no applicable planning, zoning or subdivision or partition ordinances or regulations.
   (b) “Lawfully established unit of land” does not mean a unit of land created solely to establish a separate tax account.
(4) “Lot” means a single unit of land that is created by a subdivision of land.
(5) “Negotiate” means any activity preliminary to the execution of a binding agreement for the sale of land in a subdivision or partition, including but not limited to advertising, solicitation and promotion of the sale of such land.
(6) “Parcel” means a single unit of land that is created by a partition of land.
(7) “Partition” means either an act of partitioning land or an area or tract of land partitioned.
(8) “Partition plat” includes a final map and other writing containing all the descriptions, locations, specifications, provisions and information concerning a partition.
(9) “Partitioning land” means dividing land to create not more than three parcels of land within a calendar year, but does not include:
   (a) Dividing land as a result of a lien foreclosure, foreclosure of a recorded contract for the sale of real property or the creation of cemetery lots;
   (b) Adjusting a property line as property line adjustment is defined in this section;
   (c) Dividing land as a result of the recording of a subdivision or condominium plat;
   (d) Selling or granting by a person to a public agency or public body of property for state highway, county road, city street or other right of way purposes if the road or right of way complies with the applicable comprehensive plan and ORS 215.213 (2)(p) to (r) and 215.283 (2)(q) to (s). However, any property sold or granted for state highway, county road, city street or other right of way purposes shall continue to be considered a single unit of land until the property is further subdivided or partitioned; or
   (e) Selling or granting by a public agency or public body of excess property resulting from the acquisition of land by the state, a political subdivision or special district for highways, county roads, city streets or other right of way purposes when the sale or grant is part of a property line adjustment incorporating the excess right of way into adjacent property. The property line adjustment shall be approved.
Chapter 2—Is It a Lot, Parcel, or Legal Lot, and Why Do We Care?

or disapproved by the applicable local government. If the property line adjustment is approved, it shall be recorded in the deed records of the county where the property is located.

(10) “Plat” includes a final subdivision plat, replat or partition plat.

(11) “Property line” means the division line between two units of land.

(12) “Property line adjustment” means a relocation or elimination of all or a portion of the common property line between abutting properties that does not create an additional lot or parcel.

(13) “Replat” means the act of platting the lots, parcels and easements in a recorded subdivision or partition plat to achieve a reconfiguration of the existing subdivision or partition plat or to increase or decrease the number of lots in the subdivision.

(14) “Road” or “street” means a public or private way that is created to provide ingress or egress for persons to one or more lots, parcels, areas or tracts of land, excluding a private way that is created to provide ingress or egress to such land in conjunction with the use of such land for forestry, mining or agricultural purposes.

(15) “Sale” or “sell” includes every disposition or transfer of land or an interest or estate therein.

(16) “Subdivide land” means to divide land to create four or more lots within a calendar year.

(17) “Subdivision” means either an act of subdividing land or an area or a tract of land subdivided.

(18) “Subdivision plat” includes a final map and other writing containing all the descriptions, locations, specifications, dedications, provisions and information concerning a subdivision.

(19) “Utility easement” means an easement noted on a subdivision plat or partition plat for the purpose of installing or maintaining public or private utility infrastructure for the provision of water, power, heat or telecommunications to the public. [Amended by 1955 c.756 §1; 1973 c.696 §3; 1977 c.809 §4; 1979 c.46 §1; 1985 c.369 §5; 1985 c.717 §1; 1989 c.772 §1; 1991 c.763 §1; 1993 c.702 §1; 1993 c.704 §4; 1995 c.382 §3; 1997 c.268 §1; 2001 c.544 §3; 2005 c.399 §1; 2007 c.652 §1; 2007 c.866 §4; 2008 c.12 §3]

92.012 Compliance with ORS 92.010 to 92.192 required. No land may be subdivided or partitioned except in accordance with ORS 92.010 to 92.192. [1973 c.696 §2; 1975 c.643 §24]

* * *

92.016 Sale or negotiation to sell lot or parcel prior to approval of tentative plan. (1) No person shall sell any lot in any subdivision with respect to which approval is required by any ordinance or regulation adopted under ORS 92.044 and 92.048 until such approval is obtained. No person shall negotiate to sell any lot in a subdivision until a tentative plan has been approved.

(2) A person may negotiate to sell any parcel in a partition with respect to which approval of a tentative plan is required by any ordinance or regulation adopted under ORS 92.044 or 92.046, respectively, prior to the approval of the tentative plan for the partition, but no person may sell any parcel in a partition for which approval of a tentative plan is required by any ordinance or regulation adopted under ORS 92.044 or 92.046, respectively, prior to such approval. [1955 c.756 §24; 1973 c.696 §5; 1974 c.74 §1; 1977 c.809 §5; 1991 c.763 §5; 2003 c.14 §34]

* * *

92.018 Buyer’s remedies for purchase of improperly created unit of land. (1) If a person buys a unit of land that is not a lawfully established unit of land, the person may bring an individual action against the seller in an appropriate court to recover damages or to obtain equitable relief. The court shall award reasonable attorney fees to the prevailing party in an action under this section.

(2) If the seller of a unit of land that was not lawfully established is a county that involuntarily acquired the unit of land by means of foreclosure under ORS chapter 312 of delinquent tax liens, the person who
Chapter 2—Is It a Lot, Parcel, or Legal Lot, and Why Do We Care?

purchases the unit of land is not entitled to damages or equitable relief. [1983 c.718 §4; 1995 c.618 §53; 1997 c.805 §2; 2007 c.866 §5]

92.020 [Repealed by 1955 c.756 §5 (92.025 enacted in lieu of 92.020 and 92.030)]

92.025 Prohibition of sale of lot or parcel prior to recordation of plat; waiver. (1) A person may not sell a lot in a subdivision or a parcel in a partition until the plat of the subdivision or partition has been acknowledged and recorded with the recording officer of the county in which the lot or parcel is situated.

(2) A person may not sell a lot in a subdivision or a parcel in a partition by reference to or exhibition or other use of a plat of the subdivision or partition before the plat for the subdivision or partition has been so recorded. In negotiating to sell a lot in a subdivision or a parcel in a partition under ORS 92.016 (1) and (2), a person may use the approved tentative plan for the subdivision or partition.

(3) Notwithstanding subsections (1) and (2) of this section, the governing body of a city or county may enact an ordinance waiving the requirement that parcels created in excess of 80 acres be shown on a partition plat. Nothing in this subsection shall exempt a local government from minimum area requirements established in acknowledged comprehensive plans and land use regulations. [1955 c.756 §6 (enacted in lieu of 92.020 and 92.030); 1973 c.696 §6; 1977 c.809 §6; 1989 c.772 §4; 1991 c.763 §6; 2005 c.399 §3]

92.027 Deed reference to creation of unit of land. A person who conveys or contracts to convey fee title to a lot or parcel, or another unit of land resulting from a lien foreclosure or foreclosure of a recorded contract for the sale of real property, created or established on or after January 1, 2008, must include in the deed or other instrument conveying or contracting to convey fee title:

(1) A reference to the recorded subdivision plat or partition plat for the lot or parcel;

(2) A reference to or exhibit of the final land use decision that approved the subdivision or partition if a subdivision plat or partition plat is not required by law; or

(3) A reference to or exhibit of a final judgment or other document that evidences a lien foreclosure or a foreclosure of a recorded contract for the sale of the real property. [2007 c.866 §3]

Note: 92.027 was added to and made a part of 92.010 to 92.192 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

* * *

92.060 Marking subdivision, partition or condominium plats with monuments; types of monuments; property line adjustment. (1) The initial point, also known as the point of beginning, of a plat must be on the exterior boundary of the plat and must be marked with a monument that is either galvanized iron pipe or an iron or steel rod. If galvanized iron pipe is used, the pipe may not be less than three-quarter inch inside diameter and 30 inches long. If an iron or steel rod is used, the rod may not be less than five-eighths of an inch in least dimension and 30 inches long. The location of the monument shall be with reference by survey to a section corner, one-quarter corner, one-sixteenth corner, Donation Land Claim corner or to a monumented lot corner or boundary corner of a recorded subdivision, partition or condominium plat. When setting a required monument is impracticable under the circumstances, the county surveyor may authorize the setting of another type of monument.

(2) In subdivision plats, the intersections, the initial point, also known as the point of beginning, the point of ending, points of curves and points of tangents, or the point of intersection of the curve if the point is within the pavement area of the road, of the centerlines of all streets and roads and all points on the exterior boundary where the boundary line changes direction, must be marked with monuments either of galvanized iron pipe or iron or steel rods. If galvanized iron pipe is used, the pipe may not be less than
three-quarter inch inside diameter and 30 inches long. If iron or steel rods are used, the rod may not be less than five-eighths of an inch in least dimension and 30 inches long. When setting a required monument is impracticable under the circumstances:

(a) The county surveyor may authorize the setting of another type of monument; or
(b) The county surveyor may waive the setting of the monument.

(3) All lot and parcel corners except lot corners of cemetery lots must be marked with monuments of either galvanized iron pipe not less than one-half inch inside diameter or iron or steel rods not less than five-eighths inch in least dimension and not less than 24 inches long. When setting a required monument is impracticable under the circumstances:

(a) The surveyor may set another type of monument; or
(b) The county surveyor may waive the setting of the monument.

(4) A surveyor shall set monuments with sufficient accuracy that measurements may be taken between monuments within one-tenth of a foot or within one ten-thousandth of the distance shown on the subdivision or partition plat, whichever is greater.

(5) A surveyor shall set monuments on the exterior boundary of a subdivision, unless the county surveyor waives the setting of a particular monument, where changes in the direction of the boundary occur and shall reference the monuments on the plat of the subdivision before the plat of the subdivision is offered for recording. However, the surveyor need not set the remaining monuments for the subdivision prior to the recording of the plat of the subdivision if:

(a) The registered professional land surveyor performing the survey work certifies that the remaining monuments will be set, unless the county surveyor waives the setting of a particular monument, on or before a specified date as provided in ORS 92.070 (2); and
(b) The person subdividing the land furnishes to the county or city by which the subdivision was approved a bond, cash deposit, irrevocable letter of credit issued by an insured institution as defined in ORS 706.008 or other security as required by the county or city guaranteeing the payment of the cost of setting the remaining monuments for the subdivision as provided in ORS 92.065.

(6) A surveyor shall set all monuments on the exterior boundary and all parcel corner monuments of partitions, unless the county surveyor waives the setting of a particular monument, before the partition plat is offered for recording. Unless the governing body provides otherwise, any parcels created outside an urban growth boundary that are greater than 10 acres need not be surveyed or monumented.

(7) Except as provided in subsections (8) and (9) of this section, a survey or monument is not required for a property line adjustment when the abutting properties are each greater than 10 acres. Nothing in this subsection exempts a local government from minimum area requirements established in acknowledged comprehensive plans and land use regulations.

(8) Unless the governing body of a city or county has otherwise provided by ordinance, a survey or monument is not required for a property line adjustment when the abutting properties are each greater than 10 acres. Nothing in this subsection exempts a local government from minimum area requirements established in acknowledged comprehensive plans and land use regulations.


* * *

92.176 Validation of unit of land not lawfully established. (1) A county or city may approve an application to validate a unit of land that was created by a sale that did not comply with the applicable criteria for creation of a unit of land if the unit of land:
(a) Is not a lawfully established unit of land; and
(b) Could have complied with the applicable criteria for the creation of a lawfully established unit of land in effect when the unit of land was sold.

(2) Notwithstanding subsection (1)(b) of this section, a county or city may approve an application to validate a unit of land under this section if the county or city approved a permit, as defined in ORS 215.402 or 227.160, respectively, for the construction or placement of a dwelling or other building on the unit of land after the sale. If the permit was approved for a dwelling, the county or city must determine that the dwelling qualifies for replacement under the criteria set forth in ORS 215.755 (1)(a) to (e).

(3) A county or city may approve an application for a permit, as defined in ORS 215.402 or 227.160, respectively, or a permit under the applicable state or local building code for the continued use of a dwelling or other building on a unit of land that was not lawfully established if:
   (a) The dwelling or other building was lawfully established prior to January 1, 2007; and
   (b) The permit does not change or intensify the use of the dwelling or other building.

(4) An application to validate a unit of land under this section is an application for a permit, as defined in ORS 215.402 or 227.160. An application to a county under this section is not subject to the minimum lot or parcel sizes established by ORS 215.780.

(5) A unit of land becomes a lawfully established parcel when the county or city validates the unit of land under this section if the owner of the unit of land causes a partition plat to be recorded within 90 days after the date the county or city validates the unit of land.

(6) A county or city may not approve an application to validate a unit of land under this section if the unit of land was unlawfully created on or after January 1, 2007.

(7) Development or improvement of a parcel created under subsection (5) of this section must comply with the applicable laws in effect when a complete application for the development or improvement is submitted as described in ORS 215.427 (3)(a) or 227.178 (3)(a). [2007 c.866 §2]

Note: 92.176 was added to and made a part of 92.010 to 92.192 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

* * *

92.190 Effect of replat; operation of other statutes; use of alternate procedures. (1) The replat of a portion of a recorded plat shall not act to vacate any recorded covenants or restrictions.

(2) Nothing in ORS 92.180 to 92.190 is intended to prevent the operation of vacation actions by statutes in ORS chapter 271 or 368.

(3) The governing body of a city or county may use procedures other than replatting procedures in ORS 92.180 and 92.185 to adjust property lines as described in ORS 92.010 (12), as long as those procedures include the recording, with the county clerk, of conveyances conforming to the approved property line adjustment as surveyed in accordance with ORS 92.060 (7).

(4) A property line adjustment deed shall contain the names of the parties, the description of the adjusted line, references to original recorded documents and signatures of all parties with proper acknowledgment. [1985 c.369 §4; 1989 c.772 §24; 1991 c.763 §20; 2007 c.866 §10]

* * *

92.990 Penalties. (1) Violation of any provision of ORS 92.010 to 92.090, 92.100 and 92.120 to 92.170 or of any regulation or ordinance adopted thereunder, is a Class C misdemeanor.

(2) Any person who violates any of the provisions of ORS 92.325 (1), 92.345 to 92.365, 92.405 (1), (2) and (3), 92.425, 92.433, 92.460 to 92.475 and any alternative requirements of the Real Estate Commissioner prescribed pursuant to ORS 92.425 (3), not waived by the commissioner pursuant to ORS
92.395, or who provides false information or omits to state material facts pursuant to ORS 92.337, commits a Class C felony. [Amended by 1955 c.756 §20; subsection (2) enacted as 1963 c.624 §20; 1965 c.584 §12; 1973 c.421 §48; subsection (2) (1973 Replacement Part) enacted as 1973 c.421 §10; subsection (3) (1973 Replacement Part) enacted as 1973 c.421 §49; subsections (2), (3) (1973 Replacement Part) repealed by 1974 c.1 §23; subsection (2) (1974 Replacement Part) enacted as 1974 c.1 §22; 1975 c.643 §21; 1977 c.809 §14; 1987 c.320 §14; 2011 c.597 §155]
11.45.117 Creation Of Lots And Parcels That Were Unlawfully Divided

This Code section provides the mechanism to review and, based upon findings of compliance with specific approval criteria, to approve certain unlawfully divided lots or parcels. The review mechanism to correct an unlawfully divided unit of land differs according to the date the unlawful lot or parcel was divided as provided in (A) and (B) below, or under (C) if a land use permit was issued for a primary use.

For the purposes of this section, an "unlawfully divided" lot or parcel means a lot or parcel that, when divided, did not satisfy all applicable zoning and land division laws.

A. An application to create a legal lot or parcel from an unlawfully divided unit of land divided before January 27, 1994 (eff. date of Mult. Co. Ord. 781) shall be a Category 4 Land Division and be reviewed as a Type II process. In addition to the applicable Category 4 Land Division requirements, the application shall satisfy the following approval criteria:

1. The lot or parcel either:
   a. Conforms to current dimensional, access and area standards.
   b. Conforms to the dimensional, access and density standards in effect when the lot or parcel was unlawfully divided, or
   c. The lot or parcel has a property line that is contiguous to a road, street or zone boundary that intersected the property and the applicable zoning district on the date the lot or parcel was unlawfully divided allowed a land division when a County-maintained road/ street or zoning district boundary intersects a parcel of land. The zoning districts and effective dates that apply to this provision are as follows:
      1. The Rural Center (RC), Rural Residential (RR), and Multiple Use Agriculture-20 (MUA-20) zoning districts on or after October 6, 1977 (eff. date of Mult. Co. Ord. 148) and before January 27, 1994;
      2. The Multiple Use Forest-20 (MUF-20) zoning district on or after October 6, 1977 (eff. date of Mult. Co. Ord. 148) and before August 14, 1980 (eff. date of Mult. Co. Ord. 236); and
      3. The Multiple Use Forest-19 (MUF-19) and Multiple Use Forest-38 (MUF-38) zoning districts on or after August 14, 1980 (eff. date of Mult. Co. Ord. 236) and before January 7, 1993 (eff. date of Mult. Co. Ord. 734).

2. The owner or applicant demonstrates that the resulting lot or parcel can physically accommodate a use allowed in the zone, including necessary facilities and utilities, in compliance with all applicable siting standards of this zoning code chapter.

3. Practical physical access to the site currently exists from a public road or can be provided through an irrevocable easement or equivalent means. Practical physical access at a minimum must meet the standards of MCC 29.012 and allow emergency vehicle access to the building site.

4. The application shall include a tentative plan consisting of maps, written information and supplementary material adequate to provide the information required for a Category 4 land division.
B. An application to create a legal lots or parcels from an unlawfully divided unit of land divided on or after January 27, 1994 (eff. date of Mult. Co. Ord. 781) to January 1, 2007 shall be subject to current review procedures for a land division. The application shall satisfy the following approval criteria:

1. The lot or parcel conforms to current zoning requirements, or

2. An unlawfully divided lot or parcel may be approved notwithstanding the required dimensional, access, and area requirements, subject to the following:

   a. The lot or parcel has a property line that is contiguous to a road, street or zone boundary that intersected the property: and

   b. The applicable zoning district on the date the lot or parcel was unlawfully divided allowed a land division when a County-maintained road, street or zoning district boundary intersects a parcel of land. The zoning districts and effective dates that apply to this provision are the Rural Center (RC), Rural1 Residential (RR), and Multiple Use Agriculture-20 (MUA-20) zoning districts on or after January 27, 1994 (eff. date of Mult. Co. Ord. 781) and before October 4, 2000 (eff. date of "Rural Residential" amendments to OAR 660-004-0040).

C. A Lot Legalization application to create a lot or parcel may be made through a Type I application process when the County issued a land use permit prior to January 1, 2007 for a dwelling or other building on an unlawfully established unit of land, provided the following criteria are met:

1. The land use permit was issued after the sale of the unlawfully established unit of land to a new property owner; and

2. There is a clear property description on the permit for the unlawfully established unit of land for which the building or placement permit was issued. The description may be confirmed by tax lot references, tax lot maps, site plans, or deeds recorded at the time; and

3. The land use permit was for a building associated with a new principle use, such as a new dwelling, commercial, industrial, community service, or conditional use; and

4. There is a copy of the land use permit in the records of Multnomah County or its authorized agent's and the land use permit indicates that the proposed development on the unlawfully established unit of land complied with zoning and land division requirements; and

5. If the approved land use permit was for a dwelling, the building currently qualifies as a habitable dwelling as defined in MCC Chapter 11.15; and

6. The building was constructed under a valid building permit and the building remains on the unlawfully established unit of land described in (2) above.

   a. A County building permit was issued at the time and does not include plumbing, mechanical, electrical or other type of trade permit. An Exempt Farm Structure approval is not a building permit.

D. Within 90 days of a final decision being approved under (A), (B) or (C) of this section, the property owner(s) shall record a partition plat or subdivision plat as appropriate, in accordance with the requirements of ORS Chapter 92.

E. If an application to legalize a unit of land is approved under (A), (B) or (C) of this section, the date of creation of the legalized parcel or lot shall be the date the partition or subdivision plat is recorded.
F. Development of a parcel or lot approved pursuant to this section shall be subject to the laws in effect at the time of the development application pursuant to ORS 215.427(3)(a). No retroactive use of land use laws is authorized by this code provision once the parcel or lot is lawfully created.

G. From January 5, 1966 to December 31, 2000, the County’s zoning ordinance specified that in cases where a building permit is required under the Multnomah County Building Code, such building permit shall be deemed to be a land use permit. When reviewing a Lot Legalization application under (C) above, building permits during this time period shall constitute a land use permit.

H. The following do not qualify to legalize a lot or parcel under this code section:
   1. An area of land described as a tax lot solely for assessment and taxation purposes;
   2. An area of land created by the foreclosure of a security interest;
   3. A Mortgage Lot.
   4. An area of land created by court decree.

[Added 2008; Ord.1114 § 8]
Chapter 3
Prescriptive Easements over Existing Roadways

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Contents

Introduction ................................................................. 3–1
Supreme Court Holdings ................................................. 3–2
Remand Issue ............................................................... 3–9
Wels v. Hippe, 360 Or 569 (Or., 2016) .................................. 3–11
Wels v. Hippe (Or., 2017) .................................................. 3–17
Wels v. Hippe, 269 Or App 785, 347 P.3d 788 (Or. App., 2015) ... 3–19
Chapter 3—Prescriptive Easements over Existing Roadways

PRESCRIPTIVE EASEMENTS OVER EXISTING ROADWAYS

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Introduction. On March 18, 2015, the Oregon Court of Appeals issued an opinion dealing with prescriptive easements over existing roadways which changed the long-standing case law on this subject significantly. The case was heard en banc by the entire court, and there were three opinions: (1) the majority opinion, (2) a concurring opinion, and (3) a dissenting opinion joined in by five of the thirteen judges of that court. *Wels v. Hippe*, 269 Or App 785, 347 P3d 788 (2015).

The Oregon Supreme Court took review of this case, and reversed the Court of Appeals decision as well as the original trial court judgment. *Wels v. Hippe*, 360 Or 569 (2016). The decision was modified slightly on reconsideration, 360 Or 807 (2017). All three decisions are included in these materials.

My presentation today will cover three main areas:

1. A discussion of the Supreme Court decision and the law on prescriptive
easements over existing roadways which that decision reaffirms. That law is summarized below.

2. A discussion of the majority decision at the Court of Appeals, primarily because it is (a) so at odds with the Supreme Court decision (and prior case law) and (b) because eight judges of the Court of Appeals believe the law should be as they ruled.

3. A discussion of whether or not there should be any changes to the existing law. I received a number of comments on the Listserv about this decision which opined that it should be easier to get a prescriptive easement over an existing roadway, particularly in the more rural areas of the state.

**Supreme Court holdings.** The court stated that it “allowed review to address the elements of a claim for a prescriptive easement to use an existing road.” 360 Or at 576. The court then discussed the origin of “prescription” as a method of obtaining an interest (in this case an easement) in real property. The court then reaffirmed a “critical underpinning” of the doctrine of prescription that “the owner of land against whom a prescriptive easement is being claimed must have reason to know of the adverse use of his or her property before being held responsible for failing diligently to take action to
Chapter 3—Prescriptive Easements over Existing Roadways


Then the court recited the long-standing requirement that a claimant “must establish an open and notorious use of defendants’ land adverse to the rights of defendants for a continuous and uninterrupted period of ten years,” quoting *Thompson v. Scott*, 270 Or 542, 546, 528 P2d 509 (1974). 360 Or at 577-578. These are the three primary requirements for a prescriptive easement, with which we are all familiar:

1. The use by the claimant must be “open and notorious;”

2. It must be adverse to the rights of the landowner; and

3. It must be continuous and uninterrupted for a period of ten years.

The *Hippe* case was decided, at all three court levels, on the requirement of adversity. The landowner had admitted that the claimant’s use had been “open and notorious,” but argued that it was not adverse because it was always by permission of the landowner.¹

¹ Both the claimant and the Court of Appeals majority concluded that the landowner had somehow admitted that the use was adverse when he conceded in his trial memorandum that the use was “open and notorious,” despite the fact that the very next sentence in that memorandum was that the landowner’s position was that the use was nevertheless not adverse. The Supreme Court rejected that argument as well. 360 Or at 576.
At the outset of its opinion the Supreme Court recited how the element of adversity is established in a prescriptive easement case: “To establish that the use of an existing road is adverse, a plaintiff must show that the use of the road interfered with the owners’ use of the road or that the use of the road was undertaken under a claim of right of which the owners were aware.” 360 Or at 571. In other words, adversity can be established either by (1) demonstrating that the claimants use of the road interfered with the owner’s use of the road, or (2) that the claimant used the road because he believed he had the right to do so, and that the landowner was aware of this “claim of right.” This latter method of establishing adversity is consistent with the ruling of Feldman, supra.

The Supreme Court also reaffirmed the long-standing rule that prescriptive easements are “not favored by the law,” citing Wood v. Woodcock, 276 Or 49, 56, 554 P2d 151 (1976). 360 Or at 578. The Supreme Court then also reaffirmed the rule that because such easements are not favored, the elements of a prescriptive easement claim must be established by clear and convincing evidence. Id., citing Williams v. Harrsch, 297 Or 1, 6, 681 P2d 119 (1984).

The Supreme Court then discussed the general rules regarding the establishment of the element of adversity. First, use is adverse if it is
“inconsistent with the owner’s use of the property or if it is undertaken not in subordination to the rights of the owner.” 360 Or at 578. Also, the Supreme Court held, “use by permission is not adverse.” 360 Or at 579.

Then the Supreme Court discussed the rule which might have been one of the reasons for the Court of Appeals majority opinion: “It is often stated that open and notorious use for the prescribed period gives rise to a rebuttable presumption of adverse use.” 360 Or at 569, citing the “ancient” case of Coventon v. Seufert, 23 Or 548, 550-551, 32 P 508 (1893).

But, the Supreme Court then held, this presumption does not apply in all cases, and in particular often does not apply in prescriptive easement cases:

“That rule applies in ordinary cases, in which the person claiming the easement by prescription is a stranger to the landowner; under such circumstances, it makes sense to assume that obvious use of the owner’s property is adverse to his or her rights. But the rule does not apply in all cases; in particular, when the nature of the land or the relationship between the parties is such that the use of the owner’s property is not likely to put the owner on notice of the adverse nature of the use.” 360 Or 579.

The Supreme Court then discusses the most obvious exception to the rule, and that is where the landowner has given the claimant permission to use the road. Such permission, the Supreme Court noted, continues unless the claimant
repudiates that permission, and that repudiation is made known to the landowner. *Id.* In the *Hippe* case, the landowner presented evidence that he had given permission to the claimant by (1) providing him with a key to the gate, and (2) giving the claimant permission to cut brush along the road (after the claimant had asked for that permission). The Court of Appeals majority rejected that evidence, but in my opinion, it was wrong to do so.

But under prior Supreme Court case law, actual permission is not always necessary to avoid adversity in the case of an existing roadway that was either constructed by the landowner or is of unknown origin. This case law was also ignored by the Court of Appeals majority decision. The Supreme Court thus reaffirms the holding in *Woods v. Hart*, 254 Or 434, 436, 458 P2d 945 (1969), that in such cases “it is more reasonable to assume that the use was pursuant to a friendly arrangement between neighbors rather than to assume that the user was making an adverse claim.” 360 Or at 579-580. *See also Trewin v. Hunter*, 271 Or 245, 248, 531 P2d 899 (1975).

Thus, the Supreme Court concluded, when “a claimant uses a preexisting road, the claimant must affirmatively establish that his or her use of the road is adverse.” 360 Or at 580, citing *Thompson v. Scott, supra*. In other words, the
presumption of adversity which might otherwise arise from “open and notorious use” does not apply where the claimant’s use is of an existing roadway.

The Supreme Court then discusses the two methods by which such adversity may be established: (1) that the use interfered with the landowner’s use of the road, or (2) that the use was under a claim of right which the claimant had made known to the landowner. 360 Or at 580-581. As to the latter method, the Supreme Court made it clear that it is “not sufficient, however, for a claimant merely to believe that he or she has the right to use the road. There must be evidence that the owner of the property knew or should have known of that belief.” 360 Or at 580.

The Supreme Court then turned to the facts of this case and concluded that there “is a complete lack of evidence that anything the plaintiff did interfered with the defendants’ use of the road.” 360 Or at 581. The Supreme Court also rejected the claimant’s assertion that he “believed” he had a right to use the road, and that this was enough. Id.

It was in an effort to support this belief of the claimant that the Court of Appeals majority turned back to the Restatement (First) of Property in its rejected attempt to eliminate the necessity that any “claim of right” must also
have been made known to the landowner for the required ten-year period. *Wels v. Hippe*, 269 Or App 785, 794-797 (2015) (this opinion also in your materials). The Supreme Court discusses why this analysis of the Court of Appeals was unfounded, 360 Or at 582-583.

The Supreme Court concluded that, as it had discussed earlier, “an uncommunicated belief in a right to use property provides no notice to the owner of such a belief. It therefore cannot satisfy the essential requirement of adverse use, that is, that it inform the owner of the servient property that the claimant is asserting a right of use hostile to the rights of that owner.” 360 Or at 581.

And just to make its holding perfectly clear, the Supreme Court then summarized:

> “If a claimant who is engaging in nonexclusive use of a preexisting road fails to communicate his or her belief in a right to do so, there is no way for the owner to know that the claimant is asserting a right hostile to the owner’s. As the court observed in *Woods*, ‘the fact that [the owner] sees his neighbor also making use of it, under circumstances that in no way injures the road, or interferes with his own use of it, does not justify the inference that he is yielding to his neighbor’s claim of right or that his neighbor is asserting any right.’” 254 Or at 437-38.” 360 Or at 580-581.

Thus the Supreme Court finally concluded that where the claimant here used the existing roadway non-exclusively, he had to present clear and
convincing evidence either that his use of the road interfered with the landowner’s use of the road (and merely being seen while driving on the road and raising dust is not enough because it doesn’t interfere with the landowner’s use of the road), or by a claim of right which was communicated to the landowner (and there was no evidence that the claimant ever communicated any such claim to the landowner). 360 Or at 583.

Remand issue. You may notice that the Supreme Court’s original opinion concludes by remanding the case to the trial court “for further proceedings.” 360 Or at 569 and 583. I saw no reason for “further proceedings,” and opposing counsel leaped at that statement to tell me he thought he had the right to re-try the case and/or present further evidence. I petitioned for reconsideration, which was granted, and the Supreme Court clarified that no “further proceedings” were required, and held: “The case is remanded to the circuit court for entry of judgment in defendants’ favor, and the award of costs is modified accordingly.” (The original slip opinion had held that costs on appeal were “to abide the outcome on remand.”) 360 Or 807, 808 (2017), also in your materials.
Chapter 3—Prescriptive Easements over Existing Roadways

Wels v. Hippe, 360 Or 569 (Or., 2016)

360 Or 569

John B. WELS, Jr., Respondent on Review, v.

Douglas W. HIPPE, Defendant, and

Le Roy HIPPE and Cheryl Hippe, Petitioners on Review.

No. 71

CC 101215E3

CA A150238

SC S063486

SUPREME COURT OF THE STATE OF OREGON

Argued and submitted June 15, 2016

November 17, 2016

On review from the Court of Appeals.∗

Clayton C. Patrick, Clatskanie, argued the cause and filed the brief for petitioners on review.

John R. Hanson, Medford, argued the cause and filed the brief for respondent on review. Also on the brief was Tracey R. Howell.

Before, Balmer, Chief Justice, and Kistler, Walters, Landau, Baldwin, and Brewer, Justices, and DeHoog, Justice pro tempore.**

LANDAU, J.

The decision of the Court of Appeals is reversed. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings.

LANDAU, J.

Plaintiff seeks a prescriptive easement over an existing road that crosses defendants’ property. To establish a prescriptive easement, the law requires (among other things) that plaintiff’s use of the road was adverse to the rights of the owners of the property. The dispute in this case is whether plaintiff satisfied the requirement to prove such adverse use. The trial court found that plaintiff did establish adverse use of the road in either of two ways. First, it found that plaintiff showed that his use of the road interfered with defendants’ rights, in that defendants could see vehicles passing in close proximity to their house. Second, and in the alternative, the court found that plaintiff established adversity through testimony that he believed—although without communicating that belief to defendants—that he had the right to use the road without defendants’ permission. The Court of Appeals affirmed. Wels v. Hippe, 269 Or App 785, 347 P3d 788 (2015).

We conclude that the trial court and the Court of Appeals erred. To establish that the use of an existing road is adverse, a plaintiff must show that the use of the road interfered with the owners’ use of the road or that the use of the road was undertaken under a claim of right of which the owners were aware. In this case, there is a complete absence of evidence in the record of either of those things. We therefore reverse the decision of the Court of Appeals and the judgment of the trial court.

The relevant facts are not in dispute. Plaintiff owns three contiguous parcels of rural property near the Rogue River. He purchased the parcels in 1998. The nearest state highway, the Crater Lake Highway, is located some distance away. In between plaintiff’s property and the highway lie federally owned forest lands and a number of private parcels. Defendants own one of those private parcels, a 20-acre lot, where they have lived since 1973.

A private dirt road, known as “Lewis Creek Road,” runs from plaintiff’s property across the federally owned forest land and the intervening private parcels, eventually connecting to another private road and, ultimately, the highway.

Lewis Creek Road crosses defendants’ property and passes within 60 to 80 feet of their house. No one knows who built Lewis Creek Road or when it was first constructed, but old records indicate that it has been in existence since at least 1932. Plaintiff and the other private property owners in the area have used it to access the Crater Lake Highway.

∗ Appeal from Jackson County Circuit Court, Ronald D. Grensky, Judge. 269 Or App 785, 347 P3d 788 (2015)

** Nakamoto, J., did not participate in the consideration or decision of this case.
At some point, defendants erected a chain across Lewis Creek Road where it entered their property. But they left the chain unlocked and provided keys to neighbors, including plaintiff. Plaintiff sometimes performed general maintenance of the road, including dragging an iron bar behind his truck to level the road. On one occasion, he asked defendants for permission to trim the brush alongside the road, and defendants agreed. Plaintiff’s use of Lewis Creek Road across defendants’ property caused some dust and vehicle noise, but defendants did not believe that it interfered with their use of the road or of their land.

In 2008, plaintiff decided to build a cabin on his property. The county, however, would not issue the necessary permits unless he obtained written confirmation of his right to use Lewis Creek Road for access to the Crater Lake Highway. Plaintiff tried to obtain written easements from each of the private property owners over whose property Lewis Creek Road ran. He succeeded in obtaining easements from some of the private property owners, but not from defendants. Plaintiff then initiated this action for a declaration that he had acquired a prescriptive easement to use the part of Lewis Creek Road on defendants’ property. Plaintiff advanced no other theory in support of his right to use the road.

In his trial memorandum, plaintiff asserted that he had used Lewis Creek Road for access to his property openly, notoriously, and continuously from the time he purchased the property in 1998. He further asserted that he thought he had the right to do so without defendants’ permission and thus had acquired an easement to use the road by prescription.

In response, defendants’ trial memorandum “concede[d] that plaintiff has used the roadway open and notoriously. Defendants dispute[d] that plaintiff’s use ha[d] been adverse.” Defendants argued that, in other words, although plaintiff’s use of the road may have been obvious, it was permissive. In support, defendants asserted that, when a prescriptive easement claim involves the nonexclusive use of an existing road, such use is presumed to have been permissive, and anyone claiming otherwise must establish that their use of the existing road interfered with the owner’s use of it. In this case, defendants argued, there was no evidence that plaintiff’s use of Lewis Creek Road interfered with their own use of the same road.

In their opening statement, defendants elaborated on that line of argument:

“And it’s presumed if he used open and notoriously then it was adverse. And so we think that he’s got that presumption going in. If that presumption exists, it’s up to the defendants to rebut that with—by showing that his use was of an existing road, did not interfere with defendants’ use of the road and—and it was not exclusive. His use was not exclusive if others used the road, like the defendants or others. And if defendants can rebut those three pieces, [plaintiff] still has to come up with some other way to prove adversity by clear and convincing evidence. And I don’t think he’s got that.”

In his opening statement, plaintiff acknowledged that what was in dispute was whether, in light of his nonexclusive use of Lewis Creek Road, his use nevertheless was “open and notorious and hostile or adverse.” His position was that he had satisfied all those requirements because, during the years that he used the road, he “never received anything like permission,” that he “always assumed that [Lewis Creek Road] was his access,” and that “[h]e had a right to use it.”

At trial, two witnesses testified—plaintiff and defendant Douglas Hippe—establishing the foregoing facts. Following the trial, the court issued a written opinion ruling for plaintiff. The court explained that, in cases involving the use of an existing road, there is a presumption that such use was not adverse, but instead was permissive. Nevertheless, the court explained, that presumption
could be rebutted with evidence either that plaintiff’s use “interfered with [d]efendant’s right on his property” or that plaintiff mistakenly thought that he had the right to use the road without defendants’ permission. In this case, the court concluded, plaintiff established both. As the trial court saw it, evidence that plaintiff’s vehicles passed in “close proximity” to defendants’ house interfered with defendants’ rights to use their property, and, in any event, it was undisputed that plaintiff mistakenly thought that he had the right to use the road.

Defendants appealed. They argued that the trial court erred in concluding that plaintiff had rebutted the presumption of permissive use for two reasons. First, defendants argued that the trial court erred in relying on evidence that plaintiff’s vehicles passed in close proximity to their house, presumably referring to testimony that such use kicked up dust and made noise. That evidence, defendants argued, was not sufficient, because noise and dust “did not interfere with defendants’ use” of the road. Second, defendants argued that the trial court also erred in relying on plaintiff’s uncommunicated, subjective belief that he had the right to use Lewis Creek Road without their permission. As defendants put it, merely “[t]hinking you have a right to use a road is not sufficient” to establish adverse use.

The Court of Appeals affirmed. In so doing, the court did not address whether the trial court erred in concluding that evidence of dust and noise from plaintiff’s use of the road was sufficient to rebut the presumption of permissive use. Rather, it focused on the question whether plaintiff’s mistaken belief that he had the right to use Lewis Creek Road was adequate to rebut that presumption. Relying on the Restatement (First) of Property § 458 (1944), the court explained that “adverse” use has three elements: (1) it is not made in subordination to the owner; (2) it is wrongful as to the owner; and (3) it is open and notorious. Wels, 269 Or App at 795-96. The court noted that there was no dispute that plaintiff’s use was wrongful and defendants had “conceded” that plaintiff’s use was open and notorious. Id. at 797 n 4. So, the court explained, the only issue in dispute was whether plaintiff’s use was made in subordination to defendants’. Relying on the unrebutted evidence that plaintiff used Lewis Creek Road under the mistaken belief that he had a right to do so without defendants’ permission, the court concluded that there was evidence sufficient to support the trial court’s determination that plaintiff had established that his use was adverse. Id. at 802-04.

The court’s decision was not unanimous. The dissent took the majority to task for framing the issue as it did, in terms of the three elements set out in a comment to the Restatement (First) of Property. According to the dissent, that definition of “adverse” use has never been adopted by this court, and it cannot be reconciled with subsequent Supreme Court and Court of Appeals case law. Id. at 827-31 (DeVore, J., dissenting). In the view of the dissent, the use of an existing road gives rise to a presumption that the use was permissive, and an uncommunicated belief in a right of use cannot suffice to rebut that presumption. Id. at 814-23 (DeVore, J., dissenting). The dissent contended that the majority’s reliance on defendants’ “concession” that plaintiff’s use was open and notorious in resolving that issue was unwarranted; defendants conceded only that plaintiff’s use was obvious, not that it was adverse in character. Id. at 824 (DeVore, J., dissenting). That left, the dissent said, the question whether plaintiff used Lewis Creek Road in a manner that interfered with defendants’ own use of the road. As the dissent saw it, the record was uncontradicted that, at best, plaintiff’s use of the road caused dust and noise, but did not in any way interfere with defendants’ use of the road. Id. at 841-42 (DeVore, J., dissenting).

A concurring opinion agreed with the dissent that the trial court erred in concluding that the evidence showed that plaintiff’s use of the road interfered with defendants’. The concurrence nevertheless joined the majority on the ground that defendant’s concession that plaintiff’s use was open and notorious eliminated any concern about whether plaintiff’s mistaken claim of right ever was communicated to defendants. Id. at 804-12 (Lagesen, J., concurring).

We allowed review to address the elements of a claim for a prescriptive easement to use an existing road. We begin with some familiar legal principles. An easement is a new interest in another’s land, which grants its owner a right of limited use or enjoyment. ODOT v. Alderwoods (Oregon), Inc., 358 Or 501, 512, 366 P3d 316 (2015) (An easement is “‘a nonpossessory interest in land because it generally authorizes limited uses of the burdened property for a particular purpose.’”) (Quoting Restatement (Third) of Property: Servitudes § 1.2 comment d (2000)); see also ORS 105.170(1) (“Easement means a nonpossessory interest in the land of another which entitles the holders of an interest in the easement to a private right of way.”). Because it is an interest in land, an easement ordinarily must be created in writing. Shaw v. Proft, 57 Or 192, 214, 110 P 1092 (1910) (“The rule is that an easement can only be created by writing.”). There are exceptions to that general rule, however. One is that easements may be created by prescription; that is, easements may be created through use over time and the operation of law.

The origin of prescription is a matter of some debate. Historically, it has been tied to the idea of a fictional “lost grant”—that long use must have originated in an early, but lost, lawful grant of the right—or to an analogy to statutes of limitations that apply to the related doctrine of adverse possession. See generally Restatement (Third) of Property: Servitudes § 2.17 comment b (2000) (discussing historical and theoretical bases of prescription). Whatever the doctrine’s origins, its principal justification has been that “established patterns of land possession and use should be protected and that a diligent occupant should be rewarded at the expense of a careless owner.” Jon W. Bruce & James W. Ely, Jr., The Law of Easements and Licenses in Land § 5:1, 5-5 (2008); see also Restatement (Third) § 2.17 comment c (“Prescription doctrine * * * penalizes the property owner who sleeps on his or her rights.”). A critical underpinning of the doctrine thus is that the owner of land against whom a prescriptive easement is being claimed must have reason to know of the adverse use of his or her property before being held responsible for failing diligently to take action to protect it. As the court explained in Feldman v. Knapp, 196 Or 453, 473, 250 P2d 92 (1952),
Chapter 3—Prescriptive Easements over Existing Roadways

“[t]he foundation of the establishment of a right by prescription is the acquiescence on the part of the owner of the servient tenement in the acts which are relied upon to establish the easement by prescription. This makes it necessary that he know of those acts, or be charged with knowledge of them if he did not in fact know of them.”

Accordingly, this court has held that not just any use will suffice to establish a prescriptive easement. The plaintiff “must establish an open and notorious use of defendants’ land adverse to the rights of defendants for a continuous and uninterrupted period of ten years.” Thompson v. Scott, 270 Or 542, 546, 528 P2d 509 (1974). Moreover, prescriptive easements are not favored by the law. Wood v. Woodcock, 276 Or 49, 56, 554 P2d 151 (1976). After all, the doctrine permits one person to acquire an interest in land without paying the owner for it. See Bruce & Ely, The Law of Easements and Licenses in Land § 5:3 at 5-11 (“Courts carefully scrutinize claims of easement by prescription because the recognition of such a servitude is inconsistent with the right of the servient owner to fully utilize the servient land.”). As a result, the law requires that the elements of a prescriptive easement claim be established by clear and convincing evidence. Williams v. Harrsch, 297 Or 1, 6, 681 P2d 119 (1984).

Whether a plaintiff has established the requisite open and notorious use of another’s land adverse to the other’s interest for the requisite period is a question of fact. Historically, because of the equitable nature of a prescriptive easement claim, appellate review of the trial court’s findings concerning the elements of the claim has been de novo. Boyer v. Abston, 274 Or 161, 163-64, 544 P2d 1031 (1976). In 2009, however, the legislature amended ORS 19.415(3) to provide that de novo review in such equity cases is now discretionary. In this case, the Court of Appeals declined to exercise discretion to review this case de novo. Wels, 269 Or at 787. Accordingly, assuming the trial court applied the correct legal standards, its findings of historical fact will be upheld if there is any evidence to support them. Sea River Properties, LLC v. Parks, 355 Or 831, 834, 333 P3d 295 (2014).

With those more general principles in mind, we turn to the particular elements of a prescriptive easement claim. Use qualifies as “open and notorious” if it provides the landowner with “a reasonable opportunity to learn of its existence and nature.” Thompson v. Schuh, 286 Or 201, 211, 593 P2d 1138 (1979). The purpose of that requirement “is to give the owner of the servient estate ample opportunity to protect against the establishment of prescriptive rights.” Restatement (Third) § 2.17 comment h.

Use is “adverse” if it is inconsistent with the owner’s use of the property or if it is undertaken not in subordination to the rights of the owner. Cf. Faulconer v. Williams, 327 Or 381, 389, 964 P2d 246 (1998) (discussing “adverse” use in context of extinguishment of easement by adverse possession). Use by permission is not adverse. See, e.g., Baum v. Denn, 187 Or 401, 406, 211 P2d 478 (1949) (“A prescriptive easement can never ripen out of mere permissive use no matter how long exercised.”)

It is often stated that open and notorious use for the prescribed period gives rise to a rebuttable presumption of adverse use. See, e.g., Coventon v. Seuffert, 23 Or 548, 550-51, 32 P 508 (1893) (“[i]f there has been an uninterrupted use and enjoyment of an easement in a particular way for more than ten years, it affords a presumption of right in the party who shall have enjoyed it.”). That rule applies in ordinary cases, in which the person claiming the easement by prescription is a stranger to the landowner; under such circumstances, it makes sense to assume that obvious use of the owner’s property is adverse to his or her rights. But the rule does not apply in all cases; in particular, when the nature of the land or the relationship between the parties is such that the use of the owner’s property is not likely to put the owner on notice of the adverse nature of the use.

When, for example, an owner supplies permission to use a road across the owner’s property, use in accordance with that permission will not give rise to a presumption that it is adverse; there must be proof that the claimant repudiated the owner’s permission and communicated that repudiation to the owner. Hamann v. Brimm, 272 Or 526, 529-30, 537 P2d 1149 (1975). As this court explained in Thompson v. Scott, “[w]hen the use of the servient owner’s land is permissive at its inception, the permissive character of the use is deemed to continue thereafter unless the repudiation of the license to use is brought to the knowledge of the servient owner.” 270 Or at 548-49.

Similarly, when a claimant uses a road that the landowner constructed or that is of unknown origin, the claimant’s use of the road—no matter how obvious—does not give rise to a presumption that it is adverse to the owner. As the court explained in Woods v. Hurt, 254 Or 434, 436, 458 P2d 945 (1969), in such cases, “it is more reasonable to assume that the use was pursuant to a friendly arrangement between neighbors rather than to assume that the user was making an adverse claim.” See also Trewin v. Hunter, 271 Or 245, 248, 531 P2d 899 (1975) (if claimant and servient owner use an existing way of unknown origin, “it should be presumed that the servient owner constructed it for his own use” and that the claimant’s use is permissive). That is especially the case when the use of the road by the claimant is nonexclusive. Boyer, 274 Or at 163-64.

When a claimant uses a preexisting road, the claimant must affirmatively establish that his or her use of the road is adverse. Thompson v. Scott, 270 Or at 551 (“the claimant must affirmatively prove the adverse character of his behavior”). Such adverse use may be demonstrated by clear and convincing evidence that the claimant’s use of the road interfered with the owner’s own use of the road. Boyer, 274 Or at 163-64. It bears some emphasis that the focus is on the extent to which the claimant’s use interfered with the owner’s own use of the road, not on the extent to which the claimant’s use of the road somehow interfered with the owner’s use or enjoyment of the property generally. It is only by interfering with the owner’s use of the road that the claimant puts the owner on notice of the adverse character of his or her use. As the court emphasized in Feldman, to establish that the use of a road is adverse, there must be evidence of acts “of such nature and frequency as to give notice to the landowner of the right being claimed against him.” 196 Or at 473.

The adverse character of the use of a preexisting road also may be established by evidence that the claimant used the road under a claim of right. Hay v. Stevens, 262 Or 193, 196, 497 P2d 362 (1972). It is not sufficient, however, for a claimant merely to
believe that he or she has the right to use a road. There must be evidence that the owner of the property knew or should have known of that belief. Davis v. Gassner, 272 Or 166, 169, 535 P2d 760 (1975), provides an example of use under a claim of right. In that case, the plaintiffs sought a prescriptive easement of an existing road. Their use was nonexclusive. The court nevertheless concluded that they had demonstrated that their use was adverse, based on evidence that, when the defendant had attempted to stop them by stringing a wire across the road, the plaintiffs cut the wire and used the road anyway. Moreover, they complained to the defendant about his attempts to interfere with their right to use the road. Id. at 168-69.

Having set out the elements of a prescriptive easement claim, we turn to the question whether there is evidence to support the trial court’s findings that plaintiff satisfied them. At the outset, we note that it is undisputed that plaintiff did not construct Lewis Creek Road. The road is of uncertain origin and existed long before plaintiff acquired his property. It is likewise undisputed that plaintiff’s use of the road was nonexclusive. In fact, all of the property owners along the road used it for access to and from the Crater Lake Highway.

Because plaintiff’s prescriptive easement claim is based on his nonexclusive use of a preexisting road, the burden rests with him to establish by clear and convincing evidence that his use of the road was adverse. The trial court found that plaintiff met his burden by producing evidence that his use of the road created noise and dust that could be viewed or heard by defendants from their house some 60 to 80 feet from the road. That evidence is insufficient. It does not establish that plaintiff’s use of Lewis Creek Road in any way interfered with defendants’ use of the same road. In fact, there is a complete lack of evidence that anything that plaintiff did interfered with defendants’ use of the road.

The trial court also found that plaintiff met his burden through testimony that he believed that he had the right to use Lewis Creek Road without any permission from defendant. As we have noted, however, an uncommunicated belief in a right to use property provides no notice to the owner of such a belief. It therefore cannot satisfy the essential requirement of adverse use, that is, that it inform the owner of the servient property that the claimant is asserting a right of use hostile to the rights of that owner. If a claimant who is engaging in nonexclusive use of a preexisting road fails to communicate his or her belief in a right to do so, there is no way for the owner to know that the claimant is asserting a right hostile to the owner’s. As the court observed in Woods, “‘the fact that [the owner] sees his neighbor also making use of it, under circumstances that in no way injures the road, or interferes with his own use of it, does not justify the inference that he is yielding to his neighbor’s claim of right or that his neighbor is asserting any right.’” 254 Or at 437-38 (quoting Anthony v. Kennard Bldg. Co., 188 Mo 704, 723-24, 87 SW 921 (1905)).

The Court of Appeals concluded that the absence of any evidence that plaintiff communicated his belief that he had a right to use the road is no impediment to his prescriptive easement claim, because, according to the Restatement (First) of Property, an adverse use must be open and notorious, and defendants “conceded” that plaintiff’s use of Lewis Creek Road was open and notorious. The Court of Appeals erred in reaching that conclusion.

To begin with, it is not entirely clear that the way that the Restatement (First) of Property sets out the elements of a prescriptive easement claim is consistent with the way that this court has set out the elements of the claim. The Court of Appeals itself noted that point in observing that, although this court has emphasized that, to support a prescriptive easement claim, use of another’s property must be open and notorious, the Restatement (First) of Property relegates that consideration to an aspect of the adverse character of a claimant’s use. Wels, 269 Or App at 795 n 3. The concurrence similarly noted that the description of what constitutes “adverse” use in the Restatement (First) of Property appears to be different from the way this court’s cases describe such use. Wels, 269 Or App at 811 n 6 (Lagesen, J., concurring). To the extent that there is any inconsistency between a restatement of law and this court’s case law, the latter—not the former—controls.

Aside from that, although this court has referred to a particular section of the Restatement (First) of Property or to a particular comment in some of its prior decisions, e.g., Thompson v. Schuh, 286 Or at 211 (citing Restatement (First) of Property § 458 comment i); Hay, 262 Or at 196 (citing Restatement (First) of Property § 458 comment c), that does not necessarily mean that it has endorsed all of that particular restatement’s provisions and comments or that the court is constrained to ignore later developments in the case law. See, e.g., Jones v. Mitchell Bros. Truck Lines, 273 Or 430, 433, 541 P2d 1287 (1975) (declining to follow earlier version of Restatement of Judgments).

Finally, we do not agree that defendants, by using the phrase “open and notorious” in reference to plaintiff’s use of the road, effectively conceded that plaintiff’s use was adverse. As we have noted, defendants’ trial memorandum used that phrase in describing the proper method of analysis in light of the case law that we have described. The memorandum asserted that, although open and notorious use ordinarily triggers a presumption that the use is adverse, this is not such a case. Defendants argued, both in their trial memorandum and in their opening statement, that because plaintiff in this case engaged in nonexclusive use of an existing road, plaintiff “still has to come up with some other way to prove adversity by clear and convincing evidence. And I don’t think he’s got that.” Defendants’ entire case at trial, in fact, was that plaintiff’s use of Lewis Creek Road was not of the sort that would put them on notice as to the adverse nature of that use. And that, as we have also noted, is precisely how plaintiff understood defendants’ arguments.

To summarize: The undisputed evidence shows that plaintiff engaged in nonexclusive use of the existing Lewis Creek Road. To prevail on his prescriptive easement claim, therefore, he must supply clear and convincing evidence that his use of the road was adverse. There is a complete absence of evidence in the record that plaintiff did so. Evidence that his use of the road may have caused dust and noise is legally insufficient; such evidence does not demonstrate any interference with defendants’ own use of the road. And evidence that plaintiff believed that he had a right to use the road without defendants’ permission likewise is legally insufficient, in the
absence of evidence that he communicated that belief to defendants. The trial court therefore erred in finding for plaintiff on his
prescriptive easement claim, and the Court of Appeals erred in affirming the trial court’s judgment.

The decision of the Court of Appeals is reversed. The judgment of the circuit court is reversed, and the case is remanded to
the circuit court for further proceedings.
Chapter 3—Prescriptive Easements over Existing Roadways

Wels v. Hippe (Or., 2017)
John B. WELS, Jr., Respondent on Review,
  v.
Douglas W. HIPPE, Defendant,
  and
Le Roy HIPPE and Cheryl Hippe, Petitioners on Review.

No. 4
CC 101215E3
CA A150238
SC S063486

SUPREME COURT OF THE STATE OF OREGON
February 2, 2017

On petition for reconsideration filed by petitioners on review December 5, 2016; considered and under advisement January 4, 2017.*

Clayton C. Patrick, Clatskanie, filed the petition for reconsideration for petitioners on review.

No appearance contra.

Before, Balmer, Chief Justice, and Kistler, Walters, Landau, Baldwin, and Brewer, Justices, and DeHoog, Judge of the Court of Appeals, Justice pro tempore.**

LANDAU, J.
The petition for reconsideration is allowed. The former opinion is modified and adhered to as modified.

LANDAU, J.

Defendants have petitioned for reconsideration of our opinion in Wels v. Hippe, 360 Or 569, ___ P3d ___ (2016). Defendants prevailed but seek clarification of our instruction remanding the case to the trial court for further proceedings. Defendants assert that this instruction requires the trial court to vacate its original judgment in favor of plaintiff and enter judgment in favor of defendants, rather than holding a new trial and allowing plaintiff to present further evidence. We agree that clarification is warranted as follows: The case is remanded to the circuit court for entry of judgment in defendants’ favor, and the award of costs is modified accordingly.

The petition for reconsideration is allowed. The former opinion is modified and adhered to as modified.


** Nakamoto, J., did not participate in the consideration or decision of this case.
Wels v. Hippe, 269 Or App 785, 347 P.3d 788 (Or. App., 2015)

John B. WELS, Jr., Plaintiff–Respondent

v.

Douglas W. HIPPE, Defendant

and

Le Roy Hippe and Cheryl Hippe, Defendants–Appellants.

101215E3
A150238.

Court of Appeals of Oregon, In Banc.

March 18, 2015.

Clayton C. Patrick, Clatskanie, argued the cause and filed the briefs for appellants.

Lee S. Werdell, Medford, argued the cause and filed the brief for respondent.

Before HASELTON, Chief Judge, and ARMSTRONG, ORTEGA, SERCOMBE, DUNCAN, NAKAMOTO, HADLOCK, EGAN, DeVORE, LAGESEN, TOOKEY, GARRETT, and FLYNN, Judges.

Opinion

NAKAMOTO, J.

Defendants appeal a judgment declaring that plaintiff has an easement by prescription over a dirt road that runs through defendants’ property to his property. To establish a prescriptive easement, plaintiff was required to show, by clear and convincing evidence, that his use (or use by former owners of his property) of the road on defendants’ property was “open and notorious,” “adverse to the rights of defendants,” and “continuous and uninterrupted” for 10 years. Thompson v. Scott, 270 Or. 542, 546, 528 P.2d 509 (1974); accord Sander v. McKinley, 241 Or.App. 297, 306, 250 P.3d 939 (2011). On appeal, defendants argue that plaintiff failed to prove that (1) use of the road was sufficiently adverse to defendants’ rights to establish an easement and (2) use of the road continued for at least 10 years. We conclude that legally sufficient evidence in the record supports the trial court’s findings and its determination that (1) plaintiff established adversity through direct evidence of his mistaken claim of right, which does not require that plaintiff show that his use interfered with defendants’ use of their property, and (2) plaintiff established continuous and uninterrupted use for 10 years. Therefore, we affirm.

I. FACTS

Because it was undisputed at trial that plaintiff’s use of the road was “open and notorious,” the relevant facts relate to whether plaintiff’s use of the road was adverse to defendants’ rights and was continuous for 10 years. We initially address our standard of review of those facts. This case arises in equity, and defendants request that we take de novo review with respect to certain findings made by the trial court. See ORAP 5.40(8)(d). We decline to exercise our discretion to take de novo review, because the disputed findings have support in the record and this case is not an exceptional one that merits such review. Accordingly, we are bound by the trial court’s express and implied findings of fact if supported by evidence, Morton and Morton, 252 Or.App. 525, 527, 287 P.3d 1227 (2012), and we state the facts accordingly.

Plaintiff is the owner of four contiguous parcels, identified as Tax Lots 3300, 3400, 3500, and 3600. He acquired Tax Lot 3300 in 2006 after purchasing the other three in 1998. None of plaintiff’s parcels has a house on it, although plaintiff’s purchase of the first three parcels included a cabin that plaintiff improved and used. Defendants on appeal, a married couple, are the owners of a 20–acre parcel where they have lived since 1973.

Both plaintiff and defendants get to their respective properties from Highway 62 via Busch Road and Lewis Creek Road. From Highway 62, Busch Road passes through private property, where it connects to Lewis Creek Road. Lewis Creek Road also passes through private property, reaching defendants’ residence on their property, and then continues on through defendants’ property, then through private property owned by Larson, then for a significant distance through federal public land, then through private property owned by Woods, then through additional federal public land, where it ends at plaintiff’s parcels. Old records indicate that Lewis Creek Road has been in existence since at least 1934. The part of Lewis Creek Road that runs through defendants’ property is a dirt road, approximately 18–feet wide, and passes within 60 to 80 feet of defendants’ house.

Lewis Creek Road provides the only vehicular access to plaintiff’s parcels and was the means by which the seller showed plaintiff how to get to the three parcels that he purchased in December 1998. All the private property owners along Busch Road and Lewis Creek Road use the roads to access their properties. In addition to plaintiff, two other owners of private property beyond defendants’

1 The third defendant was also an owner of the property, but he died after plaintiff filed his complaint.
property—Larson and Woods—use the part of Lewis Creek Road that goes through defendants’ property to get to their properties. Larson has a residence on his property, which includes a home business that requires parcel delivery companies to use the road.

In 2008, plaintiff sought a building permit, but the county would not issue a permit without written confirmation of plaintiff’s legal access to his property. As a result, plaintiff sought to obtain written easements to confirm his access rights from the owners along the roads between his property and Highway 62, including defendants. In seeking an easement from defendants in June 2008, plaintiff based his request on his asserted established right to use the road. Plaintiff obtained easements from several property owners, but defendants refused his request, prompting plaintiff to seek a judicial declaration that he has a prescriptive easement over Lewis Creek Road across defendants’ property.

At trial, defendants did not dispute plaintiff’s open and notorious use of the road. Defendants filed a trial memorandum conceding that element: “Defendants concede that plaintiff has used the roadway open and notoriously. Defendants dispute that plaintiff’s use has been adverse and dispute that plaintiff’s use, if adverse, has been for the requisite 10-year period.” In opening statement, defendants’ counsel told the trial court that

“for Plaintiff to prevail, he has to *** prove that he used this road open and notoriously, adverse to Defendants for a continuous period of ten years. The case is kind of lumped into those three categories. And it’s presumed if he used open and notoriously then it was adverse. And so we think that he’s got that presumption going in.”

Plaintiff and defendant Le Roy Hippe (defendant) provided the only witness testimony. Plaintiff testified that, before seeking a written easement, he and defendants had never discussed whether he had a right to use the road. Plaintiff explained that he had always believed that he had a right to use the road based on the seller’s actions, because the road was his only means of access to his property, and because two easements that came with the property mentioned Lewis Creek Road as his means of access. By the time of trial, though, plaintiff acknowledged that he had come to understand that those easements did not cover the part of the road on defendants’ property. Plaintiff also noted that he had participated in maintaining Busch Road and Lewis Creek Road, along with the other property owners.

Defendant initially testified in plaintiff’s case-in-chief. During the course of that testimony, he changed his position several times regarding what he believed concerning his and the other property owners’ rights of access to their properties via Busch Road and Lewis Creek Road, including over the part of Lewis Creek Road that crossed defendants’ property. He initially stated on direct examination that he and other landowners had a right of access to their properties over Lewis Creek Road. He stated that he had always assumed that he, and the other property owners, had a right to use the roads for access to their properties. Defendant also admitted that plaintiff was an owner of property on Lewis Creek Road and that plaintiff occupied the same position that defendants and the other property owners occupied and had the same right to use the road. On cross-examination by his counsel, defendant asserted that, if a property owner disputed his right to have access to his property over the roads, then his access was at the “goodwill and grace” of the owner. However, on redirect examination, defendant acknowledged that he had learned that he does not have a written easement to use the roads that crossed the properties of other landowners and then testified that he was confused on the issue and did not know whether he had a right to use the roads.

Testifying during defendants’ case-in-chief, defendant confirmed that he believed that Larson had a right to use the road and did not need defendants’ permission. He also testified that, in “the last few years,” he had put a chain across Lewis Creek Road where it enters his property; however, he left the lock open and gave a key to plaintiff, Larson, UPS, Federal Express, and the power company.2 Defendant stated that he had never prevented plaintiff or the other landowners from crossing his property on the road and had no objections to plaintiff’s use of the road. The court then sought to learn why defendant was objecting to the easement, and plaintiff established that defendants had demanded $70,000 for the easement.

Defendant testified on two other subjects during defendants’ case-in-chief: whether plaintiff’s use of the road interfered with defendants’ use and whether plaintiff had sought permission from defendants to use the road. Defendant explained that plaintiff’s use of the road did not interfere with his use of his land, but his wife was always complaining that everything was dusty as a result of people driving on the unpaved road. Defendant further testified that, in 2003 or 2004, during a conversation with plaintiff by the highway, he had told plaintiff that “he did have my permission to go through my property. If he had any concerns.”

In contrast to defendant’s testimony that he gave plaintiff permission to use the road, plaintiff testified that, although he remembered generally the conversation with defendant by the highway, he did not remember defendant ever telling him that he had permission to cross defendants’ land. Defendant had failed to mention that grant of permission in his deposition, and he made no claim of permission in his answer to the lawsuit. The trial court was not persuaded that the conversation about permission had actually occurred and so found. We are bound by that factual and credibility finding.

The trial court ruled that plaintiff had established a prescriptive easement in Lewis Creek Road across defendants’ property as to the three parcels purchased in 1998. The court observed in its letter opinion that the parties agreed that, “for the most part,” the requirements for a prescriptive easement—which it described as “the use was open or notorious, and continuous and uninterrupted and adverse to the interest of the other party for a period of at least ten years”—were met. Addressing plaintiff’s adverse use of the road, which the parties had disputed at trial, the court found and concluded as follows:

“Adverse use of a disputed roadway can be shown in two different ways.

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2 Defendant also testified that he had a key for Woods but had not yet had the opportunity to give it to him.
Chapter 3—Prescriptive Easements over Existing Roadways

“1) Open [use] for ten years equates to a presumption of adversity, *Feldman [et ux.] v. Knapp [et ux.]* 196 Or. 453, 250 P.2d 92 (1952). This presumption can be overcome by showing the easement was over an existing way and the use did not interfere with the owner’s rights, *McGrath v. Bradley*, 238 Or.App. 269, 242 P.3d 670 (2010). Such presumption can also be overcome by showing the use was ‘permissive,’ but to overcome the presumption the evidence must do more than show ‘mere acquiescence’ in the non-owner’s use of the land, *Id. & Feldman[,] Supra*; or

“2) Direct evidence that claimant mistakenly thought he had a right to use the property (e.g., Plaintiff always thought he had the right and so never asked for permission), *Kondor v. Prose*, 50 Or.App. 55, 622 P.2d 741 (1981).

“The Court is of the opinion that Plaintiff satisfies ‘adversity’ using both criteria. As to the three parcels acquired by Plaintiff in 1998, Tax Lot 3400, 3500 and 3600, there exists a presumption of adversity which Defendant admitted has on occasion ‘interfered’ with Defendant’s right on his property. (Viewing vehicles go past his house in close proximity to the subject road.) Such interference prevents Defendant from overcoming the presumption.

“Further it is clear that claimant mistakenly thought he had a right to use the subject property and therefore never asked for permission until he requested the easement herein. Since the road had been in existence for many years beyond the time Plaintiff purchased his property and because Plaintiff until the time he requested an easement, thought he had a right to use the road, adversity is satisfied here as well.”

The court also concluded that plaintiff had demonstrated continuous use of the road to reach the three parcels that he purchased in 1998, but that plaintiff had not proved continuous use of Lewis Creek Road to reach Tax Lot 3300 for 10 years and had no easement for that parcel.

The court entered a general judgment, declaring, in favor of plaintiff, a perpetual easement for ingress and egress to Tax Lots 3400, 3500, and 3600 over Lewis Creek Road across defendants’ property. The court also entered a supplemental judgment awarding plaintiff his costs. Defendants appeal both the general and supplemental judgments, challenging the trial court’s conclusion that plaintiff proved the disputed elements of a prescriptive easement in the road.

II. ANALYSIS

A. Statutory bar based on recreational use

Before turning to the merits of defendants’ primary arguments, we first address and reject defendants’ contention that a statute, ORS 105.692(1), barred the establishment of a prescriptive easement. Under ORS 105.692(1), “[a]n owner of land who either directly or indirectly permits any person to use the land for recreational purposes * * * does not give that person or any other person a right to continued use of the land for those purposes without the consent of the owner.” Defendants assert that the statutory bar applies because plaintiff, who owned a cabin on his own land, traversed the road for recreational purposes.

The plain text of that statute, though, as supported by its context as part of the Public Use of Lands Act, applies only when a landowner permits the general public to use the landowner’s land for recreational purposes. That reading of the statute is also supported by the legislature’s declared policy in enacting the Public Use of Lands Act and by the case law interpreting other provisions within the same act. See ORS 105.676 (“The Legislative Assembly hereby declares it is the public policy of the State of Oregon to encourage owners of land to make their land available to the public for recreational purposes * * * by limiting their liability toward persons entering thereon for such purposes and by protecting their interests in their land from the extinguishment of any such interest or the acquisition by the public of any right to use or continue the use of such land for recreational purposes * * *.”); *Liberty v. State Dept. of Transportation*, 342 Or. 11, 21–22, 148 P.3d 909 (2006) (holding that the act’s liability immunity does not apply to an owner who allows the public to cross its land to engage in recreational activities on another’s land); *Conant v. Stroup*, 183 Or.App. 270, 276, 51 P.3d 1263 (2002), *rev. dismissed*, 336 Or. 126, 81 P.3d 709 (2003) (explaining that the act was based on a model act that has uniformly been interpreted to apply “only when landowners permit members of the public generally to use private property for recreational purposes”). Thus, ORS 105.692(1) is inapplicable to the facts presented here—plaintiff’s use of a road that runs through defendants’ property so that plaintiff may get to and use his own property for recreational purposes—and does not bar the establishment of a prescriptive easement in this case.

B. Proof of adverse use

We turn to defendants’ remaining and primary arguments, which concern whether plaintiff properly established the elements of a prescriptive easement. Defendants assert as their first assignment of error that the trial court “erred in granting the plaintiff a prescriptive easement over the defendants’ property, and in ruling that the plaintiff’s use of the roadway had been adverse to the defendants, and that such adverse use had been continuous for ten years.” Thus, as noted, defendants assert that plaintiff failed to establish two of the elements required for a prescriptive easement: (1) the adversity of plaintiff’s use of Lewis Creek Road across their property and (2) the length of any adverse use. To establish those elements by clear and convincing evidence, plaintiff was required to show that the truth of the facts asserted was “highly probable.” *Sander*, 241 Or.App. at 306, 250 P.3d 939.

1. Restatement (First) of Property § 458

This case in large part concerns the appropriate method of proving adverse use for purposes of establishing a prescriptive easement. For its understanding of the adverse use element, the Oregon Supreme Court has repeatedly relied on section 458 of the Restatement
Chapter 3—Prescriptive Easements over Existing Roadways

(First) of Property (1944). For example, in Thompson, the court stated that “[a]dverse use is defined as follows” in section 458 of the Restatement, and then quoted that section with approval. 270 Or. at 548 n. 8, 528 P.2d 509.

Thompson was not the first case in which the Supreme Court relied on the Restatement formulation of adverse use. In Feldman et ex. v. Knapp et ux., 196 Or. 453, 474, 250 P.2d 92 (1952), the court relied on the Restatement in a passage addressing the use of property under a claim of adverse use. Other Supreme Court cases relying on section 458 of the Restatement are Thompson v. Schuh, 286 Or. 201, 211, 593 P.2d 1138 (1979); Hamann v. Brimm, 272 Or. 526, 529, 537 P.2d 1149 (1975); Arrien v. LeVanger, 263 Or. 363, 371, 502 P.2d 573 (1972); and Hay v. Stevens, 262 Or. 193, 196, 497 P.2d 362 (1972). The Supreme Court has never disavowed the definition of adverse use in section 458 or the idea that Oregon courts should look to section 458 for their understanding of adverse use for purposes of a prescriptive easement. Indeed, as defendants recognize, in Arrien, the Supreme Court acknowledged the requirement in the Restatement that a claimant seeking a prescriptive easement must show that the claimant’s use is “not made in subordination to those against whom it is claimed to be adverse,” 263 Or. at 371, 502 P.2d 573 (internal quotation marks omitted); the court concluded in that case that, because there was no evidence that the claimant had used the servient owner’s land in subordination to the servient owner, the trial court “erred in finding that [the claimant’s] use was not adverse,” id. at 371–72, 502 P.2d 573. We thus disagree with the dissent’s view that the Supreme Court has merely “made references” to “general concepts” in the Restatement that are of little import to the analysis in this case. 269 Or.App. at 830, 347 P.3d at 814 (DeVore, J., dissenting).

Accordingly, to set the context, we first discuss at length the Restatement’s formulation of adverse use.3 The Restatementformulates the test for adverse use as follows:

“A use of land is adverse to the owner of an interest in land which is or may become possessory when it is

(ª) not made in subordination to him, and

(bb) wrongful, or may be made by him wrongful, as to him, and

(cc) open and notorious.”

Restatement at § 458.

The Restatement explains that the key concept with respect to sub-element (a)—not made in subordination—is non-recognition of the authority of the owner to prevent the plaintiff’s use:

“To be adverse it is not essential that a use be hostile. It is not necessary that it be made either in the belief or under a claim that it is legally justified. It is, however, necessary that the one making it shall not recognize in those as against whom it is claimed to be adverse an authority either to prevent or to permit its continuance. It is the non-recognition of such authority at the time a use is made which determines whether it is adverse. * * * * A use of land is adverse when made as of right even though no right exists. * * * * A use which is not made in recognition of and in submission to a present authority to prevent it or to permit its continuance is adverse though made in recognition of the wrongfulness of the use and, also, of the legal authority of another to prevent it.”

Restatement at § 458 comment c (emphasis added). The Restatement also provides further guidance on what is meant by a “claim of right” as referred to in comment c:

“As indicated in Comment c, it is not necessary in order that a use be adverse that it be made either in the belief or under a claim that it is legally justified. The essential quality is that it be not made in subordination to those against whom it is claimed to be adverse. Yet he who claims a right in himself is impliedly asserting an absence of any right in another inconsistent with the right claimed. Hence one who uses under a claim of right himself is denying a use by the permission of another. Quite commonly, therefore, the absence of submission to another is evidenced by the fact that the one making the use did so under an affirmative claim of right in himself.”

Id. at § 458 comment d (emphasis added).

With respect to sub-element (b) of the Restatement formulation of adverse use—uses that are “wrongful” or “may be made [by the owner] wrongful”—the key idea is whether the landowner against whom the adverse use is claimed could “protect himself by vindicating his rights through legal proceedings.” Restatement at § 458 comment f. Thus, for example, a neighbor could build a structure on the neighbor’s property that receives support from an adjoining owner’s land, but the use is not wrongful and so cannot be adverse to the adjoining owner. Id. at 458 comment e. The parties do not discuss this sub-element, but it is apparent from the nature of the use of the road over defendants’ land that this sub-element was met.

Finally, with respect to sub-element (c) of the Restatement formulation—“open and notorious”—the Restatement explains that the clause is to protect those owners against whom the adverse use is claimed. Restatement at § 458 comment h. The requirement of open and notorious use “enables them to protect themselves against the effect of the use by preventing its continuance.” Id. That sub-element of adversity is satisfied by the owner’s actual knowledge of the use being made or, in the absence of actual knowledge, when

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3 Section 457 of the Restatement sets forth the elements for creation of an easement by prescription, namely, use that is “adverse” and “for the period of prescription, continuous and uninterrupted.” As stated by the Oregon Supreme Court in Thompson, 270 Or. at 546, 528 P.2d 509, an additional element of proof—use that is “open and notorious”—is required in Oregon. The Restatement formulation also requires proof of “open and notorious” use, but as a sub-element of “adverse” use instead.
the owner has “a reasonable opportunity to learn of its existence and its nature.” Restatement at § 458 comment i. As stated earlier, defendants do not dispute that plaintiff’s use of Lewis Creek Road over their property was open and notorious.4

2. The challenged determination

It follows that the only sub-element of adverse use actually in contention in the trial court was whether plaintiff’s use of Lewis Creek Road was not made in subordination to defendants. On appeal, the parties dispute the permissible methods of proving that sub-element. As we explain below, the Restatement formulation of adverse use, and particularly of the sub-element pertaining to lack of subordination, is key to an understanding of Kondor v. Prose, 50 Or.App. 55, 622 P.2d 741 (1981), and another of our more recent cases regarding proof of adverse use. It is also key to our conclusion in this case that the trial court’s ruling was correct.

In light of what was actually in dispute, the trial court determined that plaintiff could establish that his use of the road was adverse to the rights of defendants in two ways: (1) through the use of a rebuttable presumption that the use was adverse, which arises through open and continuous use for the prescribed period, citing Feldman, 196 Or. at 471, 250 P.2d 92, or (2) through direct evidence of the nonsubordinate use, that is, that plaintiff used the road under a claim of right, citing Kondor, 50 Or.App. at 60, 622 P.2d 741. The court then concluded that plaintiff had established adversity in both ways. Plaintiff defends that view of the law.

Defendants agree that the trial court correctly stated that a plaintiff may rely on a rebuttable presumption of adverse use that arises from proof of 10 years of open and continuous use of the defendant’s property. McGrath v. Bradley, 238 Or.App. 269, 274, 242 P.3d 670 (2010). Defendants argue, however, that the trial court erred because it was bound to consider only that method of proof because the case concerned a jointly used road and that the evidence at trial established that they had rebutted the presumption. We reject the first premise of defendants’ argument, and, because of that and because the trial court correctly determined that plaintiff had established adverse use given his evidence that his use of the servient property was not in subordination to defendants, we need not—and the dissent should not—reach defendants’ argument that they rebutted the presumption that, according to defendants, applies.

3. Proof by direct evidence and by presumptions

First, defendants cite no case holding that a plaintiff seeking to establish a prescriptive easement over a jointly used road can prove adverse use of the road solely through the rebuttable presumption of adverse use that arises upon proof of 10 years of open and continuous use. We, too, have found no case in which an Oregon court has held that a plaintiff’s proof of adverse use to establish a prescriptive easement is so limited.5

Instead, based on our review of the case law on prescriptive easements in Oregon, we conclude that the trial court correctly determined that a plaintiff may also establish a prescriptive easement by proving the disputed sub-element of adverse use—use not in subordination to the servient owner—through direct evidence of a claim of right, in accordance with Kondor. The discussion of adverse use in Kondor adheres closely to the description of adverse use in section 458 of the Restatement.

Our case in Kondor, although not directly citing to the Restatement discussion of adverse use, adhered to the Restatement as it had been expressed in earlier Oregon Supreme Court cases. In Kondor, we affirmed a judgment declaring a prescriptive easement in the plaintiffs over a road that ran through the defendants’ property and provided the only access to the plaintiffs’ property. We explained that adverse use means “that the use is not in subordination to [the rights of the property owner]. Therefore, even if the user mistakenly believes he has the right to use the easement, that use is sufficiently adverse.” 50 Or.App. at 60, 622 P.2d 741 (citing Arrien, 263 Or. at 371, 502 P.2d 573, and City of Ashland v. Hardesty, 23 Or.App. 523, 527–28, 543 P.2d 41 (1975)). We then stated that open and continuous use for 10 years creates a presumption that the plaintiff is using the road by a claim of right that is adverse to the rights of the property owner, which can be rebutted with evidence of permission. Id. (citing Trewin v. Hunter, 271 Or. 245, 246–47, 531 P.2d 899 (1975), and Feldman, 196 Or. at 471–73, 250 P.2d 92). That discussion tracks the Restatement formulation of adverse use because it emphasizes sub-element (a)—use that is not in subordination to the servient owner—including an adverse user’s mistaken “claim of right.”

Defendants attempt to distinguish that discussion by reading Kondor narrowly. Defendants contend that the statement in Kondor that, “even if the user mistakenly believes he has the right to use the easement, that use is sufficiently adverse,” 50 Or.App. at 60, 622 P.2d 741, simply means that “mistakenly believing you have the right to use a roadway does not defeat the initial presumption of adversity created by ten years of open and notorious use.” Thus, in defendants’ view, the trial court misread Kondor when the court stated that plaintiff could demonstrate “adversity”—in this case, referring to the sub-element of nonsubordination—through “[d]irect evidence that claimant mistakenly thought he had a right to use the property,” such as by showing that plaintiff “always thought he had the right and so never asked for permission.”

We do not read Kondor as narrowly as defendants and the dissent do, for two reasons. First, defendants and the dissent overlook Kondor’s reference to the sub-element of nonsubordinate use. That reference unmistakably points to the Restatement formulation of adverse use and the recognition that using a road based on a “claim of right” is in effect the same as using the road not in

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4 The dissent’s argument that our holding effectively drops the “open and notorious” element from the proof required for a prescriptive easement, see 269 Or.App. at 824, 347 P.3d at 810 (DeVore, J., dissenting), is incorrect. First, the dissent fails to fully acknowledge that defendants conceded the “open and notorious” element and that the trial judge proceeded accordingly. 269 Or.App. at 835, 347 P.3d at 816 (DeVore, J., dissenting). Use not in subordination to the servient owner is a distinct and separate element from open and notorious use of the road; however, the dissent appears to conflate the two. Second, the dissent’s argument depends on an inference that the trial court assumed that plaintiff had proved open and notorious use from his proof of use not in subordination to defendants. That inference is not supported by the record because defendants conceded at the outset of trial that plaintiff’s use of the road was open and notorious.

5 Neither has the dissent.
subordination to the property owners’ rights, as required by sub-element (a) in section 458 of the Restatement. The gravamen of the sub-element is use “not made in subordination to those against whom it is claimed to be adverse.” Restatement at § 458 comment d. Either a belief in a legal right or a claimed legal right to use the servient property is inconsistent with use by permission of the servient owner, thus establishing use that is not in subordination to the servient owner. Id.6

Second, defendants argue that the trial court’s reading of Kondor was incorrect because the nonsubordination sub-element of adverse use cannot be proved through direct evidence, such as plaintiff’s testimony here that he used the road for 10 years believing that he had the right to do so. That is also a focus of the dissenting opinion. See 269 Or.App. at 802, 347 P.3d at 798 (DeVore, J., dissenting). However, in Sander, we have more recently addressed and explicitly stated that the nonsubordination sub-element of adverse use is susceptible to proof through direct evidence of a claim of right, as suggested by Kondor.

In Sander, which also involved the plaintiffs’ use of a road across the defendants’ land for access to their property, 241 Or.App. at 299, 250 P.3d 939, we explained that a claimant can “directly” show “that the claimant’s use was not in subordination to the rights of the property owner,” id. at 306, 250 P.3d 939. Such direct evidence can be based on the claimant’s “mistaken belief that he or she has the right to use the servient property.” Id. at 306–07, 250 P.3d 939.

The dissent deals with Sander by rejecting it in its entirety. 269 Or.App. at 832, 347 P.3d at 814 (DeVore, J., dissenting).

However, we rely on Sander for the narrow issue of permissible proof on the sub-element of nonsubordination at stake in this case. Whatever disagreements the dissent may have with other aspects of Sander should be raised in an appropriate case on another day. As to the narrow issue we decide, the dissent may be contending that there is necessarily mischief to be made by permitting a claimant to testify that the use was not in subordination to the servient landowner because he or she used the servient property without permission of the landowner, believing in a right to use the property. We disagree. Witnesses testify concerning their subjective beliefs and knowledge in all manner of cases; we also routinely call on factfinders to assess the credibility of such testimony.

Defendants’ argument about Kondor is limited, and the rest of their argument focuses on the facts that they established consonant with rebutting the presumption of adverse use. Although neither we nor the Oregon Supreme Court have held that a plaintiff must establish adverse use only by relying on the presumption of adverse use that arises from open and notorious use of the defendant’s property for 10 years, defendants assume that is so. Defendants rely on two Supreme Court cases, Woods v. Hart, 254 Or. 434, 458 P.2d 945 (1969), and Trewin, and four of our cases: Read v. Dokey, 92 Or.App. 298, 758 P.2d 399 (1988); Hayward v. Ellsworth, 140 Or.App. 492, 915 P.2d 678 (1996); R & C Ranch, LLC v. Kunde, 177 Or.App. 304, 33 P.3d 1011 (2001), modified on recons., 180 Or.App. 314, 44 P.3d 607 (2002); and Webb v. Clodfelter, 205 Or.App. 20, 132 P.3d 50 (2006). Citing Webb and R & C Ranch, defendants note that a servient owner may rebut the presumption of adverse use by proof that the claimant’s use of a preexisting road did not interfere with the servient owner’s use. Defendants also contend that the facts in this case are indistinguishable from the facts in Woods and Trewin. Specifically, they argue that, as in Woods and Trewin, the following facts were sufficient to rebut the presumption of adverse use: the road was in existence before either of the parties acquired their properties, plaintiff used the road through defendants’ property with defendants’ knowledge, and plaintiff’s use did not interfere with defendants’ use. Similarly, defendants argue that the facts in Read and Hayward are similar to those in this case and that the claimants in those cases failed to prove adverse use.

The dissent defends defendants’ assumption, offering a rationale for why a plaintiff must establish the element of adverse use solely by relying on the presumption of adverse use that arises from open and notorious use of the defendant’s property for 10 years. Yet, as noted, defendants’ argument about appropriate methods of proof is limited to its argument that the trial court misread Kondor, an argument that we have rejected. The focus of defendants’ appeal concerns whether the record reflects that they rebutted the presumption of adverse use in accordance with the means of rebuttal described in Woods and Trewin. Thus, the dissent would reverse the trial court’s ruling based on an argument that defendants are not actually making. That is a departure from our typical approach to decisions. See Beall Transport Equipment Co. v. Southern Pacific, 186 Or.App. 696, 700 n. 2, 64 P.3d 1193, adhd to as clarified on recons., 187 Or.App. 472, 68 P.3d 259 (2003) (it is not our “proper function to make or develop a party’s argument when that party has not endeavored to do so itself”). Accordingly, we do not reach the balance of the argument that defendants make concerning the proof at trial as to adverse use.

In sum, defendants’ assertion that proof that a claimant used a roadway under the belief that he or she had the right to use it can never establish the sub-element of nonsubordinate use flies in the face of Oregon’s application of the Restatement formulation of adverse use in section 458. Accordingly, we apply Kondor and Sander and turn to the sufficiency of the evidence, which defendants also challenge.

4. Sufficiency of the evidence

The trial court determined that plaintiff had established through clear and convincing evidence that he had used the road by claim of right and had not asked for, nor been given, permission from defendants to use the road on their property during the 10–year prescriptive period. We conclude that the record supports the trial court’s findings.

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6 We disagree with the dissent’s characterization of the analysis in Kondor, which is that it was divorced from the principles in the Restatement formulation of adverse use and simply “proceeded on the familiar principle that continuous, open, and notorious use of a road would be presumed to be adverse—that is, to be without the defendants’ permission.” 269 Or.App. at 832, 347 P.3d at 807 (DeVore, J., dissenting) (emphasis in original).
Plaintiff testified that (1) he believed that he had a right to use the road based on the seller showing him the road as the means to gain access to the property, the road’s existence and course through defendants’ property and beyond for a significant distance until its end at his property, and his mistaken belief that certain easements over portions of the road also covered defendants’ property; (2) he had regularly used the road since he acquired the parcels in 1998; and (3) he had never asked for nor was given permission to use the road on defendants’ property. Defendant testified that he, and the other property owners, had a right to use the road for access and that Larson did not need his permission, although Larson also did not have an easement. Although defendant also testified that, if you do not have a written easement you go at the “goodwill and grace” of the owner, defendants behaved as if they believed that plaintiff, along with Larson and Woods, had a right to use the road through defendants’ property, and the trial court found that permission was not actually given.

Thus, the trial court heard evidence from defendant and plaintiff concerning whether plaintiff’s use was in subordination to defendants. And, for a number of good reasons, including the fact that defendant’s trial testimony presented a new factual and legal twist that had never come up in defendants’ pleadings or defendant’s deposition, the trial court found defendant’s testimony concerning permission to be lacking in credibility and accepted plaintiff’s testimony.

The trial court did not commit legal error by considering direct evidence that plaintiff had not used the road in subordination to defendants, and we are bound by the trial court’s express and implied findings concerning the factual dispute over whether plaintiff used the road by permission.

C. Proof of 10 years of adverse use

We also reject defendants’ contention that, contrary to the trial court’s finding, plaintiff did not establish 10 years of adverse use because he acted in subordination to defendants when he asked defendants to sign a written easement at a time when he had owned three of his parcels for slightly less than 10 years. Plaintiff, though, asked for a written easement from defendants (and the other property owners along the roads) to confirm his claimed rights in writing, as required by the county. Plaintiff’s request did not end his claimed adverse use of the road; he continued to assert that he already had an established, legal right to use the road. See Arrien, 263 Or. at 372, 502 P.2d 573 (“A willingness to purchase land from the servient owner does not, in itself, negate an adverse use.”). There was no evidence that, following his request, plaintiff made his use subservient to defendants’ rights. Accordingly, the evidence supports the trial court’s finding of 10 years of adverse use of the road by plaintiff. Because all of the elements for a prescriptive easement were satisfied, we affirm the trial court’s judgment.

Affirmed.

LAGESEN, J., concurring.

I join fully in the majority opinion with the understanding that its discussion of the content of the “open and notorious” element of a prescriptive easement, see 269 Or.App. at 797, 347 P.3d at 795, is dictum. I write separately for two reasons: (1) to elaborate on why the notice concerns raised by the dissent do not provide a basis for reversing the trial court’s judgment under the circumstances present in this case; and (2) to highlight the fact that, in general, we no longer review de novo a trial court’s determination as to the existence of a prescriptive easement, and to emphasize the significance of the applicable standard of review to my determination that the trial court’s judgment should be affirmed.

A. My understanding of the Oregon law of prescriptive easements

Under Oregon law of prescriptive easements, a plaintiff seeking to establish a prescriptive easement generally must prove that the use for which the plaintiff seeks the easement had three characteristics: (1) the use must have been “continuous and uninterrupted” for the prescriptive period; (2) the use must have been “adverse to the rights” of the defendant; and (3) the use must have been “open and notorious.” Thompson v. Scott, 270 Or. 542, 546, 528 P.2d 509 (1974).

The meaning of the element of “continuous and uninterrupted” is not in dispute in this case, and I therefore do not discuss it further. With respect to the “adverse” element, a plaintiff’s use of land is “adverse to the rights” of a defendant landowner if the use is under claim of right rather than by permission of the landowner. See generally Feldman et ux. v. Knapp et ux., 196 Or. 453, 467, 250 P.2d 92 (1952); see also Parrott v. Stewart, 65 Or. 254, 260–61, 132 P. 523 (1913) (explaining that a use of land is adverse to the rights of the owner if the use is by claim of right rather than permission); Kondor v. Prose, 50 Or.App. 55, 60, 622 P.2d 741 (1981) (“In the context of prescriptive easements, the requirement that the use be ‘adverse’ to the rights of the property owner means that the use is not in subordination to those rights.”).

Under Feldman, the open and continuous use of land for the prescriptive period gives rise to a rebuttable presumption that the use was adverse.1 196 Or. at 470–73, 250 P.2d 92. A servient landowner may then introduce evidence to rebut that presumption. Woods v. Hart, 254 Or. 434, 437, 458 P.2d 945 (1969). What a landowner must show to rebut the presumption depends on the nature of the particular use. In all circumstances, a landowner may rebut the presumption by affirmatively proving that the use was, in fact,

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1 This court sometimes misstates the presumption articulated in Feldman as being established by a showing of “open and notorious” use. McGrath v. Bradley, 238 Or.App. 269, 274, 242 P.3d 670 (2010). In the future, we should take care to use the correct phrase because in the law of prescriptive easements, “open and notorious” is a term of art with a well-defined meaning. See Restatement (First) of Property § 458 comments h—k (1944) (defining “open and notorious” element of prescriptive easement).
Chapter 3—Prescriptive Easements over Existing Roadways

Throughout. Analogy with the claim of adverse possession, as well as general principles, require him to sustain the burden as to all the elements of a prescriptive right. The presumption of adverseness which supports him in the first instance is a typical legal presumption. It is not a mere evidential one.

“The weight of reason and authority supports the proposition that the burden of proof as to the adverse nature of the use remains on the plaintiff throughout. Analogy with the claim of adverse possession, as well as general principles, require him to sustain the burden as to all the elements of the adverse character. The presumption of adverseness which supports him in the first instance is a typical legal presumption. It is not a mere evidential inference, although that may lie back of it. It is one which requires a trial judge, when no evidence opposes it, to direct a verdict for the claimant. Being a typical legal presumption, it disappears when confronted with evidence of permission or license, leaving the issue as one of fact. And upon that issue the burden to support the allegation of adverseness by a preponderance of the evidence remains on the claimant.”

170 ALR at 790–91.

2 Of course, proof by the landowner that the use was, in fact, permissive does more than simply rebut the presumption that the use is adverse; it affirmatively disproves the element of adverse use, thereby defeating a plaintiff’s claim for a prescriptive easement. See Baum et al. v. Denn et al., 187 Or. 401, 405–06, 211 P.2d 478 (1949) (finding that no adversity existed because the use “was merely permissive in character”).

3 Macy describes the burden-shifting dynamic for the presumption of adversity as follows:

“Of course, proof by the landowner that the use was, in fact, permissive does more than simply rebut the presumption that the use is adverse; it affirmatively disproves the element of adverse use, thereby defeating a plaintiff’s claim for a prescriptive easement. See Baum et al. v. Denn et al., 187 Or. 401, 405–06, 211 P.2d 478 (1949) (finding that no adversity existed because the use “was merely permissive in character”).

4 As we observed in Winters, in formulating the “open and notorious” element of a prescriptive easement, the Supreme Court has relied on the comments to the Restatement (First) of Property (1944) that discuss what it means for a use to be “open and notorious.” 154 Or.App. at 559, 559 n. 3, 962 P.2d 720. However, this court has relied on the comments to the Restatement (Third) of Property (2000) to support the proposition that, notwithstanding the word “and”, we treat “open and notorious” as a disjunctive term with specific and separate definitions for each element. See Montague v. Elliott, 193 Or.App. 639, 651, 92 P.3d 731 (2004) (stating that “open and notorious” element of prescriptive easement, in reality, mean “open or notorious.”). I believe that that is an incorrect formulation of the term under Oregon law, to the extent that it conflicts with the old Restatement, which treats “open and notorious” as a legal term of art with a well-defined meaning. See 269 Or.App. at 707, 242 P.3d at 707 (discussing the meaning of “open and notorious” based on the comments to the Restatement (First) of Property (1944)).
Chapter 3—Prescriptive Easements over Existing Roadways

trial court applied the wrong legal standard when it found that plaintiff’s use of the road “interfered” with defendants’ property because defendants had to view vehicles traveling by their house on the road. As a matter of law, that sort of “interference” has no bearing on whether defendants rebuffed the presumption of adverse use. Rather, to rebut the presumption in the context of an existing roadway of unknown origin, a landowner need only establish that the plaintiff’s use of the road did not interfere with the landowner’s use of the road (or damage the road). Woods, 254 Or. at 437–38, 458 P.2d 945. Because we are not reviewing de novo, that legal error by the trial court ordinarily would require a remand to make the required factual findings (that is, the findings as to whether defendants proved that plaintiff’s use of the road did not interfere with defendants’ use of the road, and did not damage the road, thereby rebutting the presumption of adverse use) under the correct legal standard. Nevertheless, a remand is not required here because the trial court correctly concluded—based on the evidence presented and defendants’ concession in court—that plaintiff established the elements of a prescriptive easement.

First, defendants conceded in their trial memorandum before trial that the “open and notorious” element of a prescriptive easement was met in this case: “Defendants concede that plaintiff has used the roadway open and notoriously. Defendants dispute that plaintiff’s use has been adverse and dispute that plaintiff’s use, if adverse, has been so for the requisite 10-year period.” The trial court—appropriately so—relied on that concession in determining that plaintiff had established the elements of a prescriptive easement. Second, for the reasons stated in the majority opinion, the evidence in the record is sufficient to support the trial court’s factual findings that the other two elements for a prescriptive easement are satisfied: (1) that plaintiff’s use was adverse to defendants’ rights (that is, under claim of right rather than by permission); and (2) that the adverse use was continuous for long enough to give rise to a prescriptive easement.

The question of adverseness is a close one for me, albeit not for the same reasons that it is a close question for the dissent. In some of our previous cases we have concluded on similar evidence that prescriptive-easement claimants have not demonstrated that a use was adverse; we have even found that such evidence demonstrated affirmatively that a use was permissive. See Nice, 137 Or.App. at 624–25, 905 P.2d 252 (on de novo review, finding that defendants rebutted presumption of adverse use and plaintiffs failed to prove adverse use where claimed easement was based on use of road in common with others and where defendants had put gate up on road but gave plaintiffs a key); see also Bridston v. Panther Crushing Co., Inc., 206 Or.App. 178, 184–85, 136 P.3d 84 (2006). In particular, in Bridston we found—again on de novo review—that a party’s use of a road was permissive on facts similar to those present here: (1) the landowner had put up a gate across the road and given the user a key; (2) where the party used the road in common with others; and (3) where the party had assisted in the maintenance of the road. Id. However, in those cases we reviewed de novo and were ourselves acting as factfinders, charged with weighing the evidence and determining for ourselves whether we were convinced by the evidence that the use was under a claim of right, rather than permissive. Now, however, we review de novo a trial court’s determination that a party has proved a claim for a prescriptive easement only in exceptional circumstances, ORS 19.415(3)(b) and ORAP 5.40(8)(c), and we have not elected to conduct de novo review in this case. As a result, we are bound by the trial court’s factual finding that plaintiff’s use of the road was under a claim of right, rather than by permission, if there is any evidence to support that factual finding. 269 Or.App. at 805, 347 P.3d at 800. There is such evidence here. That evidence, viewed in the light most favorable to the trial court’s determination, shows that plaintiff used the roadway under the belief that he had the right to use the road, that plaintiff did not ask for permission to use the road and defendants did not give permission to use the road, and that defendants themselves, like plaintiff, believed that they had the right to use the road over other neighbors’ properties. From that evidence, the trial court reasonably could infer that plaintiff’s use of the road was under claim of right and not by virtue of defendants’ permission.5

The dissent contends that the evidence is insufficient to support a factual finding that plaintiff’s use of the roadway was adverse because, in the dissent’s view, the evidence is insufficient to support a factual finding that defendants were on notice of the adverse character of plaintiff’s use. 269 Or.App. at 826, 347 P.3d at 811 (DeVore, J., dissenting). From that, the dissent reasons that the majority has adopted a “subjective theory of adverseness” that will result in the granting of prescriptive easements in circumstances in which the servient landowner was not given fair warning that a use of a road might ripen into a prescriptive easement.

I tend to agree with the dissent that the evidence would not support a factual finding that defendants were on notice of the adverse character of plaintiff’s use of the road. However, that does not suggest that the majority’s formulation of the “adverse” element of a prescriptive easement is wrong. Whether defendants were on notice of the adverse character of plaintiff’s use of the road does not bear on whether that use was by claim of right. Instead, the absence of notice bears on whether the use was “open and notorious,” and to

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5 I do not believe that the trial court’s inference that plaintiff’s use was under claim of right and not permissive is the only reasonable inference that can be drawn from the evidence in this case; on this record, the trial court inferred that plaintiff’s use was permissive. I believe that we would be bound to uphold that factual finding as well, absent a decision to engage in de novo review. Put simply, different reasonable factfinders could view the evidence in this case in different ways.

6 The dissent relies on comment j to section 458 of the Restatement (First) of Property for the proposition that the lack of notice as to the character of the use bears on the determination of whether the use itself is adverse. 269 Or.App. at 829, 347 P.3d at 813 (DeVore, J., dissenting). That comment states, in pertinent part: “[w]here a user of land and one having an interest affected by the use have a relationship to each other sufficient in itself to justify the use, the use is not adverse unless knowledge of its adverse character is had by the one whose interest is affected.” Restatement § 458 comment j (emphasis added). Notwithstanding the emphasized wording, it is clear from the context of the comment that it is referring to what must be shown to establish the “open and notorious” element of a prescriptive easement, and not to what must be shown to establish that a use is “adverse” as that term is employed in the Oregon cases. First, the comment is titled “Open and notorious use—Special relationship.” Id. Second, as the majority opinion explains, the Restatement defines “adverse” more broadly than the Oregon cases define the term. 269 Or.App. at 795 n. 3, 347 P.3d at 794 n. 3. Under the Restatement formulation, to qualify as “adverse” a use must be “open and notorious,” among other things. Id. at 795, 347 P.3d at 794. Accordingly, under the Restatement definition of “adverse,” a use that is not “open and notorious” can never be “adverse.” By contrast, under Oregon law, the question of whether a use is “adverse” is distinct from the question of whether it is “open and notorious.” As the majority also explains, Oregon’s definition of “adverse” equates to the non-subordination element of the Restatement’s definition of “adverse.” Id. at 795, 347 P.3d at 794.
obtain a prescriptive easement a plaintiff will have to show that the owner of the servient estate had whatever notice of the adverse character of the plaintiff’s use was required under the circumstances of the case. See Winters, 154 Or.App. at 558–59, 962 P.2d 720.

As I noted above, Woods suggests that under the circumstances present here, a prescriptive easement plaintiff may need to prove that the servient landowner had actual knowledge of the adverse character of the plaintiff’s use in order to prove that the use was “open and notorious.” However, in the light of defendants’ express written concession in the trial court that plaintiff’s use of the land met the “open and notorious” element of a prescriptive easement (a concession that, in my view, relieved plaintiff of the obligation to further develop the evidence on that element), this case does not present the opportunity for us to address the scope of the “open and notorious” element of a claim for a prescriptive easement for use of an existing road across a neighbor’s property.

With those considerations, I concur in the majority opinion.

DeVORE, J., dissenting.

This case offers the chance to eliminate or to exacerbate confusion in the law of prescriptive easements. Here, a well-established line of cases collide with what will become a new line of cases. The conflict requires this court to decide whether the law will continue to require that, in order to claim a prescriptive easement over preexisting roads of unknown origin, the claimants must show that their use interfered with the owner’s use of the road, so as to prove the requisite open, notorious, and adverse use. The majority opinion offers a nascent alternative that will render the long-established rule immaterial. The alternative posited is that the court will now recognize a claimant’s testimony about a prior, unexpressed, and subjective belief in the claimant’s right to use a road as sufficient evidence—indeed, as so-called “direct evidence”—of open, notorious, and adverse use of preexisting roads of unknown origin. The result of this subjective theory of adverseness will be to tacitly overrule eight cases in concept and in practice.

Fearing this alternative to be ill-founded, I respectfully dissent. To explain why, this dissent (1) revisits the facts, (2) recalls the rules on preexisting roads, (3) compares how the parties and the majority grappled with the issues presented here, (4) questions the theory that a subjective belief constitutes “direct evidence” of adverse use of pre-existing roads, (5) observes how this case conflicts in concept and in practice with established cases on prescriptive easements, (6) suggests how the law should apply to this case, and (7) concludes with a hope that the conflict between neighbors and between cases might be resolved.

I. FACTS

Plaintiff bought three parcels of land in December 1998 that are reached by Lewis Creek Road. Plaintiff testified that he could not remember any conversations with his seller about the road access. He admitted that he had noticed a disclaimer that appeared on the face of each of his three deeds, warning, “This property does not have access to or from a legally dedicated street, road or highway and access therefore cannot be insured.” Plaintiff is not the only person served by Lewis Creek Road. It passes through defendants’ property, Larson’s property, public land, Woods’ property, and more public land before reaching plaintiff’s parcels. Before his closing, plaintiff had seen purchase documents that included written easements over the Larson and Woods properties, but he did not check to which sections of the road the easements applied. When plaintiff inquired about it, the title company said that it could not give legal advice. Plaintiff choose to assume that the two easements overrode the deeds’ warning and gave him uninterrupted access to his properties. Plaintiff’s use of the properties during the relevant years was limited to recreational use in the summer time. One of his parcels had an old cabin, which he improved.

Lewis Creek Road has existed since at least 1934. Plaintiff admitted that he had not built the road over defendants’ property, and he did not know who did. The neighbors shared the cost and tasks of maintaining the road. One neighbor oversaw things, asking others to help. Defendant LeRoy Hippe performed maintenance over his properties, Larson’s property, public land, Woods’ property, and more public land before reaching plaintiff’s parcels. Before his closing, plaintiff had seen purchase documents that included written easements over the Larson and Woods properties, but he did not check to which sections of the road the easements applied. When plaintiff inquired about it, the title company said that it could not give legal advice. Plaintiff choose to assume that the two easements overrode the deeds’ warning and gave him uninterrupted access to his properties. Plaintiff’s use of the properties during the relevant years was limited to recreational use in the summer time. One of his parcels had an old cabin, which he improved.

Plaintiff testified that, prior to 2009, he had never had any discussions with defendants about his use of the road across their property. In 2008, less than 10 years after his purchase, the county told plaintiff that, in order to get a building permit for a house, he had to have written easements to reach his property. In May 2008, plaintiff wrote to defendants’ brother (in interest) to ask for a written easement. Defendants have not and do not object to plaintiff’s use of the road. Because they preferred that

II. PREEXISTING ROADS

The principles surrounding prescriptive easements are well-established. First among them is the reminder that “[t]hese principles are not favored by the law.” Wood v. Woodcock, 276 Or. 49, 56, 554 P.2d 151 (1976). Second, clear and convincing

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1 A fourth parcel is not at issue on appeal, because it was purchased in 2006 with too little time to support prescriptive use.

2 An implied easement presupposes a set of circumstances beginning with a common grantor of plaintiff’s and defendants’ properties, a fact that this situation lacked. See Thompson v. Schuh, 286 Or. 201, 211–12, 593 P.2d 1138 (1979) (denying easement by prescription and by implication). A way of necessity requires a court proceeding and a favorable judgment, which had not happened. See ORS 376.150–376.200 (petition and proceedings for ways of necessity).
Chapter 3—Prescriptive Easements over Existing Roadways

Evidence is required when claimants seek to prove the elements of a prescriptive easement. To prove those elements, claimants must show “that they or their predecessors used the roads in an open, notorious, adverse, and continuous manner for a period of ten years.”

Webb v. Clodfelter, 205 Or.App. 26, 132 P.3d 50 (2006) (citing Thompson v. Scott, 270 Or. 452, 546, 528 P.2d 509 (1974)). The first two fundamentals will become important when we turn to the requirements for open, notorious, and adverse use as applied to preexisting roads. And, those two fundamentals will be significant in recognizing a conflict between old and new lines of cases. 269 Or.App. at 815, 347 P.3d at 805 (DeVore, J., dissenting).

In the varied situations that arise, there are many ways in which a claimant may demonstrate adverseness in making use of another’s land. There is indeed no single way in which adverse, overt, and physical use of another’s land might be manifested. Contrary to the majority’s reading, this dissent and the defendants do not contend that an easement claimant can only rely on the presumption of adverseness from use of a road. Examples of the many ways to demonstrate an adverse claim range from a claimant who builds a new road on another’s land to a claimant who dams a seasonal creek so as to flood the meadow of an upstream neighbor. See, e.g., Montagne v. Elliott, 193 Or.App. 639, 653, 92 P.3d 731 (2004) (physical deviation from written easement for street); Arrien v. Levanger, 263 Or. 363, 373, 502 P.2d 573 (1972) (flooding as prescriptive use). Merely traveling over an existing road on occasion, however, is not nearly so overt and physical, nor open, notorious, and adverse, as a claimant building a driveway across a neighbor’s lot or as establishing a trail of tire tracks across a neighbor’s fields. See Feldman et ux. v. Knapp et ux., 196 Or. 453, 250 P.2d 92 (1952); R & C Ranch, LLC v. Kunde, 177 Or.App. 304, 33 P.3d 1011 (2001), modified on recon., 180 Or.App. 314, 44 P.3d 607 (2002) (road becoming tire track trail across field).

When the prescriptive claim involves simply the use of a road and no other demonstrable evidence of adverseness, Oregon’s cases provide a rule that yields one or another answer, depending upon whether the roads were preexisting. The long-standing rule has been expressed in this way:

“It is generally said that the open and continuous use of a road for the prescriptive period is presumed to be adverse and under a claim of right. It is further generally said that the servient owner has the burden to rebut the presumption.

“When the road is preexisting, however, and the claimant’s use is nonexclusive, that presumption may be rebutted by proof that the claimant’s use of the road did not interfere with the servient owner’s use of the road.”

Webb, 205 Or.App. at 26–27, 132 P.3d 50 (citations omitted; emphases added). Ordinarily, the use of the road will be presumed to be adverse, unless the servient owner proves that the use was permissive. But, if it is known that the owner built the road or if the road is of unknown origin, then mere use is not adverse. That use is no longer “adverse and under a claim of right.” To show open, notorious, and adverse use of a road of unknown origin, the claimant must show that the claimant’s use of the road interfered with the owner’s use of the road. Id. The importance and reasons for this standard are reflected in a line of cases from the Oregon Supreme Court and continuing through decisions of the Court of Appeals.

The Oregon Supreme Court explained the significance of preexisting roads in Woods v. Hart, 254 Or. 434, 436, 458 P.2d 945 (1969). In that case, the roadway had been in existence before either the defendants or the plaintiffs acquired their lands. The plaintiffs used the defendants’ road, and the defendants knew it. If the plaintiffs had built the road without asking, the court noted, then the use would have been adverse. Id. But, like our facts here, the most that could be said was that the plaintiffs shared in the work and expense of maintaining the road. Id. The court observed that helping with maintenance does not assert a right to the road, because it is equally possible that the money and work was compensation to the owners for the privilege of using the road. Offering the reason for our rule on preexisting roads, the court declared:

“Where one uses an existing way over another person’s land and nothing more is shown, it is more reasonable to assume that the use was pursuant to a friendly arrangement between neighbors rather than to assume that the user was making an adverse claim.”

Id. Even if the normal notion were imagined—that a presumption of adverseness arises when crossing another’s land—“the fact that the claimant’s use is of an existing way and the use does not interfere with the owner’s use” would “rebut the presumption of adverseness.” Id. at 437, 458 P.2d 945 (emphasis added).

“[T]he fact that [an owner] sees his neighbor also making use of [the road] under circumstances that in no way injures the road, or interferes with his own use of it, does not justify the inference that he is yielding to his neighbor’s claim of right or that his neighbor is asserting any right. It signifies only that he is permitting his neighbor to use the road * * * in a neighborly way”’”


The court was pragmatic: To see a neighbor travel over a road, without interfering with the owner’s use, does not alert the owner that the neighbor may harbor an adverse claim of right to use the road. The court affirmed the decree refusing the prescriptive claim. Id. at 438, 458 P.2d 945.

The Supreme Court has made the rule plain in other decisions. In Trewin v. Hunter, 271 Or. 245, 531 P.2d 899 (1975), there was recent adverse use, but not for a sufficient period of ten years. Before the recent adverse use, the plaintiffs had used the roadway over

3 The dispute is whether a claimant’s later testimony about a prior, unexpressed, subjective belief can suffice as direct evidence to prove an open, notorious, and adverse claim, in a context in which travel over a preexisting road does not suffice to prove an open, notorious, and adverse claim.
the defendants’ land and had never asked permission. The defendants did not object to the use, but they were not shown to have actually given permission. Citing Woods, our state’s high court concluded:

“It is our opinion that when a road is used in common by the dominant and servient owner and there is no evidence to establish who constructed the road, it should be presumed that the servient owner constructed it for his own use.”

Id. at 247–48, 531 P.2d 899 (emphasis added). Another decree refusing a prescriptive use was affirmed.

Again, in Boyer v. Abston, 274 Or. 161, 544 P.2d 1031 (1976), the Supreme Court affirmed another judgment rejecting a prescriptive claim, observing that the road’s “origin is unknown” and that “plaintiffs and their predecessors did not use the road so as to injure it or interfere with defendants’ use.” Id. at 163, 544 P.2d 1031. Decisions of the Court of Appeals have been in accord, following the same principles. See, e.g., Read v. Dokey, 92 Or.App. 298, 758 P.2d 399 (1988) (reversing judgment for prescriptive easement over a road in common use of unknown origin); Hayward v. Ellsworth, 140 Or.App. 492, 915 P.2d 483 (1996) (reversing judgment for prescriptive easement involving informal center road built by original owner of all lots).

Oregon’s rules on roads—both the general rule and its counterpart—are paralleled in the commentary to today’s more recent Restatement:

“In states following the majority rule, particular fact situations overcome the presumption of prescriptive use, creating a counter-presumption that the initial use was permissive. * * * Evidence that the use was made in common with the owner of the land, or that the road over which a right of way is claim was constructed by the owner for his own use, may also overcome the presumption of prescriptive use.”

Restatement (Third) of Property (Servitudes) § 2.16 comment g (2000) (emphases added).

Because Oregon understands a cooperative use of roads of unknown origin to be a permissive arrangement, it inescapably follows that, in order to demonstrate an open, notorious, and adverse use, a claimant must show the claimant’s use to interfere with the owner’s use of the road. That is so because our rule on preexisting road parallels the same sort of requirement for proof of adverseness when permission was previously granted. See Hamann v. Brimm, 272 Or. 526, 537 P.2d 1149 (1975) (to repudiate permission, claimant must show a use of a different character and the owner must have a reasonable opportunity to learn of the repudiation).

Curiously, the first Oregon case on which the majority relies to show the court’s reference to the old Restatement is a case illustrating the importance of showing interference in this parallel situation. In Thompson v. Scott, 270 Or. 542, 528 P.2d 509 (1974), the plaintiffs claimed a prescriptive easement across the defendants’ meadow to reach their timberland. Before a common property was split, the predecessor of the plaintiffs and the defendants had hired the plaintiffs to haul logs out of a timbered area of the property. That area was later sold to the plaintiffs who asserted a prescriptive right to the road to their property. Because the initial use was permissive, something more than ordinary use was required to alert the defendants to an adverse claim. The Supreme Court explained:

“When the use of the servient owner’s land is permissive at its inception, the permissive character of the use is deemed to continue thereafter unless the repudiation of the license to use is brought to the knowledge of the servient owner.

This principle is stated in [Restatement of Property § 458 comment j (1944).]

Thompson, 270 Or. at 548–49, 528 P.2d 509. To alert the owner that the permitted use is changed to an adverse use, “the claimant is required to prove the new and different character of the continued use very clearly.” Id. at 549, 528 P.2d 509. In Thompson, the defendants knew the plaintiffs were using the road, but the character of their use—visiting rural land infrequently—was “little or no warning of an adverse claim.” Id. at 551, 528 P.2d 509. To like effect, the Supreme Court rejected a prescriptive claim in Hamann, 272 Or. at 526, 537 P.2d 1149, where there was no change in the claimant’s use that would have alerted the owners to an adverse claim.

In both the situation involving preexisting roads with assumed permission and the parallel situation involving prior, express permission, our courts have found one other fact to be noteworthy: A claimant who shares access with a number of other users, and has given no other demonstrable evidence of adverseness, is less likely to demonstrate adverseness by such shared use.4 In Thompson, the court added:

“Another fact militating against treating plaintiffs’ use as adverse is the non-exclusive character of plaintiffs’ use. Plaintiffs themselves introduced evidence establishing that the road was used by others for a variety of purposes, including the hauling of logs, the hauling of hay, the movement of farm equipment, and for hunting. It has been said that * * * *[i]f the claimant is only one of two, or several, or many, who make the user in question, it is perhaps inferable that all of these uses are permissive. In such a case the claimant must affirmatively prove the adverse character of his behavior.”

270 Or. at 551, 528 P.2d 509 (quoting 3 Powell on Real Property ¶ 413, p. 483 (1973)). This recognition is consistent with the principle expressed by the Supreme Court as to preexisting roads that, when nothing else is shown, shared use of a preexisting road among a number of users will be understood to be a “friendly arrangement between neighbors.”

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4 The majority seems to view a community of users to be indicative of prescriptive, rather than mutually permissive use. 269 Or.App. at 800 n. 6, 808, 347 P.3d at 797 n. 6, 801.
A better claim could be made if a claimant were the sole user who establishes a two-track trail across a neighbor’s field. See R & C Ranch, LLC, 177 Or.App. at 313, 33 P.3d 1011. The fact that plaintiff, here, used the road across defendants’ property in common with others, and used the road no differently than did neighbors Woods and Larson, underscores the principle that use of a preexisting road is itself not adverse, may be understood as a neighborly arrangement, and requires the claimant to show demonstrable or open and notorious adverseness in some other form—that is to say, interference with the owners’ use of the roads. See Thompson, 270 Or. at 551, 528 P.2d 509.

The same circumstance was presented in Webb, 205 Or.App. at 20, 132 P.3d 50. In a like rural setting, the defendants owned land crossed by the road that served outlying neighbors. Midway along the road, a neighbor Prock owned land through his pension fund. At the far ends of the road system, the plaintiffs owned three parcels. The road existed longer than anyone remembered, and, except for a cut-off road (not relevant here), no one knew who had built the road system. Everyone used the roads in earlier years for moving farm equipment, and, in later years, for hunting or personal uses. The defendants lived on their land and never objected to the plaintiffs’ use of the roads. Conflicts surrounded the plaintiffs’ guests, a hunting club, whom the defendants believed frightened wildlife, brought in noxious weeds, crossed freshly seeded ground in the fall, and rutted wet roads. The defendants granted permission for the plaintiffs to accompany their paying hunters on the road to the plaintiffs’ parcels. The arrangement deteriorated in years too-recent when the defendants found a locked gate had been forced open. The trial court granted the plaintiffs’ claim for a prescriptive easement.

This court acknowledged that ordinarily use of the road would be “presumed to be adverse and under a claim of right.” Id. at 26, 132 P.3d 50 (citing Feldman, 196 Or. at 473, 250 P.2d 92). Where, however, the roads are preexisting and of unknown origin, and claimants’ “use is nonexclusive,” mere use does not show adverse use. Id. at 27, 132 P.3d 50. We summarized the factors by which a presumption of adverse use is defeated, quoting an earlier case:

“Where, as here, (1) a road is used in common by the owners of a putative servient estate and by others; (2) there is no evidence to establish who constructed the road; and (3) the evidence does not establish that the common use interfered, for the requisite period, with the servient owner’s use, the claimants of prescriptive rights have not carried their burden of proof.”

Id. (quoting Petersen v. Crook County, 172 Or.App. 44, 53, 17 P.3d 563 (2001)).

Webb foreshadowed this case. We recognized the claimants were firmly convinced of their own belief in their right to use the roads. We acknowledged the claimants’ argument “that club members did not seek out [the] defendants’ permission to use the roads because they did not believe they needed it.” Id. at 28, 132 P.3d 50. But there was no overt demonstration of the plaintiffs’ belief. Referring to the relevant period, we observed, “There is not evidence of a single hostile encounter between hunting club members and [the] defendants between 1977 and 1995.” Id. at 29, 132 P.3d 50. What was shown was not enough to establish adverse use of a neighbors set of pre-existing roads. Focusing on what is needed for adverseness, we added, “More importantly, despite causing wear to roads and damage to locks and gates, plaintiffs never interfered with defendants’ own use [of the roads].” Id. We concluded that the plaintiffs’ use of the preexisting roads, bereft of any presumption of adverseness and supported only by their belief that they did not “need” permission, failed to establish a prescriptive easement. Id. We reversed the judgment for the claimants.

We recognized another friendly arrangement as to a road of unknown origin in Skidmore v. Clark, 205 Or.App. 592, 135 P.3d 367 (2006), which shares some facts with the case at hand. There, too, we required that the claimants demonstrate that their use “interfered” with the servient owners’ use of the roads. Like defendants in our case here, the owners or predecessors had given the plaintiffs’ predecessor a key to the lock on the road’s gate, or they had allowed the plaintiffs’ predecessors to add their own lock. As in Webb, there was some testimony about runs in the road, which damage the plaintiffs denied. Like defendants in our case here, a plaintiff trimmed back trees and bushes. Nevertheless, we noted, “Oregon courts have consistently held that maintenance is more indicative of a friendly agreement than it is of adversity.” Id. at 598, 135 P.3d 367. Finding little more than ordinary use of preexisting roads and “no evidence of adverse use,” we reversed the judgment for the claimants. Id. at 599, 135 P.3d 367.

In Insko v. Mosier, 235 Or.App. 451, 234 P.3d 984 (2010), we confronted the notion that a claimant’s subjective belief was affirmative evidence of adverseness. An early owner had deeded to the defendants’ predecessor a strip of land for east and west access between a county road and the land of the defendants’ predecessors. The defendants’ predecessors had developed the road in dispute. The plaintiff’s father and mother had bought landlocked land that lay immediately south of the road strip. Like plaintiff in our case at hand, the plaintiff’s father, when buying the land, had thought that his deed included the access strip. Fences lined both sides of the access road, and the plaintiff’s fence encroached along the defendants’ access strip. For a couple of weeks in each of two years, the plaintiff had fenced off the access strip in order to enclose yearling cattle within the strip. The plaintiff and his parents made open a dirt road, which the defendants suspected to be the plaintiff’s claims of prescriptive easement. Finding little more than ordinary use of preexisting roads and “no evidence of adverse use,” we reversed the judgment for the claimants. Id. at 599, 135 P.3d 367.

We reversed, focusing on a critical element needed for a prescriptive easement over a preexisting road. We explained that “the case turns on the question of interference.” Id. at 455, 234 P.3d 984. We rejected the argument that the encroaching fence showed interference, because there was “no evidence that the fence encroached on the road.” “Id. at 459, 234 P.3d 984 (emphasis in original).
We rejected the argument that blocking the road for two weeks in each of two years was interference, because it did not continue over 10 years, and the plaintiffs did not do so when the defendants’ predecessors would return to their property. We rejected the argument that the plaintiff’s use had actually caused compensable damage to the road, because “damage to a road alone will not support a finding of interference if the damage did not actually interfere with the owner’s use.” *Id.* (citing *Webb*, 205 Or.App. at 29, 132 P.3d 50) (emphases added). And, finally, we rejected the fact that the plaintiff’s predecessor over the years had objectively manifested his belief in his ownership or legal right to use the road by making statements to neighbors. Referring to adverse possession, we explained, that, with a prescriptive easement, it is not necessary that the claimant intended to assert ownership. Instead, a prescriptive easement turns on “‘the manner in which the property is used[,]’” *Id.* at 460, 234 P.3d 984 (quoting *Wiser v. Elliott*, 228 Or.App. at 489, 209 P.3d 337 (emphasis in *Insko*)). Specifically, we rejected the suggestion that the plaintiff’s subjective belief in his claim could make ordinary use become adverse use. We emphasized:

“Contrary to the implication of plaintiff’s argument, the question of adverse use *does not depend on the claimant’s subjective intentions* with regard to the disputed road; the question of adverseness turns on whether the property was *actually used in a manner that was inconsistent with the owner’s use.*”

*Id.* (emphasis and underscoring added). The essential quality of adverseness lies, not in a “subjective intention,” but in the claimant’s demonstrable “manner” of use that is “inconsistent with the owner’s use” of the road. We reversed and remanded for entry of a judgment for defendants. *Id.*

### III. GRAPPLING WITH THE ISSUES

If the law of prescriptive claims to preexisting roads governed this case, then there should be little doubt that our conclusion is controlled by the Supreme Court decisions in *Woods*, *Trewin*, and *Boyer* and the decisions in *Read*, *Hayward*, *Webb*, *Skidmore*, and *Insko*. Defendants presented the issue squarely, and, contrary to the majority, 269 Or.App. at 824, 347 P.3d at 810, this dissent does not raise an issue that defendants failed to raise. *5* Defendants argued in their briefs that plaintiff needed to prove plaintiff’s use interfered with defendants’ use of the road. In plain language, defendants literally underscored their point, “Thinking you have a right to use a road is not sufficient by itself.” (*Underscoring in original.*) Defendants cited and argued *Woods*, *Trewin*, and *Boyer*, as well as *Read*, *Hayward*, *Webb*, *Skidmore*, and *Insko*.

Like the property owners in other cases of preexisting roads, see, e.g., *Woods*, 254 Or. at 436, 458 P.2d 945, defendants knew plaintiff was using the road in an ordinary way. *6* In that sense, defendants recognized in their first trial memorandum that plaintiff “used the roadway open [sic] and notoriously.” In opening statement, defense counsel said that plaintiffs use gave plaintiff a presumption. He allowed, “[W]e think he’s got that presumption going in.” (Emphasis added.) As a consequence, he continued:

“[I]t’s up to Defendants to rebut that with—by showing that his use was of an existing road, *did not interfere* with Defendants’ use of the road—and it was *not exclusive* * * * And if Defendants can rebut those three pieces, he [plaintiff] still has to come up with some other way to prove adversity by clear and convincing evidence.”

(Emphases added.) Those were three keys recited in *Webb*, 205 Or.App. at 27, 132 P.3d 50 (quoted 269 Or.App. at 829, 347 P.3d at 813 (DeVore, J., dissenting)), and they were also quoted in the same trial memo.

To construe defendants’ recognition of “open and notorious” travel as an unwitting legal concession that defendants knew or had reason to know of plaintiff’s adverse claim (*i.e.*, so-called adverseness reduced to “use not in submission”) is to attribute a meaning that defendants did not intend and should not now be understood to have conceded. Viewed in context, defendants’ counsel wrote and said that plaintiff must show interference or come up with some way other than mere travel to prove open, notorious, and adverse use. In this situation, defendants insisted, plain travel was not adverse. By frankly saying that plaintiff’s travel was “open and notorious,” defendants were not conceding half the battlefield in an ordinary claim for a prescriptive easement. Defendants were saying that this is no longer an ordinary claim for a prescriptive easement. Because circumstances are different, plaintiff must now prove something more than known travel. Defendants were telling the trial court that plaintiff could not succeed by proving an ordinary claim (*i.e.*, simply traveling over the road without subordination to the owner) where the context of a preexisting road requires something significantly different. In other words, in a case of preexisting roads in common use, the paradigm shifts.

Defendants’ cases, like the parallel cases of *Thompson* and *Hamann*, explain that when roads are pre-existing, ordinary use does not suffice as open, notorious, and adverse use. They explain why a plaintiff must show interference with the owner’s use of the road or demonstrate some change in the character of the claimant’s use, in order to bring to the owner’s attention that the claimant’s use is no longer friendly. By implication or expressly, those cases reject the proposition that a claimant’s later testimony about an earlier, subjective, and unexpressed “claim of right” somehow constitutes any evidence, let alone “direct evidence” fully sufficient by itself to prove adverse use of roads of unknown origin. See, e.g., *Insko*, 235 Or.App. at 460, 234 P.3d 984. Even when the claimant’s subjective belief is objectively manifested during the prescriptive period in statements made to neighbors, a subjective belief cannot serve to recharacterize mere travel over preexisting roads as adverse use.

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*5* What the dissent does do is explore conflict between defendants’ authorities and those that seem contrary. That task is the obligation of any court when an issue is presented.

*6* Plaintiff’s counsel did not try to misconstrue defense counsel’s candor about known travel. Plaintiff’s counsel recognized “that the issue that the Defense makes [is] that there wasn’t open and notorious and hostile or adverse use.”
Our majority opinion acknowledges Woods and Trewin, but misses their significance. The majority “cabin” them as relevant only to presumptions. The majority does not mention Webb or Insko, on which defendants principally relied. The majority explores none of the reasons why our case law requires, as proof of open, notorious, and adverse use, something during the prescriptive period that is demonstrably more than ordinary use of preexisting roads, or why the Supreme Court and Court of Appeals would have erred repeatedly in requiring interference. The majority does not respond directly to defendants’ reliance on these cases, nor do we consider them of any relevance to the prospect of an alternate theory of subjective proof of adverseness.

Instead, the majority deems defendants and this dissent to have failed to cite anything that prevents an alternate theory of adverseness (i.e., belated testimony about an earlier, unexpressed, subjective belief); the majority says that defendants gave too narrow of an explanation of Kondor v. Prose, 50 Or.App. 55, 622 P.2d 741 (1981); and the majority sees the dissent’s explanation of Sander v. McKinley, 241 Or.App. 297, 250 P.3d 939 (2011), which follows, as a wholesale rejection of the decision, rather than a reconciliation of it with established principles. 269 Or.App. at 787, 347 P.3d at 790. The majority faults these seeming failures, while failing to recognize that defendants’ authorities discredit the theory that an unexpressed, subjective belief suffices to transform unremarkable travel into adverse use. The majority sidesteps defendants’ authorities, because there seems to be an easy and alternate theory of adverseness that renders defendants’ authorities immaterial.

If the criticism were redirected, the majority would be quite right to observe that more could have been said to examine today’s issue—by both parties. At trial and on appeal, the parties predictably spent most of their energies arguing about the conflicting evidence of express permission. Although the trial court did posit an alternate theory of adverseness, citing Kondor, the successful plaintiff, curiously, did not cite or argue Kondor at all in his brief on appeal in support of his judgment. Even the trial court did not cite Sander, which is arguably a better case for an alternate theory of adverseness, and which was decided eight months before the trial court’s judgment. In his brief, plaintiff did not cite Sander, either. Put in context, the majority opinion has done more to develop a subjective theory of adverseness than defendants ever had a chance to see in their opponent’s brief.

Defendants did cite and distinguish Kondor, treating the decision as misconstrued by the trial court. As, however, the majority opinion reflects, an alternate theory of adverseness appears to be developing. In light of Sander, which neither plaintiff nor the trial court mentioned, the prospect of a subjective theory cannot be discounted in a paragraph, as defendants might have hoped. Although defendants could not have anticipated the majority’s opinion, precognition would have helped little, because, despite the majority’s claim, an alternate theory of adverseness is not rooted in the Restatement (First) of Property, nor in the cases of the Supreme Court. The theory that a subjective belief or a “lack of subordination” is direct evidence—and itself fully sufficient proof of open, notorious, and adverse use—is a relatively recent conception appearing in our own work, particularly in Sander, a case which could be better explained in other terms. It is a theory that does not stand up well on its own, nor against the established law involving preexisting roads.

IV. EVOLUTION OF A MISCONCEPTION

A. The Old Restatement

The majority traces its analysis upstream to the Restatement (First) of Property. Summarizing the law as it was understood in 1944 as to most situations, the Restatement introduced the concept that an easement is prescriptive, “provided the use is (a) adverse, and (b) for the period of prescription, continuous and uninterrupted.” Restatement (First) of Property § 457 (1944). The Restatement (First) described adverse use as requiring several components, to wit:

“A use of land is adverse to the owner * * * when it is

“(a) not made in subordination to him, and

“(b) wrongful, or may be made by him wrongful, as to him, and

“(c) open and notorious.”

Restatement (First) at § 458. Although Oregon speaks of “open and notorious use” as a separate element of a prescriptive easement, Thompson, 270 Or. at 546, 528 P.2d 509, the old Restatement combines “open and notorious” as one of three components of adverse use. Ordinarily, the difference should matter little, so long as the “open and notorious” prerequisite is not dropped out of consideration of adverse, prescriptive use.7

The concept of a mistaken “claim of right” is itself not a described component in the primary text of section 458 in of the old Restatement formulation of adverse use. Instead, the term appears in commentary as an optional possibility pertaining to the first component, which requires that a claimant show that the use was “not made in subordination” to the owner. Use in subordination would defeat a claim. To ask for permission to use a road shows subordination to the owner. For example, although “A” uses a pathway across Blackacre, even telling third persons at various times that he has an easement, “A” asks the owner for permission. Such use would not be found adverse. Id. at comment c (illus. 1). A “claim of right” is one way by which a person may show that the use was “not made in subordination” to the owner. But a “claim of right” is not always necessary. “[I]t is not necessary in order that a use be adverse that it be made either in the belief or under a claim that it is legally justified.” Id. at § 458 comment d. A person could

7 As the dissent will note later, the “open and notorious” aspect of adverse use suffers in the majority’s formulation of adverse use. 269 Or.App. at 800, 347 P.3d at 797 (DeVore, J., dissenting).
build a road or dig a mine on another’s land, while knowing that there was no right and asserting no right and, yet, the physical acts would demonstrate the use was “not made in subordination” to the owner. Id. at § 458 comment c (illus. 2).

That said, a “mistaken claim of right” or a lack of subordination does not wholly satisfy all the components of adverse use under the old Restatement formulation, because, by itself, it does not satisfy the second component of wrongfulness or the third component of adverseness, requiring “open and notorious” use. In short, a mistaken “claim of right” is not the equivalent of adverse use. It is an optional factor relating to one component of adverseness (i.e., (a) that the use not be in subordination to the owner).

Section 458 of the old Restatement is only a generalized summary of older American case law. It did not address the specific and varied situations that arose then or that would be developed later in Oregon’s law. Even so, the old Restatement did anticipate the development of Oregon’s law, when it explained the third component of adverse use, that component which requires that the use be open and notorious. It explained that something more than ordinary use was required when the owner would understand that the use was friendly. The Restatement explained:

“Where a user of land and one having an interest affected by the use [e.g., the owner] have a relationship to each other sufficient in itself to justify the use, the use is not adverse unless knowledge of its adverse character is had by the one whose interest is affected. The responsibility of bringing this knowledge to him lies upon the one making the use. It is not open to a user of land to contend as against one to whom he stands in a relationship sufficient to justify the use that, because the one to whom he stands in this relationship had a reasonable opportunity to learn of the existence of the use and of its nature, the use was as to him open and notorious and therefore adverse. Thus, a licensee cannot begin an adverse use against his licensor merely by repudiating his license under such circumstances that the licensor has a reasonable opportunity to learn of the repudiation. Justice to the licensor requires more than this. It requires that he know of the repudiation. If knowledge does come to him the source is immaterial. It is not necessary that it come from the licensee, but the responsibility of seeing that it does come to him is on the licensee, a responsibility the obligation of which cannot be satisfied by showing that the licensor neglected to avail himself of means of knowledge.”

Restatement (First) at § 458 comment j (1944). This rule, governing a situation more specific than the generalities of section 458, was quoted as explanation for the decision in Thompson, 270 Or. at 549, 528 P.2d 509, rejecting a prescriptive claim when use had begun with permission. See also Hamann, 272 Or. at 529, 537 P.2d 1149.

This commentary is also consistent with the understanding that, when neighbors use roads of unknown origin, the use is “pursuant to a friendly arrangement between neighbors.” Woods, 254 Or. at 436, 458 P.2d 945; Trewin, 271 Or. at 247–48, 531 P.2d 899; Boyer, 274 Or. at 163–64, 544 P.2d 1031; Webb, 205 Or.App. at 27–28, 132 P.3d 50; Skidmore, 205 Or.App. at 597, 135 P.3d 367; Insko, 235 Or.App. at 458, 234 P.3d 984. After the Restatement was updated 56 years later, it acknowledged that such particular fact situations defeat the presumption of adverseness arising from ordinary use and create a “counter-presumption that the initial use was permissive.” Restatement (Third) at § 2.16 comment g. For that reason, the claimant must demonstrably interfere with the owner’s use of the road or must let the owner know, directly or indirectly, that the use of the road is no longer friendly, in order that the claimant’s use may be proven openly and notoriously adverse.

To be sure, nothing in the old Restatement elevates a negative component—a lack of subordination—into the positive proof on the element of adverseness, especially without the other prerequisites of adverse use. By its nature, a mistaken belief in the claimant’s right can only go so far, because proof of a mistaken belief is only “evidence” of something that is not. It is proof of a negative circumstance—that the claimant’s use was not in subordination to the owner. It is like a claimant disproving a defense, while still needing to prove the affirmative claim. To prove that the claimant’s use was not nonadverse does not go further to prove the positive proposition that the use is, in fact, adverse. To prove that the claimant had not done something to demonstrate subordination does not prove, thereby, that the claimant had actually done something demonstrably adverse. At best, proof that use was not in subordination means simply that the use still has the potential of being adverse.

In Restatement thinking, in order to be adverse, a claimant must still show the use to be wrongful as to the owner and that the use was open and notoriously so. See Restatement (First) at § 458 (components (b) and (c)). Nothing in the Restatement—old or new—suggests that a subjective and unexpressed belief is somehow complete in itself as “direct evidence” of adverseness. That misconception lies elsewhere—with Sander. Nothing in the Restatement suggests that an unexpressed “claim of right” is a trump card applicable despite specific situations, like preexisting roads, which assume permissive use is the norm. That proposition will rest elsewhere—with this case.

B. Supreme Court Precedent

The majority opinion correctly observes that the Supreme Court has made references to the Restatement (First), but those references are only references to general concepts in ordinary cases. See Feldman, 196 Or. at 474, 250 P.2d 92 (common driveway built by the claimants’ predecessors); Thompson v. Schuh, 286 Or. 201, 211, 593 P.2d 1138 (1979) (the claimants’ periodic trips to rural land not open and notorious use); Hamann, 272 Or. at 529, 537 P.2d 1149 (prior permissive use and no change in character of use); Arrien, 263 Or. at 371, 502 P.2d 573 (the defendant’s periodic flooding of owner’s land—a physical invasion—was not in subordination, i.e., was under claim of right, even if the defendant thought he was trespassing); Hay v. Stevens, 262 Or. 193, 196, 497 P.2d 362 (1972) (the claimant’s use was not in subordination, despite his statement he would have stopped use of beach path upon objection, because that only meant that he did not claim full ownership).
None of these cases does more than treat the old Restatement as a secondary resource involving ordinary principles of prescriptive easements.\textsuperscript{8} None of these cases cites the Restatement for a theory that, where there has been no physical damage to an owner’s land and no interference with the owner’s use of a preexisting road on his land, a claimant’s unexpressed “claim of right” is somehow “direct evidence” of adverseness. None of these Supreme Court cases employed the Restatement for such a proposition. None of these cases criticized, distinguished, or overruled the Supreme Court’s decisions in Woods, Trewin, and Boyer on roads of unknown origin. In other circumstances, claims of noble lineage may lend authority, but, here, we should find no support for a prescriptive easement either in the Restatement or in decisions of the Supreme Court.

C. Source of the Confusion

The source of today’s confusion can be traced through several cases from correct statements of law to misapplications of those statements. In City of Ashland v. Hardesty, 23 Or.App. 523, 527–28, 543 P.2d 41 (1975), there was no road of unknown origin. The city had built a roadway to its sewer plant, and the roadway deviated from its easements and trespassed on the defendants’ land. Although city officials testified that they believed that the roadway followed the easements, we observed that their intent to be lawful did not mean that their use was “subordinate to the property owners whose land they crossed[.]” Id. at 528, 543 P.2d 41. Giving the text its proper application, we cited the same Restatement commentary at issue here for the proposition that a use is not in subordination to a land owner even when a claimant is mistaken about its claim of right. Id. (citing Restatement (First) at § 458, comment d). This point is paralleled in the law on adverse possession. “An intent to claim land occupied under a mistaken belief of ownership is sufficient to prove hostile intent.” Id. (citing Rider v. Potteratz, 246 Or. 454, 456, 425 P.2d 766 (1967)). We did not declare that a mistaken “claim of right” was itself “direct evidence” of adverseness. Rather, the city’s construction of the roadway on the defendants’ land—a physical invasion—was the demonstration of adverse use.

In Kondor, there was no road of unknown origin, nor a group of owners sharing a common road in a neighborly arrangement. There were only two tracts of land derived from common owners of both tracts. The northern and southern tracts respectively would become the plaintiffs’ and the defendants’ lands. Before then, the common owners of both tracts had allowed Mayfield, a third-party user, to build a mill on the southern tract “about 1950” and “shortly thereafter” to build the disputed road that connected the northern tract, across the southern tract, to a public road. 50 Or.App. at 57, 622 P.2d 741. “In 1950,” the prior owners of the tracts conveyed the southern tract to the defendants’ predecessors, who apparently knew of the original owners’ permission to Mayfield for his construction and use of the road. Hauling in the logs over the road, Mayfield built a cabin on the northern tract. The road served as the only access for the northern tract. For 16 years, Mayfield or Boats, the subsequent tenants, lived there.

Mayfield “supposed it was legal to go over the road at all times,” because he had built the road and begun renting from the original owners of both tracts. Id. at 58, 622 P.2d 741. Whether he was right or wrong about that did not matter. We recited the principle from City of Ashland, recalling that, “even if the user mistakenly believes he has the right to use the easement, that use is sufficiently adverse.” Id. at 60, 622 P.2d 741. That is to say, a mistaken belief does not make the use “in subordination” to the land owner. Id. The claim was adverse, because the original owner had granted permission for the construction of the road, a fact known to the defendants’ predecessors, and because mere acquiescence by the defendants or their predecessors “does not equal permission.” Id. at 61, 622 P.2d 741. A decree for a prescriptive easement was affirmed.

Kondor did not declare that a mistaken belief, standing alone, suffices as affirmative evidence in itself that a claimant’s use is adverse. Kondor declared simply that, even if Mayfield might have been mistaken, his mistake did not mean his use was thereby in subordination to the defendant owners. That was the narrow point borrowed from City of Ashland. Kondor did not say that a subjective belief (lack of subordination) sufficed in itself as “direct evidence” of adverseness. The term “direct evidence” does not appear in the case.

The analysis in Kondor proceeded on the familiar principle that continuous, open, and notorious use of a road would be presumed to be adverse—that is, to be without the defendants’ permission. That presumption was especially appropriate when the road was not of unknown origin and was instead a road known to have been constructed by the original third-party user himself. In short, Kondor was just about the defendants’ failure to overcome the plaintiffs’ presumption of adverse use. It did not create a new and alternate theory of adverseness. Kondor was decided on traditional principles; it did not suggest an alternate way to prove adverseness simply by means of self-serving testimony in an eventual trial about a previously held unspoken, subjective belief during the years of allegedly prescriptive use.

The theory that a subjective “claim of right” or lack of subordination might suffice as affirmative evidence to prove adverseness should be attributed to a case that the trial court did not mention and that plaintiff did not cite or argue on appeal. In Sander, 241 Or.App. at 297, 250 P.3d 939, the claimants’ devised that theory and, with its spin, gave Kondor a new meaning. As in Kondor, there were in Sander only two adjoining tracts. There was no group of neighbors using a common road in a neighborly arrangement. The defendants’ predecessors bought what was to become the McKinley property in 1969, through which ran a county road. In 1968 and

\textsuperscript{8} The majority cites Arron, 263 Or. at 371–72, 502 P.2d 573, for its discussion about whether a claimant’s use was in subordination to the servent owner. The case did not involve preexisting roads of unknown origin. A claimant’s dam openly and notoriously flooded land of the servent owner. Because the claimant was alleged to know that he was trespassing and had said he hoped to “straighten up the matter,” the issue was whether that evidence meant his use was in subordination. Id. Consistent with comment d of Restatement (First) section 458, the court held such flagrant use of the other’s property was not in subordination, regardless whether the claimant believed he was entitled. The decision did not suggest that the claimant’s subjective claim of right, if he actually had one, would have sufficed in itself to prove adverseness. The periodic flooding from his dam accomplished that. The decision does not suggest that a basis for the majority’s conclusion lies in precedent of the Supreme Court.
Chapter 3—Prescriptive Easements over Existing Roadways

1971, the plaintiffs’ predecessors bought the adjoining Sander property to the northeast. The upland portion, which immediately adjoined the McKinley property, could not be reached by road.

In 1970, the plaintiffs’ predecessors began crossing from the county road, across the McKinley property, to reach their Sander property to the northeast. Their “primitive road” had never been improved, graded, or surfaced in any way. It consisted of “two narrow dirt tracks in the grass, which [were] the result of vehicles repeatedly following the same route.” 241 Or.App. at 301, 250 P.3d 939. One of the plaintiffs’ predecessors had always assumed that there was an easement in place and had never asked for permission to cross the McKinley property.9

The trial court granted a judgment recognizing a prescriptive easement for benefit of the plaintiffs. The defendants appealed, asserting that their predecessors had given permission, and that the plaintiffs had failed to prove that the primitive road interfered with the defendants’ property. In a creative moment, the claimants reasoned that the lack of interference could only serve to rebut a presumption of permissive use, that they were not relying on any presumption, and that what they offered was affirmative evidence in itself of adverseness. Agreeing with the first premise that use gives rise to a presumption of adverseness and the second premise that a lack of interference serves to rebut the presumption of adverseness, we accepted the logic of the plaintiffs’ syllogism, in these words:

“That said, as plaintiffs argue, an easement claimant need not rely on that presumption to establish the element of adverse use. Adverseness can be established directly by showing that the claimant’s use was not in subordination to the rights of the property owner. Kondor, 50 Or.App. at 60, 622 P.2d 741. A claimant’s mistaken belief that he or she has the right to use the servient property is sufficient to establish adverse use. Id. In this case, plaintiffs contend that they established adversity directly and thus do not rely on the presumption. Because they do not rely on the presumption, we agree with plaintiffs that it is immaterial that the [plaintiffs’ predecessors’] use of the McKinley property did not interfere with any of its respective owners’ use of it.”

241 Or.App. at 306–07, 250 P.3d 939. Of course, Kondor did not actually hold that a mistaken belief was itself “sufficient to establish adverse use”; the mistaken belief only avoided viewing the use to be in subordination to the owner. It was a constellation of facts—starting with construction of the road on the defendants’ land and ending with the defendants’ failure to overcome the plaintiffs’ presumption—that established adverseness. Nevertheless, in Sander, we went on to conclude “that the [plaintiffs’ predecessors’] use of the road on the McKinley property was not in subordination to [defendants’ predecessors’] rights and, thus, that their use was adverse.” Id. at 309, 250 P.3d 939. We affirmed the plaintiffs’ judgment.

The language in Sander, adopting the claimants’ novel theory that they were offering an alternate proof of adverseness, would seem to lend support to the majority’s conclusion here, if it were not so overshadowed by Woods, Trewin, Boyer, Webb, Skidmore, and Insko, and if it were not better distinguished and explained on its facts. In Sander, there was only the one adjoining parcel that needed access across the defendants’ property, such that travel by the one neighbor is of more significance. Cf. Kondor, 50 Or.App. at 57, 622 P.2d 741 (road crosses to serve only northern parcel). The plaintiffs and their predecessors made exclusive use of the road. See Thompson, 270 Or. at 551, 528 P.2d 509. There were no other neighbors traveling the road pursuant to an understood neighborly arrangement. See Woods, 254 Or. at 436, 458 P.2d 945. This was a unique one-on-one situation of adjoining parcels.

Perhaps of more significance, this was an unimproved, primitive road whose use seemingly begun in 1970 around the time the plaintiffs’ predecessors bought their property. It consisted of two tracks through the grass. Therefore, this “road” was like the two track, primitive pathway along or across fields in R & C Ranch, LLC, 177 Or.App. at 304, 33 P.3d 1011. Where it appears that the primitive road serves one remote parcel, the adverse use is better explained as the apparent establishment of the road by the claimant’s use of the road to reach the remote parcel. The adverseness lies not in the negative, not in the lack of subordination by itself, and not in just the absence of nonadverseness, but in the positive evidence that the primitive path has been created.

In other words, Sander was correctly decided, even if it strayed when accepting the claimant’s misconception that Kondor could be read to say that a mistaken “claim of right” is sufficient in itself to constitute the full equivalent of adverse use. Sander need not be overruled. If it deserved any attention, which neither the trial court nor plaintiff gave it, the case only needs to be explained in terms of its facts and familiar principles.

V. TROUBLED THEORY

Although Kondor was cited by the trial court and the majority opinion, Kondor is not the problem, for the reasons reviewed above. It does not stand for the proposition attributed to it, and defendants did correctly distinguish it. If, however, Sander cannot be better explained in the terms suggested here, then Sander, together with this case, will present serious problems for the law on prescriptive easements.

Although all cases agree that “[e]asements by prescription are not favored.” Wood, 276 Or. at 56, 554 P.2d 151, they will now be favored, because prescriptive claims will become much easier to win and often impossible to defend. In nearly every case in which people disagree so vigorously as to hire lawyers, take their dispute to court, and spend life savings in litigation, the easement claimants will insist that they have a right to use the road in dispute, and that, if somehow mistaken, they have a “mistaken claim of right” to use the road. If claimants did not believe themselves justified, there would never be lawsuits over prescriptive easements. Because nearly

9 This summary omits, as unnecessary to our discussion, facts concerning defendants’ predecessors erecting new fencing and gates, the plaintiffs’ predecessor consequently creating a new pathway across a portion of the defendants’ fields, and defendants’ predecessors providing plaintiffs’ predecessor a key to the gate by the county road, as well as the court’s conclusion about relocation by agreement of the location of the prescriptive easement.
all claimants will come to court to swear that they held a subjective belief in their claims, nearly all prescriptive claims will begin with the element of adverse-ness established by the simple fact that there is a dispute. Although other elements such as continuity or defenses such as express permission will remain, the element of adverse-ness, as a practical matter, will be all but removed as a necessary element of the claim. Claimants can simply testify that they thought they could use someone’s road without permission.

Although all cases agree that proof of a prescriptive easement must be established by clear and convincing evidence, proof of adverseness, when offered in the form of a “lack-of-subordination” will be anything but clear and convincing. Proof of a subjective belief in a person’s right to use a road is not a tangible thing and not suitable to meaningful cross-examination. Although circumstantial evidence might be offered to show whether the subjective belief was honestly held, pretrial discovery and trial proof of such matters will prove to be a morass. Because claimants will prove adverseness through their own opinion, efforts at discovery or cross-examination will be a waste of clients’ fees, lawyers’ efforts, and courts’ time.

This problem will be most troubling in this context of roads of unknown origin. Where a number of neighbors cross an owner’s land on a road that predated them all, where they share maintenance, and where they assume a neighborly arrangement of permissive use, an owner cannot know which neighbor secretly harbors a “mistaken claim of right” (or lack of subordination) to use the road. An owner will not know against whom to protect from a future prescriptive claim. Surely, it must remain true that ordinary use of preexisting road is not presumptively adverse. But, if an uncommunicated, “mistaken claim of right” silently transforms ordinary, non-adverse travel over a shared road into adverse use, then an owner cannot know which of the neighbors holds such a subjective belief.

In cases of preexisting roads, this is not just a problem that adverseness is effectively dropped from the disputable elements of a claim. The Oregon element requiring open and notorious use is now effectively dropped from the claim, as well, whenever roads preexist where mere travel does not demonstrate adverseness. Because an owner cannot tell which neighbor harbors a bad attitude from among those in a cooperative, permissive arrangement, the owner will have no reason to know of an allegedly adverse claim—because a claim now is proven by innocuous travel and an unexpressed attitude.

To suggest that a subjective belief in one’s right to use a road is itself, full and complete, open and notorious, “direct evidence” of adverseness is a contradiction in terms. In most situations, it is an oxymoron, because to prove a subjective belief proves nothing. A mistaken “claim of right” is only relevant to disprove subordination; it is not itself affirmative proof of adverseness. This court has already explained that a subjective belief does not make plain use become adverse use. The statement warrants repetition. We have recognized that

“the question of adverse use does not depend on the claimant’s subjective intentions with regard to the disputed road; the question of adverseness turns on whether the property was actually used in a manner that was inconsistent with the owner’s use.”

Insko, 235 Or.App. at 460, 234 P.3d 984 (emphasis added). It is the conduct of the claimant that matters, not the unseen attitude of the user. See id. (rejecting subjective intent).

The claimants in Sander may have been ingenious. By offering so-called “direct evidence” of adverseness—that is, the claimant’s own belated testimony about a prior, subjective belief—without relying on their travel over the road for a presumption—without any other tangible proof of open, notorious, and adverse activity—without any overtly demonstrable facts that were known or even could be known by the defendants—the claimants avoided our long-established case law on preexisting roads of unknown origin. The claimants avoided the need to explain why, with their novel conception, three decisions of the Supreme Court and five decisions of this court should be effectively overruled. To overrule those cases sub silentio is much easier. It is much easier to assume eight cases on preexisting roads are left untouched, when they are ignored as immaterial in light of another theory of adverseness.

Even if there were a subjective theory of adverseness, Woods, Trevin, Boyer, Read, Hayward, Webb, Skidmore, and Insko cannot be ignored. At the least, these cases would stand for the point that, in the case of roads of unknown origin or roads built by the land owner, the claimant’s ordinary use of an owner’s road is a fact of no consequence for a prescriptive claim. This is necessarily true because ordinary travel over roads of unknown origin does not give rise to a presumption of adverseness. This must be doubly true because the majority, like the plaintiffs in Sander, declares that plaintiffs are not relying on any presumptions from use. If so, then they cannot rely on the mere travel over the road as something that the landowner should notice as adverse. Ordinary use of a preexisting road is unlike the demonstrated adverseness of creating a roadway across an owner’s land. Ordinary travel over a preexisting road does not alert an owner that a neighbor’s trip over the road is unfriendly, hostile, or contrary to the owner’s rights in his property. Ordinary travel over a preexisting road can mean nothing for a claimant who would shun the presumption of adverseness from such travel and who instead would assert the “direct evidence” of his or her own subjective belief in a right to use the road.

Because such travel is insufficient for adverseness, and because the claimant does not rely on any presumption based on use of a road, we should ask: How is an owner to know that one of the neighbors harbors the unspoken attitude that is a “lack of subordination” or a “mistaken claim of right”? If the law provides that travel over a preexisting road counts for nothing in itself, because such travel is not open and notorious adverse use, then how could the addition of the neighbor’s eventual testimony at a trial about a previously uncommunicated, subjective belief during the prescriptive period somehow transform unremarkable use into open, notorious, adverse use? There is no good answer. In root concept, therefore, a subjective theory of adverseness conflicts with Oregon law on prescriptive claims on pre-existing roads. In root concept, established law holds that ordinary travel over preexisting roads does not suffice to

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10 In terms of the Restatement (First) formulation, the effect is the same. The third component of adverseness—open and notorious use—will become unnecessary.
signal an open and notorious adverse claim; but now the same unremarkable use, when coupled with a belated disclosure of a subjective claim of right does constitute a purportedly open and notorious adverse claim. By endorsing this recently developed misconception, today’s decision contradicts the principles that underlie eight decisions on prescriptive claims to preexisting roads.

In practice, as in concept, an alternate theory conflicts with Oregon law on preexisting roads. If adverseness can be proven by accepting the claimant’s belated testimony about a prior belief as so-called “direct evidence” of adverseness, then no one will ever again need to bother with relying on the presumption of adverseness that arises from open and continuous use of a road for a prescriptive period. Nor will anyone need to prove one of the many, other, legitimate, manifest ways that adverseness might be shown, ranging from directly telling the owner that the use is adverse to demonstrating adversity with obvious interference with the owner’s own use. To look for such real proof becomes unnecessary. Lawyers will simply choose the easier theory for their clients’ cases. The fact that the user did not interfere with the owner’s use of the road, that the user did not demonstrate that the character of the use had changed, that the owner has been shown no indication of an adverse claim in an “open and notorious” manner will all become immaterial. In practice, the long-settled law on preexisting roads will become a dead letter. If litigants may readily choose an easier theory to prove a prescriptive claim to a preexisting road, then that predictable change in litigation practice should reveal that there is an unacknowledged change in the law.

VI. THIS CASE

If not our own decisions in Read, Hayward, Webb, Skidmore, and Insko, then the decisions of the Supreme Court in Woods, Trewin, and Boyer should control the resolution of this case. Application of that law should be straightforward, accepting the facts as the trial court found them. No one knows who built Lewis Creek Road. From the start, plaintiff had deeds that told him that there was no legal access to his parcels. Unlike cases in which claimants may establish use of a two-track road across an owner’s fields, plaintiff admits that he did not build the road. He just used it. His use of a preexisting road, however, has no significance in suggesting open, notorious, adverse use. See, e.g., Webb, 205 Or.App. at 20, 132 P.3d 50. Unlike cases in which the plaintiffs are the lone users of the road, plaintiffs here had nonexclusive use of the road. Thompson, 270 Or. at 551, 528 P.2d 509. The fact that the neighbors shared the costs and tasks of maintenance reflects a cooperative neighborly arrangement, not adverse claims. Woods, 254 Or. at 436, 458 P.2d 945. The fact that defendant Leroy Hippe and others used the road as their only access likewise reflects a cooperative, neighborly arrangement, not adverse claims. Id. The fact that defendant Hippe expressed confusion whether his own use was entitlement or permissive merely expresses the subtlety and confusion of this field of law. An honest and untutored lay witness could not be expected to testify any better, even while resisting an adverse claim.

Although this court defers to the trial court on any factual finding with sufficient evidence, the trial court here did not find “something more” to support a prescriptive claim. The trial court did not believe defendant Hippe’s testimony that, when speaking with plaintiff alongside a highway sometime between 2003 and 2005, Hippe had told plaintiff that plaintiff could use the road. Plaintiff agreed the men had talked, but plaintiff testified, “I don’t remember the conversation.” Plaintiff did not go on to provide “something more.” Plaintiff did not testify that, at some time sufficient for the prescriptive period, plaintiff had told defendants that he did not need permission. In fact, when asked if he ever had any conversation with defendant Hippe, prior to the time plaintiff asked for a written easement, plaintiff testified, “I don’t believe that was ever discussed.” In short, this was the classic situation—or as the majority would say, the default situation—in which neighbors use a road in a cooperative arrangement. In the evidence and the trial court’s findings, there was not “something more.”

Like Webb, during all but a latter year when the issue arose, there was no evidence of even a single hostile encounter between the parties. Although the trial court disbelieved that defendant Hippe verbalized permission, there is still no dispute that defendant gave plaintiff and others a key to the lock on the chain across the road at his property line. The fact that plaintiff “did not seek out defendants’ permission to use the roads because [he] did not believe [he] needed it” does not show open and notorious adverseness. Webb, 205 Or.App. at 28, 132 P.3d 50. Although plaintiff may have harbored a subjective belief that he had written easements, a subjective belief does not show adverseness.11 Insko, 235 Or.App. at 460, 234 P.3d 984 (rejecting evidence of subjective intentions, beliefs about an easement or outright ownership, and even overt statements made to others during the prescriptive period). There is no evidence that plaintiff ever told defendants that plaintiff thought he had a right to use the road until plaintiff’s letter in May 2008, less 10 years after his purchase. Put another way, plaintiff asserted an adverse claim less than ten years before this action.

The road passes about 60 to 80 feet from defendants’ house, but, contrary to the trial court’s view, simply viewing a passing car does not bespeak adverse use, especially because defendants had never felt or expressed an objection to plaintiff’s use and because a permissive arrangement among neighbors is understood to be the norm.12 See, e.g., Woods, 254 Or. at 434, 458 P.2d 945. Plaintiff had a cabin on one of his parcels and testified that his trips over the road were limited to recreational use in the summer time. Defendants would have had little reason to have noticed or objected to plaintiff’s infrequent trips. See Thompson v. Schuh, 286 Or. at 201, 593 P.2d 1138 (periodic, intermittent visits). Passing by on the road is not adverse use, and, more importantly, it is not interference with defendants’ use of the road.

When asked, defendant Hippe testified that his wife did not care for the road’s dust and that she would like it even less if plaintiff’s parcels developed and created heavier use. Yet, because rats or wear and tear on the road in Webb did not suffice, and, because actual, compensable damage to the road did not suffice in Insko, some dust from the road cannot suffice as interference with defendants’ use.

11 Misconstruing Kondor, the trial court opined that “[b]ecause [p]laintiff * * * thought he had a right to use the road, adversity is satisfied * * *.” (Emphasis added.)

12 The trial court deemed adverseness satisfied by Hippe “[v]iewing vehicle go past his house in close proximity to the subject road[,]”
Dust would not notify defendants of an adverse claim. In sum, plaintiff offered no evidence that his use of a road that he shared in common with Larson and Woods was openly and notoriously adverse to defendants. The trial court should have dismissed this claim for a prescriptive easement, because plaintiff failed to offer sufficient evidence by any standard.

VII. CONCLUSION

If, in the end, neighbors cannot find a mutually agreeable way to provide access, then the law does provide plaintiff with a remedy in the form of a statutory way of necessity, just as he asserted in his letter in May 2008. See ORS 376.150 –376.200 (ways of necessity). If, in the end, we do not find a better response than a subjective theory of adverseness, then, in cases of preexisting roads, we will prove the truth of the tired axiom that bad facts make bad law. Oregon landowners, lawyers, and courts will suffer from a misconception—the misapplication of a “mistaken claim of right.”

ORTEGA, DUNCAN, HADLOCK, and TOOKEY, JJ., join in this dissent.
# Chapter 4A

## Inclusionary Zoning in Oregon

**Mary Kyle McCurdy**  
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### Contents

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<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>White Paper: Inclusionary Zoning in Oregon</td>
<td>4A–1</td>
</tr>
<tr>
<td>Introduction</td>
<td>4A–1</td>
</tr>
<tr>
<td>History of Inclusionary Zoning in Oregon</td>
<td>4A–1</td>
</tr>
<tr>
<td>Inclusionary Zoning Ordinances and Laws Across the US</td>
<td>4A–2</td>
</tr>
<tr>
<td>Various Incentives</td>
<td>4A–2</td>
</tr>
<tr>
<td>Various Requirements</td>
<td>4A–4</td>
</tr>
<tr>
<td>Public Benefits of Inclusionary Zoning</td>
<td>4A–4</td>
</tr>
<tr>
<td>Residential Income Segregation and Economic Mobility</td>
<td>4A–5</td>
</tr>
<tr>
<td>IZ and Education</td>
<td>4A–5</td>
</tr>
<tr>
<td>Healthy Neighborhoods and Transportation Accessibility</td>
<td>4A–6</td>
</tr>
<tr>
<td>IZ and Fair Housing</td>
<td>4A–7</td>
</tr>
<tr>
<td>The IZ Ban Restricts Affordable Housing Provision and Promotes Segregation</td>
<td>4A–8</td>
</tr>
<tr>
<td>Voluntary vs. Mandatory IZ</td>
<td>4A–9</td>
</tr>
<tr>
<td>Case Studies: Failed Attempts at Voluntary IZ in Oregon</td>
<td>4A–10</td>
</tr>
<tr>
<td>Enrolled SB 1533</td>
<td>4A–13</td>
</tr>
</tbody>
</table>
Chapter 4A—Inclusionary Zoning in Oregon

White Paper: Inclusionary Zoning in Oregon

Oregon Inclusionary Zoning Coalition

Introduction

Inclusionary zoning (IZ) is a market-based, land-use housing policy that enables lower- and moderate-income households to live in new, private developments in middle- or upper-income communities. IZ policies encourage real estate developers to include units that are sold or rented at below-market prices into market-rate developments in exchange for incentives designed to offset the costs. By integrating affordable units into market-rate projects, IZ creates opportunities for households from diverse socioeconomic backgrounds to live in the same communities and allows people of all incomes to have access to the same amenities, services and opportunities, such as good jobs, good schools, transportation and healthy living environments. More inclusive, mixed-income communities reduce concentrated poverty in other areas by giving low- and middle-income families and residents more opportunities to live in low-poverty neighborhoods and communities. Reducing concentrated poverty benefits the entire community by reducing crime rates, dropout rates and teenage pregnancies, and increasing educational outcomes, economic opportunities and public health outcomes. Additionally, reducing concentrated poverty through the expansion of mixed-income communities can open more neighborhoods to market-rate development opportunities. Ensuring that everyone has access to high-quality housing is more than just a numbers game: place matters. To give just one example, it's long been observed in public health that a strong predictor of a person's future health is the ZIP code in which they're born. That's fundamentally unjust; every individual deserves an opportunity to thrive. Inclusive housing is the necessary first step.

Inclusionary Zoning programs vary widely in their structure. They are preferable to traditional one-size-fits all affordable housing programs because they can be customized and flexible to adapt to each community’s unique housing market and needs. Mandatory ordinances require any new development over a predetermined threshold of units to “set aside” a certain percentage of units as affordable, or pay an “in-lieu-of” fee into a local housing trust or program. Voluntary programs are sometimes seen as more feasible politically, but produce far fewer affordable units and must offer substantial subsidies to the developer. Both mandatory and voluntary programs have different set-aside requirements, affordability levels and control periods, and offer developers incentives to offset costs, such as density bonuses, expedited permit approval, reduced parking requirements, and fee waivers. Inclusionary Zoning is a local policy tool, and should not be mandated, implemented or prohibited at the state level. Local communities deserve to have local control and decide which tools are necessary to address local housing markets, housing needs, fiscal and economic realities, and political priorities.

History of Inclusionary Zoning in Oregon
In the late 1990s, the Portland metropolitan area's elected regional government initiated a process that led to the adoption of the Regional Affordable Housing Strategy (RAHS).\(^1\) An early regional framework plan included affordable housing policies that considered a mandatory inclusionary zoning policy, as a last resort, if other voluntary incentives were not offered to developers by local jurisdictions.\(^2\) Metro was quickly served with a legal appeal of the regional framework by various local jurisdictions, and as a result of mediations and negotiations, any reference to a mandatory inclusionary zoning ordinance was stripped from the final RAHS.\(^3\) Then in 1999, the Oregon Home Builders Association successfully lobbied to amend Oregon Revised Statute 197 to effectively ban any governing body in the state from adopting a mandatory Inclusionary Zoning Ordinance. Various efforts by housing advocates since 1999 to overturn the statewide preemption have fallen short.

**Inclusionary Zoning Ordinances and Laws Across the US**

Montgomery County, Maryland was the first jurisdiction to adopt an inclusionary zoning law in 1973, and by 2003, the IZ program had produced over 11,000 affordable housing units. Across the country, over 400 jurisdictions currently have some type of inclusionary zoning law or ordinance on the books. More than 100 jurisdictions employ inclusionary zoning in California alone; a 2003 survey found that in California more than 34,000 units of affordable housing had been created in California.\(^4\) IZ laws are developed locally, based on current housing needs, market conditions, development trends, and political considerations. According to a 2010 study of 52 jurisdictions nationwide, over half had amended their IZ ordinances at least once since initial inception.\(^5\) These amendments and adjustments to various IZ ordinance highlight the flexible nature of the policy to adjust to ever-changing market trends and needs. Just as local housing markets across the US vary widely and change dynamically, the customizable nature of IZ laws and ordinances make them an attractive local housing policy.

**Various Incentives**

Effective inclusionary zoning programs, both mandatory and voluntary, usually offer the developers a menu of diverse incentives to offset any costs associated with including below-market units. Each jurisdiction must strike an often delicate balance between fulfilling the need for affordable housing without overreaching and cooling the market. Jurisdictions typically conduct an economic feasibility analysis that takes into account various aspects of development (e.g., cost of land, normal profit margins, construction costs, fees, etc.) and the jurisdiction's housing needs and goals.

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\(^1\) Metro. (2000). *Regional Affordable Housing Strategy*. Portland, OR


\(^4\) California Coalition for Rural Housing & Non-Profit Housing Association of Northern California. (2003). *Inclusionary Housing in California: 30 Years of Innovation.*

The table below offers examples of how various jurisdictions utilize a combination of incentives of offset the costs to developers.

<table>
<thead>
<tr>
<th>Type of Cost-offsets</th>
<th>What It Does and Why It Helps Developers</th>
<th>Example</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Density bonus</strong></td>
<td>Allows developers to build at a greater density than residential zones typically permit. This allows developers to build additional market-rate units without having to acquire more land.</td>
<td>Most jurisdictions offer density bonuses. Typically they are equivalent to the required set-aside percentage. For example, Santa Fe, which varies its set-aside from 11 to 16 percent depending on the character of the market-rate units, matches its density bonus accordingly.</td>
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<td><strong>Unit size reduction</strong></td>
<td>Allows developers to build smaller or differently configured inclusionary units, relative to market rate units, reducing construction and land costs.</td>
<td>Many programs allow unit size reduction while establishing minimum sizes. Burlington, Vermont, requires that inclusionary units be no smaller than 750 sqft. (1-bedroom), 1,000 sqft. (2-bedroom), 1,100 (3-bedroom) or 1,250 sqft. (4-bedroom).</td>
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<tr>
<td><strong>Relaxed Parking Requirements</strong></td>
<td>Allows parking space efficiency in higher density developments with underground or structured parking: reducing the number or size of spaces, or allowing tandem parking.</td>
<td>Denver, Colorado, waives 10 required parking spaces for each additional affordable unit, up to a total of 20 percent of the original parking requirement.</td>
</tr>
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<td><strong>Design Flexibility</strong></td>
<td>Grants flexibility in design guidelines-such as reduced setbacks from the street or property line, or waived minimum lot size requirement-utilizing land more efficiently.</td>
<td>Boston, Massachusetts, grants inclusionary housing projects greater floor-to-area ratio allowances. Sacramento, California, permits modifications of road width, lot coverage, and minimum lot size in relation to design and infrastructure needs.</td>
</tr>
<tr>
<td><strong>Fee waivers or reductions</strong></td>
<td>Reduces costs by waiving the impact and/or permit fees that support infrastructure development and municipal services. A jurisdiction must budget for this, since it will mean a loss of</td>
<td>Longmont, California, waives up to 14 fees if more affordable units (or units at deeper levels of affordability) are provided. Average fees waived are $3,250 per single family home, $2,283 per apartment unit.</td>
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</tbody>
</table>
### Fee deferrals

Allows delayed payment of impact and/or permit fees. One approach allows developers to pay fees upon receipt of certificate of occupancy, rather than upon application for a building permit, reducing carrying costs.

**San Diego, California** allows deferral of Development Impact Fees and Facility Benefit Assessments.

### Fast track permitting

Streamlines the permitting process for development projects, reducing developers' carrying costs (e.g., interest payments on predevelopment loans and other land and property taxes).

**Sacramento, California**, expedites the permitting of inclusionary zoning projects to 90 days from the usual time frame of 9-12 months. The City estimates an average savings of $250,000 per project.

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**Various Requirements**

Inclusionary Zoning programs require that a certain percentage of units are “set aside” as affordable. The percentage varies, but is typically in the range of 10-25%, and can also depend on the size of the development. Many mandatory ordinances employ a “trigger”, whereby developments under a certain size (5, 10, 20 units, etc.) are exempt from the requirement.

Each ordinance has various income targets for the affordable units as well, depending on the housing needs for each market. Moderate-income households, such as public-sector employees, nurses, teachers, etc., would require fewer cost offsets, and might be available for purchase, whereas rental housing for extremely low-income households might be difficult with cost offsets alone, but are often paired with additional subsidies, such as Low Income Housing Tax Credits, or tenant-based Section 8 housing vouchers.

**Public Benefits of Inclusionary Zoning**

Inclusionary zoning shifts the geography of our affordable housing stock to assure that affordable housing is a part of all new development in areas of high opportunity. 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. The need for integration is great. People living in poor neighborhoods are typically isolated from high-quality schools to educate their children, living-wage jobs and quality transportation to access job centers, parks and open spaces that can improve health outcomes, and adequate health services. Additionally, neighborhoods with a high concentration of poverty typically have higher crime rates, dropout rates and teenage pregnancies. Inclusionary Zoning policies help break up the concentration of poverty while giving housing opportunities to low-income residents in amenity-rich, high opportunity areas.
Residential Income Segregation and Economic Mobility

Overall economic income inequality in the US has increased since the 1970s, and research shows that residential segregation by income has increased as well.\(^6\) Residential segregation by income describes the extent to which families of different incomes live in different neighborhoods. A recent study finds clear evidence that “income segregation has grown rapidly, particularly in the last decade and particularly among black and Hispanic families.”\(^7\)

This is important because the demographic composition of neighborhoods is strongly correlated with neighborhood effects, such as poverty rates, educational attainment levels, teenage birthrates, and the proportion of single-parent families. Income segregation amplifies the negative effects of the unequal distribution of collective resources, such as high quality schools or public parks, as well as public hazards, such as pollution or crime, among neighborhoods. Higher residential segregation are found to also have negative fiscal impacts on municipalities, straining already-limited public resources.\(^8\)

Residential income segregation also can lower overall economic mobility, which refers to the ability of a child born to lower- or middle-income parents to climb higher on the income ladder, or, in other words, the American Dream. A 2013 study by the Equality of Opportunity Project recently found substantial variation in the economic outcomes of children from low-income families across areas of the U.S.\(^9\) Depending on where you live in the US, you have a lesser or greater chance of earning a higher income than your parents. The researchers examined economic mobility in terms of racial and income segregation. They found that a higher level of residential income segregation is correlated with lower levels of economic mobility. Areas in which low-income residents were residentially segregated or isolated had lower rates of economic mobility. If people are not interacting with a wider mix of society and people of different income levels, then it translates into less mobility over time and children and communities are trapped in the same income bracket from one generation to the next. Inclusionary Zoning is a key element to foster mixed-income communities that help to break this cycle of stagnation.

IZ and Education

Inclusionary Zoning policies can improve educational outcomes, especially among low-income students. Affordable housing units built within new market-rate developments are more likely to give those residents access to low-poverty, high-performing schools.\(^10\) In the case of

7 Bischoff, K., & Reardon, S. (2013). Ibid. p. 1
Montgomery County Maryland, roughly one third of the affordable units produced under IZ are owned by the local housing authority, and provide public housing for families living under the poverty line. The children of these families on average have access to better performing schools than other children of poverty in the surrounding area. After conducting a longitudinal study, researcher Heather Schwartz found that, “over the course of elementary school, highly disadvantaged children with access to the district’s lowest-poverty neighborhoods and schools began to catch up to their non-poor, high-performing peers, while similar disadvantaged children without such access did not.”

**Healthy Neighborhoods and Transportation Accessibility**

Our ability to live healthy lives is influenced by the circumstances and environments in which we live. Many factors throughout our lives influence health, such as: economic opportunity, educational attainment, access to services, and environmental conditions. The quality of our home environment is one of these important factors and greatly impacts our health. Improving access to quality affordable housing is one strategy to reduce health disparities related to substandard housing.

Substandard or uninhabitable housing impacts health through several pathways including but not limited to: exacerbating chronic health conditions, unintentional injuries such as falls or electrocution, and lead-poisoning. Low-income communities and communities of color are more likely to experience housing that is substandard and in-turn the related health effects. Locally, mold is of particular concern. It is a common symptom of a property being poorly maintained and poses significant health risks, including asthma. In Oregon low-income and communities of color experience asthma more than other populations. Those same groups are also more likely to be renters.

In Oregon, as in any other state, some communities are simply healthier than others. Health-promoting or “complete” communities offer access to healthy food options, adequate transportation systems, safe streets with low traffic, sidewalks and street lighting, usable open space, and opportunities for physical activity. Low-income residents are less likely to live in healthy neighborhoods, as they are often less affordable. Lack of sidewalks, bike paths and

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13 Multnomah County Health Department. *Health Impacts of Housing in Multnomah County*. Portland, OR; 2009.
16 U. S. Census Bureau. *2006-2010 American Community Survey: Table B25119: Median household income the past 12 months (in 2010 inflation-adjusted dollars) by tenure*. Available at: factfinder2.census.gov.
17 U. S. Census Bureau. *2010 Census Summary File 1: Table H14: Tenure by race of householder*. Available at: factfinder2.census.gov.
recreational areas in some communities can discourage physical activity and contributes to obesity. Income segregation has also been linked to obesity and negative mental health outcomes, and can limit low-income residents’ access to healthy food since high-poverty neighborhoods are more likely to be in a food desert. Inclusionary Zoning can improve health outcomes for low-income residents, and as a result, reduce health-care costs for all Oregonians.

Traffic congestion, long commutes and air pollution are also significant challenges for all Oregonians. Many working individuals and families are not able to afford housing near to where they currently work, or regional job centers with future employment opportunities. Inclusionary Zoning policies can bring the workforce closer to jobs. This in turn reduces reliance on personal vehicles, and decreases air pollution, risk of collisions, and congestion. Oregon has made and will continue to make large and expensive investments in transportation projects, such as highways and public transit. Inclusionary Zoning can leverage these public investments to ensure that their benefits are shared equitably among all income levels, and that residents are not “priced out” if these investments lead to rising rents and real estate values. Inclusionary Zoning is a critical component in creating complete, healthy communities where essential amenities are easily accessible to everyone. Reductions in vehicle miles traveled, improve air-quality and slow climate change by reducing greenhouse gas emissions.

IZ and Fair Housing

Federal Fair Housing law requires that governments work to ensure that all residents have equal access to housing opportunities. Under the Federal Fair Housing Amendments Act of 1988 ("FHAAA"), it is a violation to “deny or otherwise make unavailable” housing opportunities on the basis of race, color or national origin. Furthermore, under Executive Order No. 12892, recipients of federal funding for “all programs and activities related to fair housing and development” have a duty to affirmatively further fair housing. 48 states allow jurisdictions to use IZ, and use it to implement their affordable and fair housing goals in accordance with federal law. The use of mandatory IZ has been an effective tool to maintain an acceptable level of affordable housing and reduce segregation.

Oregon’s ban on the use of mandatory inclusionary zoning (O.R.S. § 197.309), eliminates a

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19 42 USC § 3604
20 Executive Order 12892, LEADERSHIP AND COORDINATION OF FAIR HOUSING IN FEDERAL PROGRAMS: AFFIRMATIVELY FURTHERING FAIR HOUSING.
21 ORS 197.309 Local ordinances or approval conditions may not effectively establish housing sale price or designate class of purchasers; exception. (1) Except as provided in subsection (2) 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
policy tool that local jurisdictions can use to fulfill these federal law requirements. The ban interferes with local jurisdictions’ ability to combat barriers to fair housing and it effectively makes fair housing “unavailable” to groups of people protected under federal law.

For example, Portland’s private housing market is currently failing to meet the federal fair housing standard. Low- and moderate-income minorities from traditional communities of color are being displaced from areas like Northeast Portland, where developers are constructing new apartment buildings without replacing affordable units. With a continued ban on mandatory IZ, Oregon jurisdictions lack an important tool to promote mixed-income neighborhoods, reduce segregation, and meet their obligation to affirmatively further fair housing.

**The IZ Ban Restricts Affordable Housing Provision and Promotes Segregation**

Mandatory IZ would make a fair distribution of affordable housing available to racial and ethnic minorities in the Portland metro region, as well as the rest of Oregon, and the ban makes housing “otherwise… unavailable” to protected groups, in violation of the FHAA, and should be repealed. A statistical analysis demonstrates that the IZ ban has restricted affordable housing options for low-income minority residents in the Portland Metro Region. In 2009, 40.6% of African-Americans in Multnomah County paid over 50% of their income on rent, compared with 24.28% of Whites. For persons who owned homes, 22.02% of Hispanics and 28.19% of African-Americans paid over 50% of their income on housing, compared with 11.61% of Whites. Mandatory IZ could provide a significant tool to address this racial stratification by providing a more equitable distribution of low-income housing. Mandatory IZ would help make a fair distribution of affordable housing available to racial and ethnic minorities in cities and regions throughout Oregon.

The result of the ban on mandatory IZ in Oregon is that racial and economic segregation not only continues in our neighborhoods, but it is actually increasing. The 2010 Census revealed that 38 census tracts within the City of Portland alone became whiter in the last decade, with more Whites moving in and many people of color, especially African-Americans, moving out. In North and Northeast Portland, African-American homeowner and rental rates both declined by

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21 Condition for approving a permit under ORS 215.427 or 227.178, a requirement that has the effect of establishing the sales 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 to any particular class or group of purchasers.

21 (2) This section does not limit the authority of a city, county or metropolitan service district to:

21 (a) Adopt or enforce a land use regulation, functional plan provision or condition of approval creating or implementing an incentive, contract commitment, density bonus or other voluntary regulation, provision or condition designed to increase the supply of moderate or lower cost housing units; or

21 (b) Enter into an affordable housing covenant as provided in ORS 456.270 to 456.295. [1999 c.848 §2; 2007 c.691 §8]


23 According to 2009 Census data. *Portland Housing Needs Assessment*, at 44.

over 30%. This displacement has caused increased economic and racial segregation and distanced minority communities from the benefits of public investment. The inability of local and regional governments to require set-asides for low-income residents in new developments and infill projects is a barrier to equal housing opportunities for racial minorities.

The ban on mandatory IZ disproportionately harms low-income minority residents because it increases economic and racial segregation. In order for local jurisdictions to fulfill their obligation to affirmatively further fair housing, which includes a duty to integrate housing, the ban on mandatory IZ should be lifted.

**Voluntary vs. Mandatory IZ**

Cities and counties implementing a new inclusionary zoning ordinance decide whether to utilize a mandatory or voluntary program. Voluntary programs are often seen as more politically palatable, and less likely to face legal challenges. Voluntary programs, however, are only effective in jurisdictions with highly restrictive, onerous, exclusionary zoning practices and regulations, such as minimum lot sizes, low density maximums and FAR ratios, high parking minimums, strict design standards, long permitting process periods, and high development fees. These restrictions increase the costs of new developments, and can drastically reduce the private market’s ability to provide housing for low- and middle-income families. Since each of these restrictions incur a cost on the developer, offering them as incentives produces a monetary value to the developer that can offset the costs of including affordable units. One significant disadvantage to a voluntary program’s effectiveness is that it is often administered on a case-by-case basis, where the incentives and the affordable unit set asides are often negotiated for each new development. This increases financial and administrative burdens on both parties and reduces the overall quantity of affordable units. If the public or neighbors are involved in negotiations, this can lengthen the process and further decrease the level of certainty and predictability the developer needs to make the project successful.

Mandatory policies offer reliability and predictability of all parties involved, and produce more affordable units overall. Mandatory programs provide predictability to developers by setting clear and consistent expectations and a level playing field. The value or price of land is directly related to what can be built on it. Thus, when developers or real estate investors bid on a property for sale, if the zoning codes are clear and consistent, each party will take these limitations into consideration and price their bids accordingly. The cost of land is a significant factor to determine whether a new development is profitable for the developer, and/or affordable to middle- and lower-income families. Like other zoning regulations, mandatory IZ policies with clear cost offsets and requirements offer the buyer and seller of land, as well as neighbors and the

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permitting jurisdiction, the information needed to make efficient decisions about the allocation of resources.

According to a 2003 study of 107 local IZ policies throughout California, 101 were mandatory and produced far more affordable units than the six that were voluntary. Three of the six produced no units at all, and two locales, Los Alamitos and Long Beach, “blame the voluntary nature of their programs for stagnant production despite a market rate boom.”26 In other parts of the country, Cambridge MA, Irvine CA, and Pleasanton CA and Boulder CO, among others, have switched from voluntary to mandatory due to a lack of production of affordable units under the voluntary program. All justifications experienced an increase in affordable housing production under the new mandatory policy. Orange County, CA did the opposite by converting from a mandatory to voluntary IZ policy in 1983. In the 4 years before the switch, the county produced 6,389 units under the mandatory policy, and produced only 952 units in the 11 years after the switch to a voluntary program.27 In 2013, Brooklyn (New York) City Councilman Brad Lander28 and the Association of Neighborhood and Housing Development (ANHD) each published reports finding that New York City’s voluntary Inclusionary Housing Program (IHP) failed to produce an adequate number of affordable units, less than 2% of multi-family units produced in the same period. The ANHD report found that NYC could reasonably generate 4,000 units per year with a mandate, instead of the current average of 400 per year under the voluntary program.29

Case Studies: Failed Attempts at Voluntary IZ in Oregon

North Bethany, Washington County

Washington County was the fastest growing county in Oregon from 2000-2010, and currently has the highest median family income in the state. In 2002, leaders of Metro and Washington County opened the North Bethany area to eventual development, with the expectation that it would include affordable housing.30 The two governments agreed to the goal that 20 percent of owner-occupied properties would be available to families making less that 80% of the Area Median Income, and 20 percent of rentals would be available to families making less than 60% AMI. In 2010 the Washington County Board of Commissioners adopted

26 Non-Profit Housing Association of Northern California. (2003). Inclusionary Housing in California: 30 Years of Innovation. p. 8
29 Association for Neighborhood and Housing Development. (2013). Guaranteed Inclusionary Zoning: Ensuring affordability is part of New York City’s future.
recommendations to offer a mix of incentives to developers, such as the ability to build extra units (density bonus), tax abatements and other incentives.

In 2010 and 2011, officials from the County negotiated with West Hills Development Co, to include affordable units in the new Arbor Oaks development, in the area of the new North Bethany development site, recently included in the latest UGB expansion. County Commissioner Greg Malinowski, who helped offer the incentives in exchange for affordable units, was rebuffed by lawyers who insisted that the developer should keep the incentives but not mandate affordable housing, and that the County “should change the rules to allow the incentives, but not in exchange for affordable housing.”\(^3\) A West Hills lobbyist called the link to affordable housing “coercive and disadvantageous.”\(^3\) West Hills is the largest landowner in the North Bethany development area, and has refused to include affordable units in any of the current or future development projects.

**Portland Downtown Neighborhood Association**

A similar story is unfolding in Portland, where the Downtown Neighborhood Association (DNA) is pushing a vision of mixed-income housing. The area has a mix of luxury, private-market condominiums, and well as subsidized or publically-owned affordable housing, but not many opportunities for middle-income, or lower-middle-income housing. City planners and the DNA have attempted to offer incentives to developers, not only to make units more affordable, but to include larger 2- and 3-bedroom units for small families. Downtown’s zoning is almost entirely high-density apartments, and there are relatively few incentives available that can be used as valuable offsets.

Downtown developers claim that market-rate units can allow for diverse incomes, since units on higher floors are more expensive than lower floors, and floor plans can be configured differently. Master Development from Eugene pitched a new development at SW 11th Ave and Market Street, marketed to young professionals, single people and graduate students, but did not have plans for multi-bedroom units available to middle-income families. DNA president Felicia Williams states that “right now, we have extreme poverty and wealth, but not a lot between,” and DNA land-use chair says “affordable housing is actually not affordable.”\(^3\) The statewide prohibition on mandatory IZ was specifically stated as an obstacle in their efforts.

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\(^3\) Malinowski, G. (2013, March 22) Testimony given at Oregon House of Representatives Human Services and Housing Committee Hearing (Salem OR).

\(^3\) Schmidt, B. (2012, June 2). Ibid.

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)

CHAPTER .................................................
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 particular class or group of purchasers or renters.

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:

Enrolled Senate Bill 1533 (SB 1533-B)
(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.

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.

Passed by Senate February 26, 2016

Lori L. Brocker, Secretary of Senate

Peter Courtney, President of Senate

Passed by House March 3, 2016

Tina Kotek, Speaker of House

Received by Governor:

M., 2016

Approved:

M., 2016

Kate Brown, Governor

Filed in Office of Secretary of State:

M., 2016

Jeanne P. Atkins, Secretary of State
Chapter 4B

Portland Zoning Code and Affordable Housing Update

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Contents

Inclusionary Zoning ........................................................................................................ 4B–1
Outside the Central City and Gateway Plan Districts .................................................... 4B–1
In the Central City Zones with Base FAR 5:1 and Higher ............................................... 4B–2
Off Site Options to Satisfy Inclusionary Housing Program Requirements .................... 4B–2
Some of the Emerging Issues ...................................................................................... 4B–2
Program Changes ....................................................................................................... 4B–4
Affordable Housing FAR Changes to Non-Residential Projects .................................. 4B–4

Conclusion ..................................................................................................................... 4B–4
Inclusionary Zoning

Where does it apply? In all zones that permit 20 or more multi-family units throughout the City. The requirements apply to new developments and alterations to existing developments that create 20 or more units and the regulations apply for a term of 99 years and must be memorialized in a recorded covenant on the property.

What are the requirements?

*Outside the Central City and Gateway Plan Districts*

The inclusion rate will start at 15 percent of units at 80 percent MFI and 8 percent of units at 60 percent MFI. On January 1, 2019, the rates will increase to:

**Mandatory Inclusionary Requirement:** 20% of Units at 80% Area Median Income

Incentives:
- Density Bonus
- 10 Year Property Tax Exemption on Affordable Units
- CET Exemption on Affordable Units
- Exempt from Parking Requirements

**Voluntary/Deeper Affordability Option:** 10% of Units at 60% Area Median Income

Incentives:
- Density Bonus
- 10 Year Property Tax Exemption on Affordable Units
- CET Exemption on Affordable Units
- Exempt from Parking Requirements
- SDC Waivers on Affordable Units

*In the Central City Zones with 2:1, 3:1 and 4:1 Base FAR*

**Mandatory Inclusionary Requirement:** 20% of Units at 80% Area Median Income

Incentives:
- Density Bonus of 3.0:1 FAR
- 10 Year Property Tax Exemption on Affordable Units
- CET Exemption on Affordable Units

**Voluntary/Deeper Affordability Option:** 10% of Units at 60% Area Median Income

Incentives:
- Density Bonus of 3.0:1 FAR
- 10 Year Property Tax Exemption on Affordable Units
- CET Exemption on Affordable Units
- SDC Waivers on Affordable Units
In the Central City Zones with Base FAR 5:1 and Higher

Mandatory Inclusionary Requirement: 20% of Units at 80% Area Median Income

Incentives:
- Density Bonus of 3.0:1 FAR
- 10 Year Property Tax Exemption on all Residential Units
- CET Exemption on Affordable Units

Voluntary/Deeper Affordability Option: 10% of Units at 60% Area Median Income

Incentives:
- Density Bonus of 3.0:1 FAR
- 10 Year Property Tax Exemption on all Residential Units
- CET Exemption on Affordable Units
- SDC Waivers on Affordable Units

Off Site Options to Satisfy Inclusionary Housing Program Requirements

Option 1: Off-site Construction of New Units
Number of Affordable Units Required Off-Site
- Either, 20% of the total units in sending site at 60% AMI
- Or, 10% of the total units in sending site at 30% AMI

Option 2: Off-site Dedication of Existing Units
Number of Affordable Units Required Off-Site
- Either, 25% of the total units in sending site at 60% AMI
- Or, 15% of the total units in sending site at 30% AMI

Fee in lieu of building the units
A developer or applicant can pay a fee in lieu of building the affordable housing units. The fee revenue is managed by the Housing Bureau and deployed as public subsidy to help fund affordable projects across the City. The fee in lieu schedule provides a rate based on the gross square feet of the new development and the density of the project. For example, a project with a 9:1 FAR would pay a fee in lieu of approximately $29 for each gross square foot of the project. The fee is intentionally set high to discourage this option.

Some of the Emerging Issues

What does it mean to build the units on-site? In other words, can you build two projects on one site and locate the Inclusionary Housing units in one tower and the market rate units in another tower? Some developers are seeking this option because of the growing difficulty of financing a mixed market rate/affordable project. The Portland Zoning Code uses the term of art “site” to define where the mandatory units must be located. Site is defined as any land area that is either in contiguous ownership even if separated by a shared right of way, all lots that are part of a land division even if the lots are in separate ownership or lots that are in separate ownership but are being jointly developed. There are
also several permutations of these definitions that are not relevant here. Under this definition of site, large parcels would have the ability to allocate and configure their mandatory or voluntary Inclusionary Housing units in any manner they could finance, as long as the Inclusionary Housing units are reasonably equivalent to the market rate units on the same site (the “one-site interpretation”).

However, the converse opinion is that the on-site Inclusionary Housing program was intended to require that each building or project contain the mandatory or voluntary units and thus, the property owners cannot configure the units across multiple projects on the same site and satisfy the requirements (the “one-project interpretation”).

How this issue is resolved will likely have a significant impact on whether the new code requirement yields the desired number of new units. For example, if the one-project interpretation prevails and a developer cannot finance a mixed market rate/affordable housing project, then no new affordable units will be delivered. However, if the one-site interpretation prevails and the developer is permitted to build and separately finance two towers, the desired unit yield will be satisfied.

The policy-based counter argument to the one-site rule is that the affordable units and the market rate units would be on the same site but not within the same building and therefore less physically integrated. However, Portland’s program also allows you to satisfy your Inclusionary Housing requirement by building the affordable units entirely off-site so this argument does not seem to pass muster.

The Inclusionary Housing program is new and has not been long-tested. But from what we have seen to date, flexibility in delivering the units will likely yield more units at less cost and sooner than a program that is overly rigid in its application.

Managing the queue. Portland’s program went into effect on February 1, 2017. Applications submitted prior to that date were insulated from the requirements of the new program. It is estimated that anywhere from 14,000 to 20,000 units vested prior to February 1, 2017. Depending on market factors, that number of units could represent a 3- to 4-year housing demand. What then are the options for incentivizing the queue to voluntarily build affordable housing units?

Many options are being presented to the City but none have been implemented to date.

- Request voluntary compliance in exchange for Inclusionary Housing credits that one could sell or use as an offset in a future project. This would ensure more timely delivery of units, immediately increase supply to serve the growing need and would not reduce the overall number of units built by permitted projects. It simply trades the units required after February 1, 2017 for the units built today that are not otherwise required under the City’s program.

- One could further incentivize this credit market and the queue by allowing a property owner to sell the credits they earn in the private market to a developer who applied after February 1, 2017 but cannot, or prefers not, to build the units on their site. The price of the credits could incentive the vested project in the queue to build the affordable units now on a voluntary basis.
Program Changes

- Match the Inclusionary Housing program to the realities of project financing. If the market for low income tax credits continues to decline and it becomes too onerous to finance a mixed market rate/affordable project, add flexibility to the program to achieve the unit yield. The one-site rule is a good example of the needed flexibility.

- Amend the density bonus system to permit additional FAR up to the allowed height limit after earning the first 3:1 FAR bonus through the City’s new FAR priorities (which are affordable housing, the affordable housing fund and historic transfers). The City adopted the Inclusionary Housing program and at the same time radically altered the way in which a site can earn bonus FAR. These two changes to the code significantly increased the cost of maximizing and building density in the Central City. Today FAR bonuses are capped on most sites at 3:1, even if that extra 3:1 leaves you well under your allowed height limit. If a developer is instead allowed to freely build to the allowed height limit, after earning the first 3:1 bonus through the City’s priority system, the extra density could help subsidize the Inclusionary Housing units, resulting in more affordable units in more downtown core projects. The City’s 2035 Zoning Code amendments introduce more flexible FAR transfer rules but retain geographic limitations and require transfers from and payment to another site, both of which are perhaps unnecessary burdens if the objective is to yield more affordable housing units.

Affordable Housing FAR Changes to Non-Residential Projects

We have been focused on projects that build 20 or more multi-family units, but the City also adopted code changes with the Inclusionary Housing program that impact non-residential development. If you are not building a residential development and instead are developing office, retail or hotel, the City has significantly altered the FAR bonus system for that development. In the CX, EX and RX zones you can earn your first 3:1 FAR bonus only by payment into the affordable housing fund or by building affordable units off-site. The price per square foot for the fund option is established by the Portland Housing Bureau. However, in the case of a non-residential development, this is now the only FAR bonus available within the first 3:1 FAR bonus tier in most areas of the CCPD, effective February 1, 2017.

There are exceptions from these new rules but they are not directly applicable to the topic of affordable housing so they are not further discussed here. It is also important to note that a non-residential development can still earn the 3:1 FAR increase through an FAR transfer from an historic landmark. This historic landmark FAR transfer is not an "FAR bonus" but it does allow an alternative means to increase density on a non-residential project without making the affordable housing payment.

Conclusion

The City of Portland’s program is new and therefore we do not have enough data to determine if it will adequately incentivize affordable housing units in the quantity needed to meet demand. The rapid vesting of housing projects before the February 1, 2017 effective date may further delay a real understanding of how the program will work in the next 1 to 2 years. However, we do know from several project-based analyses, that bringing more flexibility to the program promises to deliver more units sooner and incentivizing the queue of vested units to voluntarily opt into the program will help build supply in the near term.
Chapter 5
What You May Not Know About Attorney-Client Privilege, Work Product Doctrine, and Joint Defense Doctrine in Oregon

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Contents

I. Oregon Confidentiality Rules .............................................................. 5–1
   Oregon RPC 1.6, Confidentiality of Information .................................. 5–1
   Oregon RPC 1.9, Duties to Former Clients (Excerpted) ....................... 5–2
   Oregon RPC 1.18, Duties to Prospective Client (Excerpted) .................. 5–2
   Oregon RPC 1.0, Terminology (Excerpts) ....................................... 5–2
   ABA Model Rule 1.6, Confidentiality of Information ......................... 5–5
   In re Anonymous, 932 N.E.2d 671 (Ind., 2010) .............................. 5–13
   Formal Opinion No. 2011-184, Confidentiality, Conflicts of Interest: Consulting Between Lawyers Not in the Same Firm .................... 5–17

II. Attorney-Client Privilege Rules ...................................................... 5–25
   Oregon Evidence Code, Rule 503 (ORS 40.225) Lawyer-Client Privilege ... 5–25
   Oregon Evidence Code, Rule 511 (ORS 40.280) Waiver of Privilege by Voluntary Disclosure ................................................... 5–27
   Washington Privilege Statute, RCW 5.60.060 Who Is Disqualified—Privileged Communications (Excerpted) ................................. 5–27
   Federal Rules of Evidence, Rule 501 ............................................. 5–27
   Crimson Trace Corp. v. Davis Wright Tremaine LLP, 355 Or 476, 326 P3d 1181 (Or., 2014) .......................................................... 5–29
   USA v. Henke, 222 F.3d 633 (9th Cir., 2000) ................................... 5–45

III. Work Product Rules ................................................................. 5–71
   ORCP 36, General Provisions Governing Discovery (Excerpted) ......... 5–71
   Federal Rules of Civil Procedure 26, Duty to Disclose; General Provisions Governing Discovery (Excerpted) .............................. 5–72
   In re Grand Jury Subpoena, 357 F.3d 900 (9th Cir., 2003) .................. 5–73
I. **Oregon Confidentiality Rules**

**Oregon RPC 1.6 CONFIDENTIALITY OF INFORMATION.**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

1. to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

2. to prevent reasonably certain death or substantial bodily harm;

3. to secure legal advice about the lawyer's compliance with these Rules;

4. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

5. to comply with other law, court order, or as permitted by these Rules; or

6. in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer’s clients, except to the extent reasonably necessary to carry out the monitoring lawyer’s responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
Oregon RPC 1.9 DUTIES TO FORMER CLIENTS (excerpted)

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Oregon RPC 1.18 DUTIES TO PROSPECTIVE CLIENT (excerpted)

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

Oregon RPC 1.0 TERMINOLOGY (excerpts)

(a) "Belief" or "believes" denotes that the person involved actually supposes the fact in question to be true. A person's belief may be inferred from circumstances.

(d) "Firm" or "law firm" denotes a lawyer or lawyers, including “Of Counsel” lawyers, in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization or the legal department of a corporation or other public or private organization. Any other lawyer, including an office sharer or a lawyer working for or with a firm on a limited basis, is not a member of a firm absent indicia sufficient to establish a de facto law firm among the lawyers involved.

(f) “Information relating to the representation of a client” denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.
(k) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(o) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.
Rule 1.6: Confidentiality of Information

Client-Lawyer Relationship
Rule 1.6 Confidentiality Of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
Comment on Rule 1.6

Client-Lawyer Relationship
Rule 1.6 Confidentiality Of Information - Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.
Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer’s use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

**Authorized Disclosure**

Except to the extent that the client’s instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm’s practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

**Disclosure Adverse to Client**

Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town’s water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer’s disclosure is necessary to eliminate the threat or reduce the number of victims.

Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer’s services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client’s misconduct, the lawyer may not
counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer’s obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client’s crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer’s confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer’s personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer’s compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client’s conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.
Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

**Detection of Conflicts of Interest**

Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.
[15] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[17] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

**Acting Competently to Preserve Confidentiality**

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or
Unauthorized disclosure of information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

[20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.
In re Anonymous, 932 N.E.2d 671 (Ind., 2010)

932 N.E.2d 671

In the Matter of ANONYMOUS, Respondent.

No. 18S00-0902-DI-73.

Supreme Court of Indiana.

Aug. 27, 2010.

Ronald E. Elberger, Indianapolis, IN, Attorney for the Respondent.

G. Michael Witte, Executive Secretary, Alison S. Avery, Staff Attorney, Indianapolis, IN, Attorneys for the Indiana Supreme Court Disciplinary Commission.

Attorney Discipline Action Hearing Officer Lynn Murray

PER CURIAM.

This matter is before the Court on the report of the hearing officer appointed by this Court to hear evidence on the Indiana Supreme Court Disciplinary Commission's “Verified Complaint for Disciplinary Action.” The Respondent's admission to this state's bar subjects her to this Court's disciplinary jurisdiction. See Ind. Const. art. 7, § 4.

We find that Respondent engaged in attorney misconduct by improperly revealing information relating to the representation of a former client. For this misconduct, we find that Respondent should receive a private reprimand.

Background

Respondent represented an organization that employed “AB.” Respondent became acquainted with AB though this connection. In December 2007, AB and her husband were involved in an altercation to which the police were called, during which, AB's husband asserted, she threatened to harm him. In January 2008, AB phoned Respondent and told her about her husband's allegation and that she and her husband had separated. In a second phone call that month, AB asked Respondent for a referral to a family law attorney. Respondent gave AB the name of an attorney in Respondent's firm. Respondent then called this attorney to inform her of the referral and to give her AB's phone number. The attorney called AB that same day and arranged a meeting the following day, when AB retained the attorney. AB told the attorney about the December 2007 incident and directed her to file a divorce petition. Respondent was aware that AB had retained the attorney from her firm and had filed for divorce. AB and her husband soon reconciled, however, and, at AB's request, the divorce petition was dismissed and the firm's representation of AB ended.

In March or April 2008, Respondent was socializing with two friends, one of whom was also a friend of AB's. Unaware of AB's reconciliation with her husband, Respondent told her two friends about AB's filing for divorce and about her husband's accusation. Respondent encouraged AB's friend to contact AB because the friend expressed concern for her. When AB's friend called AB and told her what Respondent had told him, AB became upset about the revelation of the information and filed a grievance against Respondent.

The Commission charged Respondent with violating Professional Conduct Rule 1.9(c)(2), which prohibits revelation of information relating to the representation of a former client except as the Professional Conduct Rules permit or require. The hearing officer concluded that Respondent violated the rule as charged. The hearing officer found no facts in aggravation and the following facts in mitigation: (1) Respondent has no disciplinary history; and (2) Respondent was cooperative with the Commission.

Neither party filed a petition for review of the hearing officer's report. When neither party challenges the findings of the hearing officer, the Court accepts and adopts those findings but reserves final judgment as to misconduct and discipline. See Matter of Levy, 726 N.E.2d 1257, 1258 (Ind.2000).

Discussion

Rules addressing revelation of confidential information. The Rules of Professional Conduct (“Rules”) contain several interrelated rules protecting the confidentiality of information relating to legal representations and consultations. Respondent is accused of violating Professional Conduct Rule 1.9(c), which sets forth the following duties owing to former clients:

A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

1. use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

2. reveal information relating to the representation except as these Rules would permit or require with respect to a client.

1 Respondent testified that she also gave AB the names of two attorneys not associated with her firm.
Chapter 5—Attorney-Client Privilege, Work Product Doctrine, and Joint Defense Doctrine in Oregon

(Emphasis added.)

Professional Conduct Rule 1.6(a), which covers duties to current clients, states: “A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).” Paragraph (b) allows disclosure under conditions not applicable to the current case, such as to prevent commission of a crime or to comply with a court order.

Professional Conduct Rule 1.18, which covers duties to prospective clients, states:

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(Emphasis added.)

Respondent's revelation of the information at issue was a violation of Rule 1.9(c)(2). Respondent argued to the hearing officer that AB initially gave her the information at issue for the purpose of seeking personal rather than professional advice and only later phoned her again to ask for an attorney referral. Thus, she argued, the information was not confidential when AB first disclosed it to her, subsequent events did not change its nature, and she violated no ethical obligation in later revealing it.

The first January 2008 phone conversation did not include discussion of the possibility of forming an attorney-client relationship. If AB's communication with Respondent had ended with that phone call, revelation of the information at issue would not have been a violation of Respondent's ethical duties. “A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a 'prospective client' within the meaning of paragraph (a).” Ind. Prof. Cond. R. 1.18 cmt. [2].

The information at issue, however, was disclosed to Respondent not long before the second call in which AB asked for an attorney referral and Respondent recommended an attorney from her firm. At that point, if not before, AB became a prospective client under Rule 1.18. The formation of an attorney-client relationship with Respondent's firm followed immediately thereafter, and the information at issue was highly relevant to the representation. Respondent then revealed the information with knowledge that her firm had been retained to represent AB in the matter. Under these circumstances, we conclude that once AB became a prospective client, the information became subject to the confidentiality protections of the Rules.

Respondent presented evidence that AB disclosed the information at issue to others, including some of AB's co-workers. Respondent argued to the hearing officer that AB's disclosure of the information to others indicated that AB's disclosure to Respondent in the first phone conversation was personal rather than professional in nature and not intended to be confidential. However, the fact that a client may choose to confide to others information relating to a representation does not waive or negate the confidentiality protections of the Rules, which we have found apply to the information at issue.

Respondent also argued to the hearing officer that revelation of the information at issue was not barred because it could be discovered by searching various public records and the internet. True, the filing of a divorce petition is a matter of public record, but Respondent revealed highly sensitive details of accusations AB's husband made against her to the police. There is no evidence that this information was contained in any public record. Moreover, the Rules contain no exception allowing revelation of information relating to a representation even if a diligent researcher could unearth it through public sources.2

Although we find it unnecessary in this case to explore the outer boundaries of the Rules concerning client confidences, the protection provided is broad.

The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”

Ind. Prof. Cond. R. 1.6 cmt. [3] (emphasis added). An attorney has a duty to prospective, current, and former clients to scrupulously avoid revelation of such information, even if, as may have been the case here, the attorney is motivated by personal concern for the client.

Conclusion

The Court concludes Respondent violated Professional Conduct Rule 1.9(c)(2) by improperly revealing information relating to the representation of a former client. For Respondent's professional misconduct, the Court imposes a private reprimand.

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2 We note that Rule 1.9(c)(1) allows for use of information relating to a prior representation if the information has become generally known. Even if this were the provision at issue in this case, there is no evidence that the information relating to AB's husband's accusation, or even the divorce filing, was generally known.
The costs of this proceeding are assessed against Respondent. The hearing officer appointed in this case is discharged.

The Clerk of this Court is directed to give notice of this opinion to the hearing officer, to the parties or their respective attorneys, and to all other entities entitled to notice under Admission and Discipline Rule 23(3)(d). The Clerk is further directed to post this opinion to the Court's website, and Thomson Reuters is directed to publish a copy of this opinion in the bound volumes of this Court's decisions.

All Justices concur.
FORMAL OPINION NO 2011-184
Confidentiality, Conflicts of Interest:
Consulting between Lawyers Not in the Same Firm

Facts:

Lawyer A participates in a mentoring program for new lawyers. Lawyer B is Lawyer A’s mentor and is not in Lawyer A’s law firm. Lawyer A wishes to discuss a matter concerning one of his clients with Lawyer B.

Lawyer C is a sole practitioner. She is a member of an e-mail LISTSERV maintained by a professional organization that provides members the opportunity to exchange ideas and respond to questions about problems and issues that arise in their practices. Lawyer C encounters an unusual situation in a case she is handling and wishes to receive advice on how to proceed from knowledgeable colleagues who participate in her LISTSERV.

Questions:

1. May Lawyer A disclose information relating to the representation of his client with Lawyer B?

2. May Lawyer B consult regarding Lawyer A’s client matter without first checking for conflicts of interest between Lawyer A’s client and any client of Lawyer B’s firm?

3. May Lawyer C relate the details of the unusual situation she has encountered to other lawyers who participate in her professional organization’s LISTSERV?

Conclusions:

1. Yes, qualified.

2. See discussion.

3. Yes, qualified.
Formal Opinion No 2011-184

Discussion:

Oregon RPC 1.6(a) provides, in pertinent part:

(1) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Oregon RPC 1.7(a) provides, in pertinent part:

Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client;

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer . . . .

It is not uncommon for a lawyer working on a client matter to seek the guidance or assistance of a knowledgeable colleague. Except when the client has specifically instructed otherwise, lawyers may consult with colleagues within their own firms or who are formally associated on a client’s matter without violating the duties to safeguard confidential information and avoid conflicts of interest.

A lawyer may also on occasion seek the advice of colleagues who are not members of the lawyer’s firm or associated on a client matter. Whether those discussions arise in the context of a formal mentoring relationship or through informal discussions, such as on a professional LISTSERV or in casual conversation, both the lawyer seeking advice and the lawyer giving the advice must exercise care to avoid violating their duties to their respective clients.

The American Bar Association’s Standing Committee on Ethics and Professional Responsibility Formal Opinion 98-411, “Ethical Issues in Lawyer-to-Lawyer Consultation,” provides practical guidance on this
subject.\textsuperscript{1} Even though the ABA opinion was adopted before LISTSERVs and other electronic discussion tools\textsuperscript{2} were commonly used by lawyers and makes no reference to them or to lawyer mentoring programs, the principles it discusses and the guidance it provides are applicable in these contexts.\textsuperscript{3}

I. Considerations for the Consulting Lawyer.

Oregon RPC 1.6 safeguards “all information relating to the representation of a client,” and prohibits disclosure of such information without the client’s informed consent or as provided in one of the specific exceptions to the rule. There is no exemption for lawyers participating in mentorship programs or for other lawyers seeking assistance on behalf of clients. Oregon RPC 1.6(a) permits disclosure of confidential information, without the informed consent of a client, when the disclosure is “impliedly authorized to carry out the representation.” The rule does not suggest what kind of disclosures might be impliedly authorized; the ABA opinion interprets Oregon RPC 1.6 “to allow disclosures of client information to lawyers outside the firm when the consulting lawyer reasonably believes the disclosure will further the representation by


\textsuperscript{2} For purposes of this opinion, when reference is made to LISTSERVs the same considerations apply to discussions on blogs, online community bulletin boards, or similar electronic discussion venues.

\textsuperscript{3} The ABA opinion purports to apply equally to consultations about the substance or procedure of a client’s matter and to consultations about the consulting lawyer’s own ethical responsibilities in the matter. However, since the ABA opinion was issued, both the ABA and Oregon have adopted rules that expressly permit disclosure of otherwise confidential information to the extent reasonably necessary “to secure legal advice about the lawyer’s compliance with these Rules.” ABA Model RPC 1.6(b)(4); Oregon RPC 1.6(b)(3). Comment [9] to ABA Model RPC 1.6(b)(4) suggests that such disclosures may be impliedly authorized for the lawyer to carry out the representation but, even if not, are permitted “because of the importance of a lawyer’s compliance with the Rules of Professional Conduct.” This opinion is limited to consultations between lawyers unrelated to the lawyer’s own professional conduct.
Formal Opinion No 2011-184

obtaining the consulted lawyer’s experience or expertise for the benefit of the consulting lawyer’s client.”

Consultations that are general in nature and that do not involve disclosure of information relating to the representation of a specific client do not implicate Oregon RPC 1.6. For instance, there would be no violation of the rule in a LISTSERV inquiry seeking the name or citation for a recent case on a subject relevant to a client matter or to discussions about an issue of law or procedure that might be present in a client matter. Similarly, inquiries or discussions posed as hypotheticals generally do not implicate Oregon RPC 1.6. Accordingly, Lawyer A might safely pose a question to Lawyer B, or Lawyer C might post an inquiry on a LISTSERV, as a hypothetical case.

Framing a question as a hypothetical is not a perfect solution, however. Lawyers face a significant risk of violating Oregon RPC 1.6 when posing hypothetical questions if the facts provided permit persons outside the lawyer’s firm to determine the client’s identity. When the facts are so unique or when other circumstances might reveal the identity of the consulting lawyer’s client even without the client being named, the lawyer must first obtain the client’s informed consent for the disclosures.

To obtain “informed consent,” a lawyer must provide a client with “adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”4 As noted in the ABA opinion, that may include an explanation that the disclosure may constitute a waiver of attorney-client privilege or might otherwise prejudice the client’s interests.

A lawyer should avoid consulting with another lawyer who is likely to be or to become counsel for an adverse party in the matter. In the absence of an agreement to the contrary, the consulted lawyer does not assume any obligation to the consulting lawyer’s client by simply participating in the consultation.5 The consulting lawyer thus risks

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4 Oregon RPC 1.0(g).

5 The ABA opinions suggests that an agreement to maintain confidentiality might be inferred in some situations, such as when the consulting lawyer puts conditions on the consultation or when the information discussed is of a nature that a
divulging sensitive information to a client’s current or future adversary, who is not prohibited from subsequently using the information for the benefit of his or her own client. This should be a particular concern to Lawyer C if she posts her inquiry to a LISTSERV, whose members may represent parties on all sides of legal issues. Moreover, no LISTSERV, regardless the restrictions and limitations upon those who participate in it, can insure that messages will be read only by persons aligned with the interests of the lawyer posting an inquiry. Lawyer C, in seeking to consult about an unusual fact pattern, must be careful about using a LISTSERV to obtain assistance from other attorneys, at least not without the informed consent of her client about the potential risks of the consultation.

One way for a consulting lawyer to avoid some of the foregoing risks is to obtain an agreement that the consulted lawyer will both maintain the confidentiality of information disclosed and not engage in representation adverse to the consulting lawyer’s client.

II. Considerations for the Consulted Lawyer.

As discussed above, a consulted lawyer assumes no obligations to the consulting lawyer’s client by the mere fact of the consultation. Lawyer B will not have violated any duty to Lawyer A’s client under Oregon RPC 1.6 if Lawyer B later discloses or uses information received from Lawyer A, including in circumstances when Lawyer B undertakes representation adverse to Lawyer A’s client.

Even a consultation premised on hypothetical facts can have practical implications for the consulted lawyer if the guidance provided to the consulting lawyer is used to harm a client of the consulted lawyer. The ABA opinion illustrates this point with the example of a lawyer skilled in real estate matters, like our Lawyer B, who is consulted by a less experienced lawyer, such as our Lawyer A, about how a tenant might void a lease. As a result of Lawyer B’s guidance, Lawyer A’s client reasonable lawyer would assume its confidentiality. In the absence of any authority, however, practitioners should not assume a confidentiality agreement will be inferred.
Formal Opinion No 2011-184

repudiates a lease. Lawyer B subsequently learns that the landlord whose lease was repudiated is a client of Lawyer B’s firm.

In that situation, if there was no confidentiality agreement between the lawyers, Lawyer B has a duty to inform the landlord client about the consultation and its possible consequences. While doing so does not breach any duties to Lawyer A’s client or to Lawyer B’s client, the practical result may be allegations of negligence or ethical misconduct by the landlord client and the destruction of the relationship. Had Lawyers A and B entered a confidentiality agreement regarding the consultation, then Lawyer B and his firm could be disqualified under Oregon RPC 1.10, if Lawyer B’s obligations under that agreement would materially limit his ability to represent the landlord in the matter.6

Lawyer B can avoid the problems posed by the above example by insisting, prior to any consultation with Lawyer A about a client matter, that Lawyer A provide the identity of the client so that Lawyer B can check for possible conflicts with clients of Lawyer B’s firm. In addition to checking for possible conflicts, Lawyer B might seek an agreement from Lawyer A, on behalf of Lawyer A’s client, that the consultation will not create any obligations by Lawyer B to Lawyer A’s client.

Consultations among lawyers, whether during the course of a mentorship program, on LISTSERVs and other “social media,” during continuing education programs or in more informal settings, are an important part of a lawyer’s professional development and a critical component in representing clients. Indeed, such consultations may be one way in which lawyers fulfill their ethical duty, under Oregon RPC 1.1, to provide competent representation. But lawyers who are not members of the same firm or affiliated on a particular case must be mindful of other ethical obligations to clients. For the consulting lawyer, like Lawyers A and C herein, care should be taken not to violate the duty to maintain the confidentiality of information relating to the representation of a client.

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6 Oregon RPC 1.7(a)(2) prohibits a lawyer from representing a client if there is “a significant risk that the representation ... will be materially limited by the lawyer’s responsibilities to ... a third person,” except when the affected client gives informed consent, confirmed in writing.
Formal Opinion No 2011-184

For the consulted lawyer, like Lawyer B, the duty of loyalty to existing clients must be considered. Even though a consultation will not create an attorney-client relationship between the client of the consulting lawyer and the consulted lawyer, there may be circumstances, as illustrated above, in which the consulted lawyer will need to check for possible conflicts of interest, or take other prophylactic measures, to ensure that an obligation to current clients is not impaired.

Approved by Board of Governors, March 2011.

COMMENT: For additional information on this general topic and other related subjects, see The Ethical Oregon Lawyer § 6.2-1 to § 6.2-2 (basic components of duty of confidentiality), § 6.3-1 (client consent), § 10.2 (multiple-clients conflicts rules) (OSB Legal Pubs 2015); and Restatement (Third) of the Law Governing Lawyers §§ 62, 121–122 (2000) (supplemented periodically).
II. Attorney-Client Privilege Rules

Oregon Evidence Code, Rule 503 (ORS 40.225) Lawyer-client privilege.

(1) As used in this section, unless the context requires otherwise:

(a) “Client” means a person, public officer, corporation, association or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(b) “Confidential communication” means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(c) “Lawyer” means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(d) “Representative of the client” means:

(A) A principal, an officer or a director of the client; or

(B) A person who has authority to obtain professional legal services, or to act on legal advice rendered, on behalf of the client, or a person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the person’s scope of employment for the client.

(e) “Representative of the lawyer” means one employed to assist the lawyer in the rendition of professional legal services, but does not include a physician making a physical or mental examination under ORCP 44.

(2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(a) Between the client or the client’s representative and the client’s lawyer or a representative of the lawyer;

(b) Between the client’s lawyer and the lawyer’s representative;

(c) By the client or the client’s lawyer to a lawyer representing another in a matter of common interest;

(d) Between representatives of the client or between the client and a representative of the client; or

(e) Between lawyers representing the client.
(3) The privilege created by this section may be claimed by the client, a guardian or conservator of the client, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer’s representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(4) There is no privilege under this section:

(a) If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(b) As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(c) As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

(d) As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(e) As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

(5) Notwithstanding ORS 40.280, a privilege is maintained under this section for a communication made to the office of public defense services established under ORS 151.216 for the purpose of seeking preauthorization for or payment of nonroutine fees or expenses under ORS 135.055.

(6) Notwithstanding subsection (4)(c) of this section and ORS 40.280, a privilege is maintained under this section for a communication that is made to the office of public defense services established under ORS 151.216 for the purpose of making, or providing information regarding, a complaint against a lawyer providing public defense services.

(7) Notwithstanding ORS 40.280, a privilege is maintained under this section for a communication ordered to be disclosed under ORS 192.410 to 192.505. [1981 c.892 §32; 1987 c.680 §1; 2005 c.356 §1; 2005 c.358 §1; 2007 c.513 §3; 2009 c.516 §1]
Oregon Evidence Code, Rule 511 (ORS 40.280)

Waiver of privilege by voluntary disclosure

A person upon whom ORS 40.225 to 40.295 confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or the person’s predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This section does not apply if the disclosure is itself a privileged communication. Voluntary disclosure does not occur with the mere commencement of litigation or, in the case of a deposition taken for the purpose of perpetuating testimony, until the offering of the deposition as evidence. Voluntary disclosure does not occur when representatives of the news media are allowed to attend executive sessions of the governing body of a public body as provided in ORS 192.660 (4), or when representatives of the news media disclose information after the governing body has prohibited disclosure of the information under ORS 192.660 (4). Voluntary disclosure does occur, as to psychotherapists in the case of a mental or emotional condition and physicians in the case of a physical condition upon the holder’s offering of any person as a witness who testifies as to the condition. [1981 c.892 §39; 2003 c.259 §1]

Washington Privilege Statute, RCW 5.60.060

Who is disqualified—Privileged communications (excerpted)

(2)(a) An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

Federal Rules of Evidence, Rule 501

The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:

• the United States Constitution;
• a federal statute; or
• rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.
Crimson Trace Corp. v. Davis Wright Tremaine LLP, 355 Or 476, 326 P3d 1181 (Or., 2014)

355 Or. 476
326 P.3d 1181

CRIMSON TRACE CORPORATION, an Oregon corporation, Plaintiff–Adverse Party,
v.
DAVIS WRIGHT TREMAINE LLP, a Washington limited liability partnership; Frederick Ross Boundy, an individual; and
William Birdwell, an individual, Defendants–Relators.

(CC110810810; SC S061086).

Supreme Court of Oregon,
En Banc.

Argued and Submitted Nov. 4, 2013.

Original proceeding in mandamus.1

Kevin Stuart Rosen, Gibson, Dunn & Crutcher, LLP, Los Angeles, argued the cause and filed the brief for defendants-relators. With him on the brief was Daniel L. Keppler.

Bonnie Richardson, Folawn Alterm an & Richardson, LLP, Portland, argued the case and filed the brief for plaintiff-adverse party. With her on the brief was John Folawn.

Robyn Rider Aoyagi, Tonkon Torp LLP, Portland, filed a brief on behalf of amici curiae Interested Oregon Law Firms.

Bridget Donegan, Larkins Vacura LLP, Portland, and Kristian S. Roggendorf, of Roggendorf Law LLC, Lake Oswego, filed a brief on behalf of amicus curiae Oregon Trial Lawyers Association.

Amar D. Sarwal and Evan P. Schultz, Association of Corporate Counsel, and Kelly Jaske, Jaske Law LLC, Portland, filed a brief on behalf of amici curiae Association of Corporate Counsel.

LANDAU, J.

In this original proceeding in mandamus, relator Davis Wright Tremaine LLP (“DWT”) challenges a trial court order compelling production of certain materials that, in DWT’s view, are protected under the attorney-client privilege codified at OEC 503. The trial court issued the order in the context of a legal malpractice action against DWT by a former client. The materials that are the subject of the order are communications between DWT’s designated in-house counsel and the lawyers in the firm who had represented the former client, and concern how actual and potential conflicts between the lawyers and the former client should be handled.

The trial court concluded that all but three of the communications with the firm’s in-house counsel ordinarily would be covered by the attorney-client privilege under OEC 503. The court, however, recognized a “fiduciary exception” to the attorney-client privilege, which arose out of the fact that the firm was attempting to shield its internal communications from a former client.

We conclude that the trial court correctly determined that the attorney-client privilege as defined in OEC 503 applies to communications between lawyers in a firm and in-house counsel. We further conclude, however, that the trial court erred in recognizing an exception to OEC 503 that the legislature did not adopt in the terms of that rule. Accordingly, we issue a peremptory writ of mandamus ordering the trial court to vacate its order compelling production of materials related to those communications that it determined were otherwise subject to the attorney-client privilege.

I. BACKGROUND

Crimson Trace Corp. manufactures and sells laser grips for firearms. The company retained Birdwell, a lawyer with DWT, to prosecute certain patents for those products before the Patent and Trademark Office. Crimson later retained DWT to represent it in a dispute with a competitor, LaserMax, Inc., over possible patent infringements. Birdwell was joined by Boundy, who acted as lead trial counsel in the litigation in the federal district court.

The action did not go smoothly for Crimson. LaserMax asserted counterclaims that challenged the validity of the patents at issue. In particular, LaserMax argued that one of the patents—the “235 patent”—was invalid because Crimson had deceptively omitted material information when it submitted the patent to the Patent and Trademark Office. In its counterclaim, LaserMax named Birdwell as the lawyer who had prosecuted the patent.

Birdwell and Boundy became concerned that the “235 patent” counterclaim could create a conflict of interest between Crimson and the two DWT lawyers. Because LaserMax had named Birdwell as the attorney who had prosecuted that patent before the Patent and Trade Office, the firm could have been put in the position of defending Birdwell at the same time that it was defending Crimson. Birdwell and Boundy consulted with the firm’s Quality Assurance Committee (QAC), a small group of DWT lawyers that

1 On petition for alternative writ of mandamus from an order of Multnomah County Circuit Court, Stephen K. Bushong, Judge.
had been designated by the firm as in-house counsel. Specifically, they consulted with Johnson, a member of the QAC, after which Boundy disclosed the potential conflict in an email to Crimson’s CEO:

“[Birdwell] is also alleged to be part of the deceptive activity. * * * Under the circumstances, I should advise you that someone could argue I have a conflict of interest in that I may be defending my partner at the same time as I am representing Crimson * * *. I frankly don’t see this as an issue, but I do want you to know that you certainly have the right to consult with independent counsel to fully consider this.”

Crimson offered to dismiss its claims relating to the “235 patent.” LaserMax, however, refused to drop its counterclaims relating to that patent. Moreover, it sought to recover its attorney fees for defending against the claim. In asserting its claim for attorney fees, LaserMax argued that Crimson had both procured the “235 patent” and litigated the claim of infringement over it in bad faith. The district court granted LaserMax discovery for the purpose of determining whether Crimson in fact had acted in bad faith, and LaserMax subsequently subpoenaed Birdwell’s files relating to the “235 patent.” Birdwell and Boundy again consulted with the firm’s QAC in determining how to respond.

Eventually, Crimson and LaserMax negotiated a settlement, which the parties agreed should remain confidential. When Boundy, acting for Crimson, moved to file the settlement under seal, however, he did so in a way that publicly disclosed certain details of the agreement and gave the impression that LaserMax had conceded liability, which it had not.

LaserMax complained about the disclosure. The district court concluded that Boundy’s disclosures were intentional and damaging to LaserMax. As a result, the court disclosed the entire agreement and imposed a monetary sanction on Crimson for having acted in bad faith.

Meanwhile, Crimson had stopped paying DWT. Crimson’s CEO told Boundy that the company had intentionally stopped paying because “we did not like the status of the case and what we were getting for our money.” Boundy and Birdwell consulted extensively with Johnson and another member of the QAC, Waggoner, about how to proceed in the light of those revelations.

By that time, the litigation had begun to wind down: Crimson and LaserMax had entered into their confidential settlement agreement and the issue of Boundy’s public and misleading references to the settlement terms was before the court. The two lawyers continued to communicate with the QAC about the sanction issue and the fee dispute as they went on with their representation of Crimson. Eventually, Crimson’s CEO informed Boundy that Crimson’s board of directors had become “hostile” to DWT, leading the lawyers and the firm to believe that Crimson was contemplating a malpractice action against them. The firm nevertheless continued to bill Crimson for small amounts of work performed in the LaserMax litigation until Crimson, in fact, did file an action for legal malpractice and breach of contract.

In its complaint, Crimson alleged that the defendants committed legal malpractice in various ways, including by (1) failing to advise Crimson about problems with its “235 patent” and that Birdwell would likely be a witness in any dispute about those problems; (2) failing to advise against suing LaserMax for infringing that patent; and (3) failing to advise Crimson when conflicts arose in connection with LaserMax’s request for attorney fees. Crimson also alleged that defendants had breached their legal services contract with Crimson by charging Crimson for work that was unnecessary, was of no value, and was performed in DWT’s own interest at a time when DWT had a conflict of interest with Crimson.

In the course of the ensuing litigation, Crimson requested production of any communications between or among DWT’s attorneys about possible conflicts of interest in DWT’s representation of Crimson that occurred during the period when DWT still was representing Crimson. The discovery request specifically mentioned internal communications “regarding defendant Boundy’s handling of the confidential settlement agreement with LaserMax,” “regarding the failure to disclose * * * to the Patent and Trademark Office during prosecution of the ‘235’ patent,” and “regarding professional duties owed by [DWT] to [Crimson], possible or actual breach of those duties, and/or prevention of loss related to duties owed to [Crimson].”

DWT resisted production, arguing that the communications Crimson sought were protected by the attorney-client privilege under OEC 503 because they involved the rendition of legal services by the firm’s in-house counsel to the firm and its members. DWT also argued that some of the documents, which were prepared after DWT began to suspect that Crimson would sue them, were protected by the work-product doctrine.

Crimson responded by moving to compel DWT to respond to its discovery requests. DWT opposed the motion, again contending that the material requested was subject to the attorney-client privilege. In support, DWT offered, among other things, an affidavit of one of the members of the QAC, Thurber, which explained that “[m]embers of the [QAC] act as in-house counsel for the firm and its lawyers on matters relating to the work of the firm” and that, “[a]s a matter of firm policy and procedure, any documents generated from the work of the [QAC] do not become part of the client file for any firm client.” The firm also introduced affidavits of Birdwell and Boundy, both of whom stated that their communications with the firm’s QAC “were intended to be confidential” and “were made for the purpose of facilitating the rendition of professional legal services” and “obtaining legal advice regarding the fulfillment of [their] professional responsibilities and other matters relating to the LaserMax case.”

The trial court granted Crimson’s motion in part, ordering DWT to supply its former client with a privilege log of every document responsive to Crimson’s request for production and to produce the documents themselves to the court for in camera review. DWT complied with the order. After reviewing the documents that DWT had produced and considering additional arguments and
other evidence in the matter, the trial court concluded that the first three of the documents in the privilege log were not privileged. The balance of documents, though, the court determined were subject to the attorney-client privilege. The court found:

“The remaining documents on the privilege log, and by December 2010, at the interests of [DWT], they had a separate interest, and the lawyers who were representing Crimson *** were intending to communicate to members of the [QAC] regarding [DWT’s] separate interest. They were intending that those communications would be confidential attorney-client privileged communications.”

The court nevertheless concluded that the privilege did not apply. The court explained that “what I’m left with is a series of communications by lawyers within the same firm that were intended to be confidential, and I think the—there is a conflict of interest that did arise under the circumstances of this case.” Because of that conflict, the court concluded, the firm was not permitted to assert the attorney-client privilege. The court accordingly granted Crimson’s motion to compel in its entirety, ordering DWT to produce to Crimson all of the documents identified in the privilege log.

DWT then filed a petition with this court for a peremptory or alternative writ of mandamus directing the trial court to vacate its order granting Crimson’s motion to compel and to issue a new order denying that motion. This court granted an alternative writ, ordering the trial court to vacate its order or show cause for not doing so.

The trial court declined to vacate its order and issued an opinion explaining that decision. In the opinion, the trial court announced the following factual findings:

“The internal law firm communications at issue were made during the time defendant [DWT] represented plaintiff Crimson *** in a patent infringement action pending in federal court (the LaserMax litigation). The communication consisted primarily of emails between the DWT lawyers representing Crimson *** in the LaserMax litigation, and the DWT lawyers on the firm’s [QAC]. The communications addressed Crimson[‘s] decision to stop paying its legal bills and its dissatisfaction (and potential claim against DWT) based on the firm’s handling of the LaserMax litigation.

“The DWT lawyers intended that those communications would be confidential and not disclosed to Crimson ***. The DWT lawyers on the [QAC] were not directly involved in the firm’s ongoing representation of Crimson *** in the LaserMax litigation. The lawyers representing Crimson *** in the litigation communicated with the lawyers on the [QAC] about the LaserMax litigation. Some of those communications concerned court filings in the Lasermax litigation. DWT did not disclose a potential conflict to Crimson *** or seek its consent to DWT’s continued representation of Crimson *** in the LaserMax litigation, nor did DWT seek to withdraw from its representation of Crimson *** in that litigation.”

Based on those findings, the trial court concluded that the DWT lawyers representing Crimson “could have an attorney-client relationship with the DWT lawyers on the firm’s [QAC], so that communications among the DWT lawyers ordinarily would be covered by the attorney-client privilege.” The court also concluded, however, that a “fiduciary exception” to the attorney-client privilege applied. The court explained that because of DWT’s duties of candor, disclosure, and loyalty to Crimson as its client, the firm was precluded from asserting the attorney-client privilege as to its internal communications. The court noted that the issue was one of first impression in Oregon, but that it was persuaded by arguments that the “better rule” required DWT’s claim of privilege to give way to its “paramount duties to Crimson *** under the circumstances presented here.”

II. ANALYSIS

In its mandamus petition, DWT argues that the trial court erred in recognizing a “fiduciary exception” to the attorney-client privilege. According to DWT, OEC 503 is the sole source of law that is relevant to this, and any other, controversy about the attorney-client privilege as it applies in this state, and that the so-called fiduciary exception is not among the exceptions to the privilege that are enumerated in that rule. DWT contends that, insofar as the communications at issue here fall squarely within the general privilege as defined in OEC 503 and do not fall into any of the enumerated exceptions, the trial court was precluded from concluding that the attorney-client privilege is inapplicable and that the communications are subject to discovery.

In its response, Crimson first contends that we do not need to decide whether to recognize a “fiduciary exception” to the attorney-client privilege, because the communications at issue do not fall within the privilege in the first place. Relying on case law concerning the Oregon Rules of Professional Conduct, Crimson argues that the privilege depends on the existence of an attorney-client relationship, and that whether an attorney-client relationship exists depends in turn on the client’s “reasonable expectation” that he or she is entitled to look to the lawyer for advice. In this case, Crimson argues, Birdwell and Boundy had no such reasonable expectation with respect to the QAC, because they knew that their interests were adverse to Crimson’s, a then-current client.

In the alternative, Crimson argues that, even assuming that an attorney-client relationship exists and the communications fall within the general privilege, the “fiduciary exception” applies. In Crimson’s view, the fact that OEC 503 itself does not include that exception does not preclude this court from recognizing additional exceptions to the attorney-client privilege as set out in that rule.

A. Availability of mandamus

Mandamus is a statutory remedy aimed at correcting errors of law for which there is no other “plain, speedy and adequate remedy in the ordinary course of the law.” ORS 34.110. A trial court decision ordering the disclosure of privileged information is
subject to review in mandamus precisely because ordinary appeal provides an inadequate remedy. As the court explained in State ex rel. OHSU v. Haas, 325 Or. 492, 497, 942 P.2d 261 (1997), “[o]nce a privileged communication has been disclosed, the harm cannot be undone.” As a result, “[m]andamus is an appropriate remedy when a discovery order erroneously requires disclosure of a privileged communication.” Id.

B. Whether the attorney-client privilege applies

We turn, then, to the merits of the parties’ dispute, beginning with the question whether the attorney-client privilege described in OEC 503 applies at all. At the outset, we emphasize that, in this case, the issue is governed by statute: OEC 503, codified at ORS 40.225. Although the rules of evidence are commonly denominated “rules,” they were—unlike other rules, such as some of the Oregon Rules of Civil Procedure—adopted by the legislature. Accordingly, in construing OEC 503, our task is to determine what the legislature intended, using our traditional analytical framework, which focuses on the statute’s text, context, and any helpful legislative history. See State v. Serrano, 346 Or. 311, 318–25, 210 P.3d 892 (2009) (applying interpretive framework described in State v. Gaines, 346 Or. 160, 206 P.3d 1042 (2009), to OEC 505); State ex rel. OHSU, 325 Or. at 501, 942 P.2d 261 (citing and applying PGE v. Bureau of Labor and Industries, 317 Or. 606, 859 P.2d 1143 (1993), in interpreting OEC 503).

OEC 503 defines relevant terms and sets out the attorney-client privilege as follows:

“(a) ‘Client’ means a person, public officer, corporation, association or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer * * * with a view to obtaining professional legal services.

“(b) ‘Confidential communication’ means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

“(c) ‘Lawyer’ means a person authorized or reasonably believed by the client to be authorized, to practice law in any state or nation.

“(2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

“(a) Between the client or the client’s representative and the client’s lawyer or a representative of the lawyer.”

In State v. Jancsek, 302 Or. 270, 275, 730 P.2d 14 (1986), this court concluded that, under OEC 503, a claim of privilege generally may be asserted with respect to a communication if three requirements are satisfied. First, the communication must have been between a “client” and the client’s “lawyer,” as those terms are defined in OEC 503(1)(a) and (c). Second, the communication must have been a “confidential communication,” as that term is defined in OEC 503(1)(b). Finally, the communication must be “made for the purpose facilitating the rendition of professional legal services to the client.” OEC 503(2).

Crimson insists that a fourth requirement must be satisfied for the attorney-client privilege under OEC 503 to apply. In Crimson’s view, OEC 503 implicitly assumes the existence of an attorney-client “relationship,” which Crimson contends depends on the “reasonable expectations” of the parties. In this instance, Crimson argues, Birdwell and Boundy could not reasonably have believed that their conversations with their firm’s QAC created an attorney-client relationship, because no lawyer could reasonably expect another member of his or her firm to represent the lawyer in his or her conflict with a current client. That is so, Crimson argues, because the Oregon Rules of Professional Conduct prohibit the lawyer from representing a client when that representation might be adverse to another client.

In support of that argument, Crimson relies on statements in this court’s prior cases concerning the Oregon Rules of Professional Conduct to the effect that the existence of an attorney-client relationship is determined by the reasonable expectations of the client. See In re Weidner, 310 Or. 757, 770, 801 P.2d 828 (1990) (“To establish that the lawyer-client relationship exists based on reasonable expectation, a putative client’s subjective * * * intention or expectation must be accompanied by evidence of objective facts on which a reasonable person would rely as supporting existence of that intent.”); Kidney Association of Oregon v. Ferguson, 315 Or. 135, 145, 843 P.2d 442 (1992) (“The existence of a lawyer-client relationship primarily is determined by the reasonable expectation of the client that the lawyer will perform legal work in the client’s behalf.”); In re Spencer, 335 Or. 71, 84, 58 P.3d 228 (2002) (“The modern trend in Oregon and elsewhere is to find the existence of an attorney-client relationship whenever the would-be client reasonably believes under the circumstances that the client is entitled to look to the lawyer for advice.”) (quoting the Ethical Oregon Lawyer, 6.3 (Oregon CLE 1991)).

Crimson’s reasoning is unpersuasive for at least two reasons. First, and most important, it finds no support in the wording of OEC 503. Nothing in the rule mentions a requirement that the existence of an attorney-client relationship sufficient to trigger the privilege depends on the reasonableness of the parties’ expectations. To be sure, the rule does mention reasonableness in defining who is a “lawyer.” But it uses the term in reference to the client’s “belief that a person is “authorized to practice law in any state or nation.” OEC 503(1)(c). There is a difference between the reasonableness of a client’s belief that an individual is authorized to practice law at
all and the reasonableness of the client’s belief that the individual is authorized to be that client’s lawyer. The terms of the rule refer only to the former, not the latter.

In arguing to the contrary, Crimson relies on this court’s lawyer-discipline cases. Those cases, however, have no necessary relevance to the question of OEC 503’s applicability. While it may be true that the attorney-client privilege set out in OEC 503 requires the existence of an “attorney-client relationship” in some sense—after all, the rule defines “client” and “lawyer” and provides that the privilege applies to communications between them—there is no reason to believe that the existence of such a relationship for purposes of OEC 503 would be determined by the same analysis that applies in the disciplinary context. Rather, OEC 503 itself describes what is required.

Second, Crimson misconstrues the attorney discipline cases on which it relies. Those decisions support the idea that an attorney-client relationship may be found to exist based on the would-be client’s reasonable expectation of representation. However, none of them stand for the entirely different proposition that Crimson advances—that an attorney-client relationship can exist only if the putative client reasonably believes that he or she can look to the lawyer for advice and representation. In fact, Weidner and Spencer both suggest that the existence of an attorney-client relationship is usually a matter of the parties’ expressed intentions, and that the reasonableness of the client’s expectation of representation becomes an issue only when the lawyer denies that the relationship existed at the relevant time. See Spencer, 335 Or. at 84–85, 58 P.3d 228 (although lawyer ultimately decided not to represent person who sought his advice, the person nevertheless became the lawyer’s client for the limited purpose of safeguarding the documents that she had turned over to lawyer, because it was reasonable for the person to believe that lawyer would return them upon her request); see also Weidner, 310 Or. at 770, 801 P.2d 828 (where there was no evidence of any express lawyer-client relationship, relationship still could be established based on client’s reasonable expectation based on objective facts). It appears, then, that the reasonableness of the putative client’s expectation of representation is irrelevant when, as in this case, the client and lawyer mutually agree that an attorney-client relationship has been formed.

We turn, then, to whether the communications at issue in this case satisfy the three requirements set out in OEC 503(2). It is important to note, in approaching that issue, that the trial court concluded that the communications fell within the privilege as defined by OEC 503(2): It stated that the communications “ordinarily would be covered by the attorney-client privilege,” but were excepted under the “fiduciary exception.” In reviewing that conclusion, we are bound by the court’s factual findings as long as the record contains evidence that supports those findings. To the extent that the trial court did not explicitly state its factual findings, we assume that it found facts consistent with its conclusion (assuming, again, that the evidence in the record would support such findings). State ex rel. OHSU, 325 Or. at 498, 942 P.2d 261.

1. Was the communication between a “client” and the client’s “lawyer”?  

No one contests that Birdwell and Boundy could have consulted with lawyers outside of their firm and that such consultations would be subject to the attorney-client privilege. The issue in this case is whether Birdwell and Boundy’s communications with the members of the QAC of their own firm constituted communications between a “client” and the client’s “lawyer” as those terms are defined in OEC 503(1). That the members of the QAC are “lawyers” within the meaning of OEC 503(1)(c)—that is, that they are “authorized * * * to practice law”—is not in dispute. That leaves the question whether Birdwell and Boundy were the QAC’s “clients” within the meaning of OEC 503(1)(a).

At the outset, we note that nothing in the wording of OEC 503 or the case law construing it suggests that a law firm, or one or more of its individual lawyers, cannot be the “client” of the firm’s in-house counsel. To the contrary, this court has recognized that an organization can be the “client” of its own in-house counsel within the meaning of OEC 503(1)(a). See State ex rel. OHSU, 325 Or. at 500, 942 P.2d 261 (OHSU was the client of its own in-house counsel).

In this case, although the trial court made no explicit factual findings that are relevant to this issue, it did state the legal conclusion that, but for the “fiduciary exception,” Birdwell and Boundy could have had an attorney-client relationship with the firm’s QAC and that, as a result, those communications “ordinarily would be covered by the attorney-client privilege.” That determination suggests an implicit factual finding that Birdwell and Boundy “consult[ed] a lawyer with a view to obtaining professional legal services.” OEC 503(1)(a). And that implicit finding is supported by evidence in the record: QAC member Thurber’s affidavit explained that the members of the QAC “act as in-house counsel for the firm and its lawyers.” And Birdwell and Boundy both submitted declarations to the trial court stating that they had consulted with the QAC “for the purposes of obtaining legal advice regarding [their] professional responsibilities and other matters relating to the LaserMax case.”

Amicus, the Oregon Trial Lawyers Association (OTLA), contends that DWT and its individual lawyers should not be deemed the QAC’s “clients” within the meaning of OEC 503(1)(a), because doing so would essentially condone DWT’s violation of its duty of loyalty to its current client and undermine a client’s sense of security in frankly communicating with his or her own lawyers.

We are not persuaded. OTLA’s argument is essentially one of policy. Our task is one of statutory interpretation. As this court has cautioned in previous cases, “[t] his court’s statutory construction methodology, not policy considerations,” guides our determination of the meaning of statutes. Johnson v. Swaim, 343 Or. 423, 430, 172 P.3d 645 (2007); Rodriguez v. The Holland, Inc., 328 Or. 440, 446, 980 P.2d 672 (1999). In the absence of an explanation as to how the wording of OEC 503(1)(a) supports the result that OTLA seeks, we reject its contention that that definition does not apply to Birdwell and Boundy.

We conclude that the communications at issue were “between the client * * * and the client’s lawyer,” OEC 503(2)(a), and that, as such, the first requirement for placing a communication within the attorney-client privilege is satisfied.
Chapter 5—Attorney-Client Privilege, Work Product Doctrine, and Joint Defense Doctrine in Oregon

2. Were the communications “confidential communications”?

To qualify for the attorney-client privilege as defined at OEC 503(2), a communication must be a “confidential communication,” that is, a communication “not intended to be disclosed to third persons.” OEC 503(1)(b). In this case, the trial court expressly found that “[t]he DWT lawyers intended that those communications would be confidential and not disclosed to Crimson * * *.” That finding is supported by the affidavits of Birdwell and Boundy, both of whom stated that their meetings with members of the firm’s QAC “were intended to be confidential.” Because the trial court’s finding is supported by evidence in the record, we are bound by it. Serrano, 346 Or. at 326, 210 P.3d 892.

Crimson suggests that, regardless of the trial court’s finding, the requirement that the communication be a “confidential communication” was not satisfied. Crimson’s reasoning is as follows: Most of the communications being sought in discovery were communications at issue satisfied the identiary bound ws: Most of the communications being sought in discovery were

3. Were the communications “made for the purpose of facilitating the rendition of professional legal services to the client”?

As we have noted, the court expressly found that, but for the “fiduciary exception,” the attorney-client privilege would apply. Moreover, in addressing the question whether particular materials listed in the privilege log were subject to the attorney-client privilege, the court found that, with the exception of three documents, the balance of the materials that Crimson requested reflected the fact that the firm and its lawyers “had a separate interest, and the lawyers who were representing Crimson * * * were intending to communicate to members of the [QAC] regarding [DWT’s] separate interest.” That would appear to be a finding that those communications were made for the purpose of facilitating the rendition of professional legal services to the QAC’s client, DWT.

That finding is supported by evidence in the record, including the uncontradicted affidavits of Birdwell and Boundy that their communications with the firm’s QAC “were made for the purpose of facilitating the rendition of professional legal services” and “obtaining legal advice regarding the fulfillment of [their] professional responsibilities and other matters relating to the LaserMax case.” Accordingly, we conclude that, except for the first three communications listed on the privilege log, the third requirement is satisfied.

We have determined that, except for the three communications just mentioned, the communications at issue satisfied the three requirements set out in OEC 503(2) for application of the attorney-client privilege, and we therefore accept the trial court’s conclusion that those communications “ordinarily” would fall within the privilege. We turn, then, to the question whether those communications were nevertheless subject to a “fiduciary exception” to the attorney client privilege stated in OEC 503.

C. Do the communications fall within a recognized exception to the attorney-client privilege?

OEC 503(4) provides that “[t]here is no [lawyer-client] privilege” in five circumstances:

“(a) If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

“(b) As to a communication relevant to an issue between parties who claim through the same deceased client * * *

“(c) As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

“(d) As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness or

“(e) As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.”
In this case, there is no contention that any of the foregoing five exceptions to the attorney-client privilege applies to DWT’s communications with its QAC. The trial court, however, recognized an additional exception—denominated a “fiduciary exception”—and concluded that that exception applied to the circumstances of this case.

The trial court explained that a number of courts that have addressed the issue have concluded that, because of the fiduciary obligations that a law firm owes its clients, a firm may not invoke the attorney-client privilege to protect communications between its lawyers and its in-house counsel from the firm’s clients. The court stated that the exception to the usual rule that privileges attorney-client communications that such courts have recognized represents the “better rule,” which it suggested this court should adopt. Crimson defends the trial court’s assessment, contending that the “vast majority of courts” have adopted the exception.

What is commonly referred to as the “fiduciary exception” to the attorney-client privilege is a judicially created rule that originated in English trust cases in the mid-to late-nineteenth century. See, e.g., Wynne v. Humberston, 27 Beav 421, 423–24, 54 Eng Rep 165, 166 (1858). The rule was that a trustee who obtained legal advice concerning the administration of the trust was required to disclose that advice to beneficiaries of that trust. The attorney-client privilege was held not to apply between the trustee and the attorney because of the attorney’s fiduciary relationship with the beneficiaries, for whose benefit the advice presumably was obtained. Id.

The rule found some acceptance among American courts in the 1970s. See, e.g., Garner v. Woflinbarger, 430 F.2d 1093, 1101–04 (5th Cir.1970) (discussing whether privilege attaches to communications between corporate management and corporate counsel in lawsuit brought by stockholders); Riggs Nat. Bank of Washington, D.C. v. Zimmer, 355 A.2d 709 (Del.Ch.1976) (discussing whether attorney-client privilege bars disclosure by trustee to trust beneficiary of legal memoranda prepared by lawyer at trustee’s request). The reasoning has been extended to circumstances other than trusts in subsequent cases—in particular, to cases in which a lawyer claims a privilege as to communications with in-house counsel. A number of courts have adopted the rule that a law firm cannot assert the attorney-client privilege against a current client when self-representation would create a conflict of interest with that client. See, e.g., Sonicblue Inc. v. Portside Growth & Opportunity Fund, 2008 Bankr.LEXIS 181 (where conflicting duties to firm’s lawyers and current outside client of firm exist, “the law firm’s right to claim privilege must give way to the interest in protecting current clients who may be harmed by the conflict.”); Thelen, Reid & Priest LLP v. Marland, 2007 WL 578989, 2007 U.S. Dist. LEXIS 17482 (N.D.Cal.2007) (law firm’s fiduciary obligations to client did not allow it to protect internal communications about client); Koen Book Distribrs. v. Powell, Trachtman, Logan, Carriie, Bowman & Lombardo, P.C., 212 F.R.D. 283, 286 (E.D.Pa.2002) (attorney-client privilege not applicable in context of conflict with current client because firm’s fiduciary duty to outside client was “paramount to its own interest”); In re Sunrise Securities Litigation, 130 F.R.D. 560 (E.D.Pa.1989) (consultation with in-house counsel created conflict of interest for firm that vitiated attorney-client privilege that otherwise would attach to intra-firm communications).

Other courts, however, have declined to adopt the fiduciary exception to the attorney-client privilege. Some have done so on the ground that they are not persuaded by the reasoning offered in support of the exception. See, e.g., St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, PC, 293 Ga. 419, 425, 746 S.E.2d 98, 105–06 (2013) (“[T]he potential existence of an imputed conflict of interest between in-house counsel and the firm client is not a persuasive basis for abrogating the attorney[’]s client privilege between in-house counsel and the firm[’]s attorneys.”); RFF Family Partnership, LP v. Burns & Levinson, LLP, 465 Mass. 702, 716, 991 N.E.2d 1066, 1076 (2013) (“[A] client is not entitled to revelation of the law firm’s privileged communications with in-house or outside counsel * * * if those communications were conducted for the law firm’s own defense against the client’s adverse claims.”); Garvy v. Seyfarth Shaw LLP, 359 Ill. Dec. 202, 966 N.E.2d 523, 536 (Ill.App.2012) (“Illinois has not adopted the fiduciary-duty exception to the attorney-client privilege. The cases relied on * * * do not persuade us to create new law in Illinois by adopting it here.”).

Others have rejected it on the ground that, because the attorney-client privilege is stated in a legislatively adopted evidence code, courts lack authority to create such ad hoc exceptions to it. See, e.g., Wells Fargo Bank v. Superior Court, 22 Cal.4th 201, 206, 91 Cal.Rptr.2d 716, 990 P.2d 591, 594 (2000) (rejecting fiduciary exception because “[t]he privileges set out in the Evidence Code are legislative creations; the courts of this state have no power to expand them or to recognize implied exceptions”); Estate of Barbano v. White, 800 N.Y.S.2d 345, 6 Misc.3d 1029, 2004 N.Y.Misc. LEXIS 3016 (N.Y.Sup.2004) (noting that fiduciary exception had been largely eliminated by legislative amendments to evidence code).

In that regard, it bears emphasis that, among the courts that have adopted the fiduciary exception, most are not governed by a legislatively adopted privilege; most of the cases adopting the exception are federal. See Wells Fargo Bank, 22 Cal.4th at 208, 91 Cal.Rptr.2d 716, 990 P.2d at 595 (so noting). Under federal law, the attorney-client privilege is recognized as judge-made and, as a result, is subject to judge-made exceptions. See generally Christopher B. Mueller and Laird C. Kirkpatrick, Federal Evidence § 5:1, 405 (3d ed 2007) (“Congress decided to leave privilege law where it was, and yet without freezing the evolution of the common law relating to privileges.”); see also Trammel v. U.S., 445 U.S. 40, 47, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980) (federal rules allow courts to develop privilege law “on a case-by-case basis”). Indeed, among federal courts addressing the issue as a matter of state law, the result has not been as uniform as Crimson suggests. See, e.g., TattleTale Alarm Systems, Inc. v. Calfee, Halter & Griswold, 2011 WL 382627 (S.D.Ohio 2011) (applying Ohio law, declining to adopt fiduciary exception); Murphy v. Gorman, 271 F.R.D. 296, 318–19 (D.N.M.2010) (applying New Mexico law, declining to adopt fiduciary exception because of lack of authority to recognize exceptions not listed in state evidence code).
With the foregoing in mind, we turn to the question whether to recognize a fiduciary exception to the attorney-client privilege set out in OEC 503. We begin by recalling that OEC 503 is a statute, enacted into law by the legislature. Accordingly, the scope of the privilege—as well as any exceptions to it—is a matter of legislative intent. See, e.g., Serrano, 346 Or. at 318, 210 P.3d 892 (scope of evidentiary privilege and its exceptions governed by ordinary principles of statutory construction).

In some cases, discerning the legislature’s intentions with respect to the scope of exceptions is straightforward. When, for example, statutory lists of conditions or exceptions are preceded by the phrase “including, but not limited to,” courts readily acknowledge that such legislation is not exhaustive. See State v. Kurtz, 350 Or. 65, 75, 249 P.3d 1271 (2011) (“statutory terms such as ‘* * * including but not limited to’ * * * convey an intent that an accompanying list of examples be read in a nonexclusive sense”).

In other cases, legislation may set out a rule, but say nothing one way or the other about exceptions. The historical context of the enactment nevertheless may make clear that the legislature did not intend to foreclose the courts from adopting them. See Hatley v. Stafford, 284 Or. 523, 526 n. 1, 588 P.2d 603 (1978) (holding that the legislature, in adopting the parol evidence rule without mention of any exceptions, intended to codify the existing common-rule, but not to preclude judicial recognition of exceptions to it).

In this case, OEC 503(4) enumerates five circumstances in which “[t]here is no privilege under this section.” The rule says nothing about the authority of the courts to add to those five exceptions. To the contrary, by taking the trouble to enumerate five different circumstances in which there is no privilege, the legislature fairly may be understood to have intended to imply that no others are to be recognized. That much follows from the application of the familiar interpretive principle of expressio unius est exclusio alterius (the expression of one thing implies the exclusion of others). See, e.g., Waddell v. Anchor Hocking, Inc., 330 Or. 376, 381–82, 8 P.3d 200 (2000) (applying canon to text of rule of civil procedure); Fisher Broadcasting, Inc. v. Dept. of Rev., 321 Or. 341, 353, 898 P.2d 1333 (1995) (applying canon to text of statute).

Of course, care must be taken in applying that principle. The mere expression of one thing does not necessarily imply the exclusion of all others. A sign outside a restaurant stating “No dogs allowed” cannot be taken to mean that any and all other creatures are allowed—including, for example, elephants, tigers, and poisonous reptiles. The expressio unius principle is simply one of inference. And the strength of the inference will depend on the circumstances. For example, the longer the list of enumerated items and the greater the specificity with which they are stated, the stronger the inference that the legislature intended the list to be exhaustive. See generally Antonin Scalia and Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 108 (2012) (“The more specific the enumeration, the greater the force of the canon.”). Also relevant is whether something is stated in one portion of the statute, but excluded in another; the fact that the legislature took the trouble to include a provision in one part of the statute strongly supports the inference that any exclusion elsewhere in the statute is intentional. Norman Singer and J.D. Shambie Singer, 2A Sutherland Statutes and Statutory Construction § 47:23, 417 (7th ed 2007) (“The force of the maxim is strengthened where a thing is provided in one part of the statute and omitted in another.”).

In this case, the negative inference is especially strong for three reasons. First, the enumerated list is not short or general. OEC 503(4) sets out a list of five different circumstances in which the privilege does not apply and spells them out in some detail.

Second, the Oregon Evidence Code includes other evidentiary privileges that use the same basic drafting convention of stating the privilege and then listing exceptions to the privilege. In two cases, however, the list of exceptions is preceded by a statement that the list is not exclusive. Thus, for example, OEC 504(2) sets forth the psychotherapist-patient privilege. OEC 504(4) then lists four exceptions to that privilege, preceded by the statement that “[t]he following is a nonexclusive list of limits on the privilege granted by this section.” (Emphasis added.) Similarly, OEC 504–1(2) recognizes a physician-patient privilege. It is followed by OEC 504–1(4), which lists three exceptions to the privilege, preceded by the statement that “[t]he following is a nonexclusive list of limits on the privilege granted by this section.” (Emphasis added.) In the context of those rules, the fact that OEC 503(4) enumerates a list of exceptions without the statement that the list is nonexclusive appears to confirm the negative inference that the list was intended to be exhaustive.

Third, this court has read a similarly worded list of exceptions to another privilege recognized by the Oregon Evidence Code as precluding the recognition of exceptions not included in the code. OEC 505(2) and (3) recognize a husband-wife evidentiary privilege. The statement of the privilege is followed by OEC 505(4), which lists three exceptions under which “[t]here is no privilege under this section.” Those three exceptions are: (1) in all criminal actions in which one spouse is charged with committing or attempting to commit any of several listed offenses against the other spouse; (2) as to matters occurring before the marriage; and (3) in any civil action in which the spouses are adverse parties. Id. In Serrano, a murder case, the state offered the inculpatory testimony of the defendant’s wife concerning things that the defendant had said in the course of conversations about the dissolution of their marriage. The defendant objected on the basis of the husband-wife privilege. The state argued that the privilege did not apply. The state reasoned that, because the historical purpose of the privilege was to preserve marriages, communications regarding the dissolution of a marriage should not be privileged. 346 Or. at 319–21, 210 P.3d 892. This court rejected the state’s argument, noting that “the legislature set out three specific exceptions to the marital privileges, but did not provide for any ‘marital health’ exception.” Id. at 320, 210 P.3d 892. In the court’s view, “the omission of a ‘marital health’ exception in OEC 505(4) is decisive.” Id. at 321, 210 P.3d 892.

Crimson insists that there is evidence that the legislature did not intend OEC 503(4) as a complete listing of exceptions to the privilege. In support, Crimson relies on legislature commentary to OEC 503(4), which, after describing the five enumerated exceptions to the attorney-client privilege, adds:

Real Estate and Land Use Spring Forum 2017
“Oregon law recognizes two other exceptions to the lawyer-client privilege—an exception for assets left with the attorney, State ex rel. Hardy v. Gleason, 19 Or. 159, 23 P. 817 (1890), and an exception for the fact of employment and name and address of the client, Cole v. Johnson, 103 Or. 319, 205 P. 282 (1922); In re Illidge, 162 Or. 393, 91 P.2d 1100 (1939). By the adoption of Rule 503, the Legislative Assembly does not intend to affect these latter exceptions.”

OEC 503 Commentary (1981). Crimson asserts that, because the commentary adverts to two specific “exceptions” that are not enumerated in the rule, the rule must contemplate the recognition of other exceptions.

We are not persuaded. First, the commentary recognizes two specific, unenumerated exceptions, and no others. It does not necessarily follow from the stated intention not to eliminate the two exceptions that the legislature also intended to recognize other exceptions. In fact, it is at least equally plausible that the commentary was intended to recognize only the two exceptions that it explicitly mentions. Second, and in any event, the two “exceptions” that are identified in the commentary are not really exceptions at all, but circumstances that this court has found are not within the scope of the attorney-client privilege in the first place. See In re Illidge, 162 Or. 393, 405, 91 P.2d 1100 (1939) (“The privilege itself was to extend only to communications between a client and an attorney who had been retained. The name or identity of the client was not the confidence which the privilege was designed to protect.”); State ex rel. Hardy v. Gleason, 19 Or. 159, 162, 23 P. 817 (1890) (the client already having admitted that he possessed certain assets, answers to questions about the disposition of those assets left with an attorney “were not privileged”).

Crimson argues that failing to recognize an exception for these circumstances would be “absurd” because it would allow a lawyer to breach his or her duty of loyalty to the client and then “compound the conflicts of interest by communicating with other lawyers in his firm that not only indirectly through imputation represent the client, but actually and directly represent the client on the very same matter, and then shield those internal communications from disclosure to the client.” But, once again, Crimson conflates ethical considerations with the separate issue of the scope of the privilege set out in OEC 503.

This court’s opinion in State v. Miller, 300 Or. 203, 709 P.2d 225 (1985), is instructive on the distinction between rules of professional conduct and rules of evidence. In that case, the defendant killed another person and, shortly after, telephoned a psychiatrist, to whom he confessed. The psychiatrist later disclosed to police that the defendant had told her that he had murdered someone. The defendant moved to suppress the evidence, asserting the psychotherapist-patient privilege recognized in OEC 504. The trial court recognized the privilege, but rejected the application in the circumstances, based, apparently, on a recognition that psychotherapists have an ethical obligation to divulge a patient’s confidences when necessary to aid the victim of a patient’s violence. Id. at 215, 709 P.2d 225.

This court rejected the trial court’s reasoning. The court held that the conversations between the defendant and the psychiatrist were plainly subject to the evidentiary privilege. Id. It then noted that OEC 504 specifically included exceptions to that privilege, but that there was no such exception based on the therapist’s ethical obligation to divulge patient confidence under the circumstances of that case. Id. at 216, 709 P.2d 225. “It is important to distinguish,” the court explained,

“between the evidentiary privilege which is claimed by a patient, or a psychotherapist [o]n behalf of a patient, to prevent disclosure of confidential information at trial, and the discretionary authority of a public health care provider or any ethical obligation that a licensed psychotherapist may have to notify the police or other proper authority in order to aid a victim or warn of future dangerousness.”

Id. at 215–16, 709 P.2d 225 (emphasis in original).

The same reasoning applies in this case. As in Miller, rules of professional conduct may require or prohibit certain conduct, and the breach of those rules may lead to disciplinary proceedings. But that has no bearing on the interpretation or application of a rule of evidence that clearly applies.

We conclude that OEC 503(4) was intended as a complete enumeration of the exceptions to the attorney-client privilege. Insofar as that list does not include a “fiduciary exception,” that exception does not exist in Oregon, and the trial court erred in relying on that exception to compel production of communications that otherwise fell within the general scope of the privilege. It follows that the trial court’s order must be vacated to the extent that it orders production of communications that were otherwise within the privilege. The trial court remains free, however, to order production of the three communications that it found were not within the general scope of the privilege because, in essence, those communications were not made for the purpose of facilitating the rendition of professional legal services to DWT.

Peremptory writ to issue.

PORT OF PORTLAND, a port district, Plaintiff-Respondent,
v.
OREGON CENTER FOR ENVIRONMENTAL HEALTH, a domestic nonprofit corporation; and Jane H. Harris, Defendants-Appellants.

060606786; A137929.

Court of Appeals of Oregon.


Maureen Leonard argued the cause and filed the briefs for appellants.
William F. Gary, Eugene, argued the cause for respondent. With him on the brief were James E. Mountain, Jr., C. Robert Steringer, and Harrang Long Gary Rudnick, P.C.

Before SCHUMAN, Presiding Judge, and WOLLHEIM, Judge, and ORTEGA, Judge.

ORTEGA, J.

Defendants appeal a general judgment that granted declaratory relief to plaintiff and declared material exempt from disclosure under the Inspection of Public Records Law, ORS 192.410 to 192.505.

The material at issue is, in essence, a joint defense agreement between several entities that were designated by the federal Environmental Protection Agency (EPA) as potentially responsible parties (PRPs) for the cleanup of an area in the lower Willamette River commonly referred to as the Portland Harbor Superfund Site. Defendants requested that plaintiff Port of Portland (Port) disclose the agreement pursuant to the public records law. The trial court determined that the agreement was exempt from disclosure under the general exemption for material “otherwise privileged” under Oregon law. Specifically, the trial court concluded that the agreement fell within Oregon’s attorney-client privilege for confidential communications among parties “in a matter of common interest.” We affirm.

I. FACTS

The following facts are undisputed. In 2000, the EPA listed a portion of the lower Willamette River on the National Priorities List under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). CERCLA mandates a remedial investigation and feasibility study (investigation) of listed sites, which serves to assess site conditions and evaluate alternatives to the extent necessary to select a remedy for the pollution. 40 C.F.R. § 300.430(a)(2) (2008). The EPA identified numerous entities, including the Port, as PRPs and sent letters notifying those parties of their potential liability. Subsequently, the Port and several of the other PRPs formed the Lower Willamette Group (LWG or group) and through each group member’s counsel negotiated and entered into the agreement that is at issue here.

Although the specific contents of the agreement remain undisclosed to defendants and the general public, the parties acknowledge that the agreement serves at least three purposes: to implement a coordinated approach to the investigation, to prepare for expected litigation, and to set forth a formula by which costs associated with the investigation and litigation will be shared. The LWG also provided the agreement to other PRPs and encouraged them to join the group and share in the costs of the investigation. The LWG required each entity that received the agreement to first sign a confidentiality agreement, which prohibited that entity from disclosing the terms of the agreement or terms of membership in the group to any outside entity. Some of the entities that received the agreement ultimately did not join in the group or sign the agreement. In addition, the EPA sent correspondence to certain PRPs that had not joined the LWG, in which the EPA informed those parties that the investigation had begun, and urged those PRPs to join in the LWG’s efforts.

Defendants, a public interest group and its executive director, sought disclosure of the agreement through a public records request. The Port refused to disclose the agreement, claiming that it was exempt from disclosure under several provisions of OEC 503, including the exemptions for records prohibited from disclosure by federal law, Oregon’s attorney-client privilege, and the work-product doctrine. In response, defendants petitioned the Multnomah County District Attorney for an order that would require disclosure of the agreement. See ORS 192.460(1). The district attorney ordered the Port to disclose the agreement.1 The Port refused,

1 Before defendants filed their public records request, the Oregonian sought disclosure of the agreement from the Port. The Port refused to disclose the agreement, and the Oregonian petitioned the Multnomah County District Attorney for an order requiring disclosure. The district attorney granted the petition. Although the record in this case does not reflect how that issue was finally resolved, it is clear that the Port did not disclose the agreement. Nevertheless, in the order requiring disclosure of the agreement to defendants, the district attorney relied on the reasoning in the order granting the Oregonian’s petition.
and filed a complaint in Multnomah County Circuit Court seeking a declaratory judgment that the agreement is exempt from disclosure. Eventually, the parties filed cross-motions for summary judgment.

In its motion for summary judgment, the Port maintained that the agreement is exempt from disclosure under ORS 192.502(8) as a record protected under federal law, and under ORS 192.502(9) pursuant to Oregon’s attorney-client privilege or work-product doctrine. Defendants’ cross-motion for summary judgment essentially asked the court to rule that the Port’s claimed exemptions were barred as a matter of law.

After oral argument and the trial court’s in camera review of the agreement, the court ruled that the agreement was protected by Oregon’s attorney-client privilege because all of the PRPs, including the signatories to the agreement, had a common interest in the subject of the agreement-the investigation and clean-up of the harbor. The court concluded that the agreement and any communications leading up to the agreement were made for the purposes of facilitating the rendition of legal services, and that the circulation of the agreement to PRPs outside the LWG did not waive the privilege because the LWG took care to preserve the agreement’s confidentiality. The court then entered a general judgment granting declaratory relief to the Port. Defendants appeal, assigning error to the court’s grant of summary judgment and its denial of defendants’ cross-motion for summary judgment.

II. ANALYSIS

In a public records case, we review a grant of summary judgment on cross-motions to determine if there are any disputed issues of material fact and if either party was entitled to prevail as a matter of law. Hood Technology Corp. v. OR-OSHA, 168 Or.App. 293, 295, 7 P.3d 564 (2000); see also Kluge v. Oregon State Bar, 172 Or.App. 452, 457, 19 P.3d 938 (2001). If both the granting of one motion and the denial of the other are assigned as error, then both rulings are subject to review. Cochran v. Connell, 53 Or.App. 933, 939-40, 632 P.2d 1385, rev. den., 292 Or. 109, 642 P.2d 311 (1981). Although we review the record in the light most favorable to the nonmoving party, Jones v. General Motors Corp., 325 Or. 404, 420, 939 P.2d 608 (1997); ORCP 47 C, our determination of whether the agreement at issue in this case is privileged information is a question of law that requires us to examine the agreement.

On its face, this appeal implicates an inherent tension between the policies driving Oregon’s public records law and the attorney-client privilege. The public records law encapsulates the “strong and enduring policy that public records and governmental activities be open to the public.” Jordan v. MVD, 308 Or. 433, 438, 781 P.2d 1203 (1989). Accordingly, we narrowly construe any exemptions from disclosure and the public body asserting the exemption has the burden of sustaining that action. Kluge, 172 Or.App. at 455, 19 P.3d 938; see also ORS 192.490(1).

On the other hand, the attorney-client privilege promotes the full disclosure of information by clients to their attorneys by protecting that communication. In doing so, the privilege invokes the principle that lawyers can “act effectively only when fully advised of the facts by the parties whom they represent,” and maintains that a client’s confidential communications to his lawyer cannot be revealed without his permission. State v. Jancsek, 302 Or. 270, 274, 730 P.2d 14 (1986).

Because the public records law includes an exemption for attorney-client privileged communications, we must proceed in light of the general rule that favors disclosure of public records, but we recognize that the purposes of the attorney-client privilege likewise must be upheld, because the privilege promotes “broader public interests in the observance of law and administration of justice[,]” and that “sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.” State ex rel OHSU v. Haas, 325 Or. 492, 500, 942 P.2d 261 (1997) (quoting Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981)).

We begin with the language of the applicable statutes. ORS 192.420(1) provides that “[e]very person has a right to inspect any public record of a public body * * * except as otherwise expressly provided by ORS 192.501 to 192.505.” ORS 192.502(9)(a) exempts from disclosure “[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.” As relevant to this appeal, OEC 503(2) provides:

“A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

* * * * * *

“(c) By the client or the client’s lawyer to a lawyer representing another in a matter of common interest[.]”

In general, whether a communication is protected by the attorney-client privilege depends on whether the communication is a “confidential communication” under OEC 503(1)(b), whether the communication is made for the purpose of facilitating the rendition of professional legal services to the client as provided in OEC 503(2), and whether the communication is between persons described in OEC 503(2)(a) through (e). OHSU, 325 Or. at 501, 942 P.2d 261. In this case, the communication is claimed to be between parties

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2 OEC 503(1)(b) defines “[c]onfidential communication” as “a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.”

3 OEC 503(2)(a) through (e) protects confidential communications

“(a) Between the client or the client’s representative and the client’s lawyer or a representative of the lawyer;

(b) Between the client’s lawyer and the lawyer’s representative;

(c) By the client or the client’s lawyer to a lawyer representing another in a matter of common interest;

(d) Between representatives of the client or between the client and a representative of the client; or

(e) By the lawyer representing the client.”
in a matter of common interest.” OEC 503(2)(c). Accordingly, we must decide if the agreement is a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client, and if the communication occurred between the Port or the Port’s lawyer and lawyers representing others in a matter of common interest.

Initially, we conclude that the agreement is a confidential communication within the meaning of OEC 503(2). The agreement was prepared by attorneys for their clients and sent to counsel for other members of the group. Although an attorney cannot render a document attorney-client privileged simply by receiving it, where the document memorializes confidential communications and consists of those communications, the document itself can constitute a confidential communication. Cf. State v. Riddle, 330 Or. 471, 478, 8 P.3d 980 (2000) (stating that expert opinions not derived from a communication between the expert and the client or attorney were not privileged, and a communication is an interchange of thoughts or opinions). The agreement in this case was drafted by the attorneys for their clients and negotiated through counsel. It also represents the sum of negotiations and communications between the LWG members’ attorneys and memorializes the common approach agreed to by the group for the investigation and potential litigation.

The application of the privilege also depends on “the intent of the parties to shield the communication from disclosure and the purpose for which the communication is made.” State v. Ogle, 297 Or. 84, 87, 682 P.2d 267 (1984). The undisputed facts demonstrate that the Port and the other members of the LWG intended to maintain the confidentiality of the agreement. As the trial court acknowledged in its order, terms within the agreement demonstrate that the group intended to keep confidential not only the agreement’s terms, but also information gathered pursuant to those terms. The agreement was only disclosed to other PRPs and such disclosures were made only after the receiving party executed a separate written confidentiality agreement. That is, every party that received the agreement agreed to keep the terms of the agreement confidential regardless of whether they signed the agreement or not. Further, each PRP agreed to return or destroy all copies of the agreement if it determined that it did not want to participate in the group or sign the agreement.

Next, we address whether the agreement was made for the purpose of facilitating the rendition of professional legal services. In OHISU, the Supreme Court recognized that a communication is made for the purpose of facilitating the rendition of legal services if it makes it easier for an entity to make use of legal advice or services. 325 Or. at 502, 942 P.2d 261. There, the court determined that “[a] lawyer who conducts an internal investigation concerning a client’s potential legal liability, provides the client with a written report on the results of that investigation, and advises the client on ways to resolve problems uncovered in the investigation renders professional legal services to the client.” Id. at 501-02, 942 P.2d 261. Similarly, the court concluded that a statement made by a faculty member to other employees about the report that resulted from the investigation was attorney-client privileged because it was necessary to inform some individual employees of the content of the legal advice so that the employees could aid in carrying it out. Id. at 502, 942 P.2d 261.

Here, defendants focus their attention on the cost allocation information contained in the agreement. In short, defendants contend that the cost allocation information does not involve the rendition of legal advice because that information does not relate to any legal strategy or defense. In support, defendants cite cases from other jurisdictions that have held that a fee agreement, the amount of a fee charged, or the general nature of services performed by an attorney are not subject to the attorney-client privilege. Alternatively, defendants characterize the cost allocation information in the agreement as purely business or “policy” advice, so as to remove it from the cloak of privilege.

We conclude that the agreement facilitates the rendition of professional legal services, including those provisions that set forth the cost allocation among the group. As an initial matter, defendants’ argument that the cost allocation information is not legal advice fails to recognize that OEC 503 does not require that privileged information be legal advice, only that it be made for the purpose of facilitating the rendition of professional legal services. Organization of the LWG and the negotiation and drafting of the agreement by the group members’ attorneys was triggered by the EPA’s liability notification letters. The agreement itself represents a pact between members of the LWG to jointly undertake an investigation that is an initial step in the CERCLA process. The agreement facilitates the joint investigation of the harbor with an eye towards preparing for and defending against future litigation. The allocation of costs in the agreement relates directly to the LWG’s ability to investigate the pollution. That investigation and the anticipated litigation of liability for the pollution would certainly require the rendition of legal services, and the agreement, including the cost allocation information, will help to facilitate those actions. The potential for future litigation is well documented in the record, including correspondence from the EPA and the Oregon Department of Environmental Quality to the Port and other PRPs. Accordingly, the agreement is a confidential communication “made for the purposes of facilitating the rendition of professional legal services.” Our conclusion that the entire agreement is a confidential communication also disposes of defendants’ argument that the Port should separate exempt and nonexempt material under ORS 192.505.

Finally, we discuss defendants’ argument that the agreement does not fit within the intended meaning of OEC 503(2)(c) because the Port and the other PRPs with which the agreement was shared do not have a “common interest” sufficient to apply the attorney-client privilege. Defendants contend that there is no common interest in this case and, even if there were, any privilege was waived when the Port disclosed the agreement to other PRPs that ultimately did not sign the agreement. Defendants also point out that the membership of the group has fluctuated over time. Finally, defendants assert that the EPA sent letters to PRPs that were not part of

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4 We do not suggest that the attorney-client privilege is limited to communications made in the context of pending litigation. See Klamath County School Dist. v. Teamey, 207 Or.App. 250, 260, 140 P.3d 1152, rev. den., 342 Or. 46, 148 P.3d 915 (2006).
the group, and those letters demonstrated that the EPA participated in discussions related to the agreement that would constitute a waiver of any existing privilege.

Oregon appellate courts have not yet addressed the attorney-client privilege in the context of “matter[s] of common interest.” As such, the question presented poses an issue of statutory interpretation, and our task is to determine what the legislature intended. PGE v. Bureau of Labor and Industries, 317 Or. 606, 610, 859 P.2d 1143 (1993). We examine the text and context of the statutory language at issue, and consider any legislative history offered by the parties. State v. Gaines, 346 Or. 160, 172, 206 P.3d 1042 (2009). If necessary, we will consider relevant canons of construction. Friends of Yamhill County v. Yamhill County, 229 Or.App. 188, 192, 211 P.3d 297 (2009).

Defendants ask us to narrowly interpret the common interest privilege-contending, essentially, that parties claiming the privilege based on a common interest must have an “identical legal, and not solely commercial” interest. Under that interpretation, defendants contend that, because the Port acknowledged that some members of the LWG may end up litigating against each other, they cannot have a common interest. Defendants also define the interest claimed by the Port as “fairly sharing clean up costs” and dispute that such an interest is subject to the attorney-client privilege.

The Port argues that, to the contrary, the “community of interest” depends on whether the parties have a similar legal interest with respect to the subject of the privileged communication. Thus, the Port contends that, even if the parties have both adverse and common interests, the privilege attaches if the particular communication relates to the common interest.

We begin our analysis with the statutory phrase “common interest.” “[W]ords of common usage typically should be given their plain, natural, and ordinary meaning.” PGE, 317 Or. at 611, 859 P.2d 1143. The plain meaning of the language in OEC 503(2)(c) suggests that the interest between parties must be shared, but not necessarily identical. In this context, “common” means “of or relating to a community at large[,]” or “possessed or manifested by more than one individual[,]” or “marked by or resulting from joint action of two or more parties[.]” Webster’s Third New Int’l Dictionary 458 (unabridged ed 2002). In short, nothing within the relevant definitions of “common” lends support to defendants’ narrow construction of the statute.

Further, the legislative history supports a legislative intent in line with the plain meaning of the statutory language. The Legislative Commentary to OEC 503(2)(c) explained:

“In a case in which lawyers represent different clients who have a common interest, Rule 503 allows each client a privilege as to the client’s own statements. Thus, in ‘joint defense’ or ‘pooled information’ situations, if all clients resist disclosure, none will occur. However, if for some reason one client wishes to disclose the client’s own statements made at joint conference, the person is permitted to do so. No privilege applies where there is no common interest to be promoted by joint consultation, and the parties, therefore, meet on a purely adversary basis.”

Legislative Commentary to OEC 503, reprinted in Laird C. Kirkpatrick, Oregon Evidence § 503.02 (5th ed 2007). The commentary suggests that, in a “pooled information” case-like we have here-even if there are some adversarial aspects to a relationship between the parties, the privilege can apply as long as there is a common interest promoted by joint consultation. Some adversity is acceptable, but the key is that the communication furthers a common interest.

The Port has a common interest with the other members of the LWG, as well as the other PRPs with which the agreement was shared. Although defendants attempt to narrowly define the interest at stake as “fairly sharing the clean up costs,” the interest at issue is broader than that. Instead, we view the LWG members’ shared interest in the context of CERCLA and the anticipated litigation surrounding the cleanup of the harbor. As such, the undisputed facts reflect that all of the entities that have received the agreement were issued liability notice letters by the EPA that implicate them in the investigation and clean-up of the harbor. In addition, the PRPs share common adversities in the anticipated litigation under CERCLA, including the federal government, the State of Oregon, and the regulatory agencies associated with each. Accordingly, in this case, the Port shares a sufficiently similar interest with the other PRPs to qualify under the common interest privilege. In addition, the LWG has attempted to promote that common interest through the terms of the agreement.

Further, the LWG’s sharing of the agreement with other PRPs who ultimately decided not to join the LWG or sign the agreement did nothing to affect the application of the attorney-client privilege in this case. As we previously discussed, the Port made specific attempts to ensure that the confidentiality of the agreement was preserved even by those that did not join the group. We have already determined that the agreement is a confidential communication, and the attorney-client privilege applies if there is a confidential communication made for the purpose of facilitating the rendition of professional legal services between a client or client’s lawyer and the lawyer of another in a matter of common interest. All three elements are present in this case. Whether an entity

5 In support of their argument, plaintiffs cite other jurisdictions that have similarly limited the common-interest component of the attorney-client privilege. See, e.g., Katz v. AT & T Corp., 191 F.R.D. 433, 437 (E.D.Pa.2000) (concluding that, to claim the common-interest privilege, the parties had to prove an “identical legal, and not solely commercial, interest”); Allendale Mut. Ins. v. Bull Data Systems, 152 F.R.D. 132, 140 (N.D.Ill.1993) (stating that a common interest “must be identical, not similar, and be legal, not solely commercial”). Nevertheless, there are a number of jurisdictions that have taken a more expansive view of the privilege, holding that the common interest privilege is not limited to those perfectly aligned on one side. See, e.g., United States v. McPartlin, 595 F.2d 1321, 1336-37 (7th Cir.), cert. den., 444 U.S. 833, 100 S.Ct. 65, 62 L.Ed.2d 43 (1979) (concluding that the privilege is not limited to situations where the parties’ positions are compatible in all respects, but protects the “pooling of information” for any common defense purpose); Hanover Ins. v. Rapo & Jepsen Ins. Services, 449 Mass. 609, 618, 870 N.E.2d 1105, 1113 (2007) (rejecting argument that the “requisite interests must be identical” and concluding that parties will rarely have identical interests). We do not find either line of cases particularly helpful to our disposition of the case before us.
ultimately signed on to the agreement does not matter, as long as the members of the LWG had a common interest at the time the agreement was shared, and the confidential communication attempted to further that interest. In this case, the potential liability of each PRP provided that interest.

Because we have concluded that the trial court did not err by granting summary judgment to the Port, we need not address defendants’ assignment of error to the trial court’s ruling that denied defendants’ cross-motion for summary judgment.

Affirmed.

MATTHEW A. NEWMAN, RANDY NEWMAN and MARLA NEWMAN, Respondents,

v.

HIGHLAND SCHOOL DISTRICT NO. 203, Petitioner.

NO. 90194-5

SUPREME COURT OF THE STATE OF WASHINGTON

October 20, 2016

EN BANC

STEPHENS, J.—Highland High School quarterback Matthew Newman suffered a permanent brain injury at a football game in 2009, one day after he allegedly sustained a head injury at football practice. Three years later, Newman and his parents (collectively Newman) sued Highland School District No. 203 (Highland) for negligence. Before trial, Highland’s counsel interviewed several former coaches and appeared on their behalf at their depositions. Newman moved to disqualify Highland’s counsel, asserting a conflict of interest. The superior court denied the motion but ruled that Highland’s counsel “may not represent non-employee witness[es] in the future.” Clerk’s Papers (CP) at 636. Newman then sought discovery concerning communications between Highland and the former coaches during time periods when the former coaches were unrepresented by Highland’s counsel. Highland responded with a motion for a protective order, arguing its attorney-client privilege shielded counsel’s communications with the former coaches. The trial court denied the motion, and Highland appealed.

At issue is whether postemployment communications between former employees and corporate counsel should be treated the same as communications with current employees for purposes of applying the corporate attorney-client privilege. Although we follow a flexible approach to application of the attorney-client privilege in the corporate context, we hold that the privilege does not broadly shield counsel’s postemployment communications with former employees. The superior court properly denied Highland’s motion for a protective order. We affirm the lower court and lift the temporary stay of discovery.

**FACTS AND PROCEDURAL HISTORY**

Matthew Newman suffered a permanent brain injury during a football game on September 18, 2009. Newman sued Highland for negligence in violation of the Lystedt law, RCW 28A.600.190, which requires the removal of a student athlete from competition or practice if he or she is suspected of having a concussion. Newman alleges that Matthew suffered a head injury at football practice the day before the September 18 game, and that Highland coaches permitted him to play in the game even though he exhibited symptoms of a concussion.

In preparing for trial, Newman’s counsel deposed the entire football coaching staff employed at the time of Newman’s injury, including coaches who were no longer employed by Highland. At the depositions, Highland’s counsel indicated that he had interviewed the former coaches before their individual depositions, and was appearing on their behalf for purposes of their depositions.

Newman moved to disqualify Highland’s counsel from representing the former coaches, claiming a conflict of interest under Rule of Professional Conduct (RPC) 1.7. The superior court denied the motion but ruled that Highland’s counsel “may not represent non-employee witness[es] in the future.” CP at 636.

Newman then sought discovery concerning communications between Highland’s counsel and its former coaches. Highland moved for a protective order to shield those communications, asserting attorney-client privilege. The superior court denied the protective order and directed Highland to respond to Newman’s discovery requests. The superior court ordered Highland’s counsel to disclose “exactly when defense counsel represented each former employee,” and barred defense counsel from asserting the attorney-client privilege with respect to communications outside the deposition representation. CP at 70.1

Highland sought discretionary review of the superior court’s discovery order, which the Court of Appeals denied. This court subsequently granted discretionary review and entered a temporary stay of discovery. Newman v. Highland Sch. Dist. No. 203, 180 Wn.2d 1031, 332 P.3d 985 (2014).

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1 Newman did not appeal the trial court’s order denying disqualification of Highland’s counsel from representing the former coaches at their depositions, and does not challenge the assertion of attorney-client privilege during this period. Nor do the parties dispute that communications with counsel during the coaches’ employment are protected by the attorney-client privilege. This notion of a “durable privilege” is well recognized and does not appear to be a challenge at this issue here because the relevant communications occurred after the coaches left Highland’s employment. See In re Coordinated Pretrial Proceedings in Petrol. Prods. Litig., 658 F.2d 1355, 1361 n.7 (9th Cir. 1981) (recognizing that attorney-client privileged conversations “remain privileged after the employee leaves”); see also Peralta v. Cendant Corp., 190 F.R.D. 38, 41 (D. Conn. 1999) (concluding any privileged information obtained during employment remains privileged upon termination of employment).
Chapter 5—Attorney-Client Privilege, Work Product Doctrine, and Joint Defense Doctrine in Oregon

ANALYSIS

1. The Corporate Attorney-Client Privilege Does Not Shield Communications between Corporate Counsel and Former Employees

Whether the attorney-client privilege extends to postemployment communications between corporate counsel and former employees is an issue of first impression in Washington. The leading United States Supreme Court case addressing corporate attorney-client privilege, *Upjohn Co. v. United States*, expressly did not answer this question. 449 U.S. 383, 394 n.3, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981). Highland argues the flexible approach to protecting privileged communications recognized in *Upjohn* supports extending the privilege to postemployment communications with former employees. Am. Pet’t’s Br. at 23. We disagree. Because we conclude *Upjohn* does not justify applying the attorney-client privilege outside the employer-employee relationship, the trial court properly denied Highland a protective order to shield from discovery communications with former coaches who are otherwise fact witnesses in this litigation. We affirm the trial court’s decision to deny Highland’s motion for protective order, and lift the temporary stay of discovery.

We begin by recognizing that, in our open civil justice system, parties may obtain discovery regarding any unprivileged matter that is relevant to the subject matter of the pending action. CR 26(b)(1). “[T]he privilege remains an exception to the general duty to disclose.” *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41 (D. Conn. 1999) (alteration in original) (quoting 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 554 (McNaughton rev. ed. 1961)). A party claiming that otherwise discoverable information is exempt from discovery on grounds of the attorney-client privilege carries the burden of establishing entitlement to the privilege. See *Dietz v. John Doe*, 131 Wn.2d 835, 844, 935 P.2d 611 (1997).

Washington’s attorney-client privilege provides that “[a]n attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.” RCW 5.60.060(2)(a). But the attorney-client privilege does not automatically shield any conversation with any attorney. See, e.g., *Morgan v. City of Federal Way*, 166 Wn.2d 747, 755-56, 213 P.3d 596 (2009). To qualify for the privilege, communications must have been made in confidence and in the context of an attorney-client relationship. See *id.* at 755-57. It is “a narrow privilege and protects only ‘communications and advice between attorney and client.’” *Hangartner v. City of Seattle*, 151 Wn.2d 439, 452, 90 P.3d 26 (2004) (quoting *Kammerer v. W. Gear Corp.*, 96 Wn.2d 416, 421, 635 P.2d 708 (1981)). The privilege extends to corporate clients and may encompass some communications with lower level employees, as both the United States Supreme Court and this court have recognized. *Upjohn*, 449 U.S. at 396; *Wright v. Grp. Health Hosp.*, 103 Wn.2d 192, 195-96, 691 P.2d 564 (1984); *Youngs v. PeaceHealth*, 179 Wn.2d 645, 650-51, 316 P.3d 1035 (2014).

The attorney-client privilege does not shield facts from discovery, even if transmitted in communications between attorney and client. *Youngs*, 179 Wn.2d at 653 (“Facts are proper subjects of investigation and discovery, even if they are also the subject of privileged communications.”). Rather, only privileged communications themselves are protected in order “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Upjohn*, 449 U.S. at 389. The attorney-client privilege “recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client.” *Id.* However, because “the privilege sometimes results in the exclusion of evidence which is otherwise relevant and material, contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege cannot be treated as absolute; rather, it must be strictly limited to the purpose for which it exists.” *Pappas v. Holloway*, 114 Wn.2d 198, 203-04, 787 P.2d 30 (1990) (citing *Dike v. Dike*, 75 Wn.2d 1, 11, 448 P.2d 490 (1968)).

In enunciating a flexible test for determining the scope of the attorney-client privilege in the corporate setting, *Upjohn* expanded the definition of “client” to sometimes include non managerial employees. 449 U.S. at 394-95; *see also Youngs*, 179 Wn.2d at 661. The *Upjohn* Court considered several factors, including whether the communications at issue (1) were made at the direction of corporate superiors, (2) were made by corporate employees, (3) were made to corporate counsel acting as such, (4) concerned matters within the scope of the employee’s duties, (5) revealed factual information “‘not available from upper-echelon management,’” (6) revealed factual information necessary “‘to supply a basis for legal advice,’” and whether the communicating employee was sufficiently aware that (7) he was being interviewed for legal purposes, and (8) the information would be kept confidential. *Youngs*, 179 Wn.2d at 664 n.7 (quoting *Upjohn*, 449 U.S. at 394).

In denying Highland’s motion for a protective order, the superior court incorrectly stated that this court has never adopted *Upjohn*. In both *Wright* and *Youngs*, this court embraced *Upjohn’s* flexible approach to applying the attorney-client privilege in the corporate client context. *Wright*, 103 Wn.2d at 195-96; *Youngs*, 179 Wn.2d at 645. However, until today we have never considered whether *Upjohn* supports expanding the scope of the privilege to include counsel’s communications with former non managerial employees. In *Youngs*, this court relied on *Upjohn* to recognize that corporate litigants have the right to engage in confidential fact-finding and to communicate directions to employees whose conduct may embroil the corporation in disputes. *Youngs*, 179 Wn.2d at 651-52. The court in *Youngs* relied on the values underlying the attorney-client privilege to create an exception to the general prohibition on defense counsel’s ex- parte contact with the plaintiff’s treating physician, applicable when the physician is employed by the defendant. *Id.* at 662 (creating exception based on attorney-client privilege to rule established in *Loudon v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988)). But *Youngs* did not answer whether the attorney-client privilege should extend beyond termination of the employment relationship.
Today, we reject Highland’s argument that *Upjohn* and *Youngs* support a further extension of the corporate attorney-client privilege to postemployment communications with former employees. The flexible approach articulated in *Upjohn* presupposes attorney-client communications taking place within the corporate employment relationship. *Upjohn*, 449 U.S. at 389 (the purpose of the attorney-client privilege is “to encourage full and frank communication between attorneys and their clients”); *see also Youngs*, 179 Wn.2d at 661 (noting corporate employees may sometimes be corporate clients). We decline to expand the privilege to communications outside the employer-employee relationship because former employees categorically differ from current employees with respect to the concerns identified in *Upjohn* and *Youngs*.

A school district, like any organization, can act only through its constituents and agents. *See RPC 1.13 cmt. 1*. Corporate attorney-client privilege may arise when “the constituents of an organizational client communicate[] with the organization’s lawyer in that person’s organizational capacity.” *Id.* at cmt. 2; *see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73(2) (AM. LAW INST. 2000)*. An organizational client, including a governmental agency, can require its own employees to disclose facts material to their duties (with some limits not relevant here) to its counsel for investigatory or litigation purposes. *See RESTATEMENT (THIRD) OF AGENCY § 8.11 (AM. LAW INST. 2006)*.

But everything changes when employment ends. When the employer-employee relationship terminates, this generally terminates the agency relationship.2 As a result, the former employee can no longer bind the corporation and no longer owes duties of loyalty, obedience, and confidentiality to the corporation. *See id.* & cmt. d. Without an ongoing obligation between the former employee and employer that gives rise to a principal-agent relationship, a former employee is no different from other third-party fact witnesses to a lawsuit, who may be freely interviewed by either party. *See Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 305 (E.D. Mich. 2000) (“It is virtually impossible to distinguish the position of a former employee from any other third party who might have pertinent information about one or more corporate parties to a lawsuit.”) (quoting *Clark Equip. Co. v. Lift Parts Mfg. Co.*, 1985 WL 2917, at *5 (N.D. Ill. Oct. 1, 1985) (court order)).

Highland’s argument for extending the attorney-client privilege to its communications with the former coaches emphasizes that these former employees may possess vital information about matters in litigation, and that their conduct while employed may expose the corporation to vicarious liability. These concerns are not unimportant, but they do not justify expanding the attorney-client privilege beyond its purpose. The underlying purpose of the corporate attorney-client privilege is to foster full and frank communications between counsel and the client (i.e., the corporation), not its former employees. *State v. Chervenell*, 99 Wn.2d 309, 316, 662 P.2d 836 (1983). This purpose is preserved by limiting the scope of the privilege to the duration of the employer-employee relationship. *See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73(2)*.3 Upon termination of the employment relationship, the interests of employer and former employee may diverge. But the attorney-client privilege belongs solely to the corporation, and it may be waived or asserted solely by the corporation, even to the detriment of the employee.

Refusing to extend the corporate attorney-client privilege articulated in *Upjohn* beyond the employer-employee relationship preserves a predictable legal framework. *Upjohn* recognized the value of predictability when determining the applicability of the attorney-client privilege:

[If] the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. 449 U.S. at 393. We find this considerations particularly relevant here, where the question before us is at what point in the employer-employee relationship the attorney-client privilege ceases to attach. All agree that it cannot extend forever and that it cannot encompass every communication between corporate counsel and former employees. But it is difficult to find any principled line of demarcation that extends beyond the end of the employment relationship. We conclude that the interests served by the privilege are sufficiently protected by recognizing that communications between corporate counsel and employees during the period of employment continue to be privileged after the agency relationship ends. *See supra* note 1.

We recognized that some courts have extended the corporate attorney-client privilege to former employees because of the corporation’s perceived need to know what its former employees know. *See In re Allen*, 106 F.3d 582, 605-06 (4th Cir. 1997) (collecting cases). We find this justification unpersuasive. A defendant might easily perceive itself as needing to know many things known by potential witnesses, and might strongly prefer not to share its conversations with those witnesses with the other side. So might a plaintiff. So might a government. That alone should not be enough to justify frustrating “the truth-seeking mission of the legal

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2 Some courts have recognized that the attorney-client privilege could extend to former employees in those situations in which a continuing agency duty exists. *See Peralta*, 190 F.R.D. at 41 n.1 (stating “[a]ccording to the Restatement (Third) of the Law Governing Lawyers, [§ 73 cmt. c], the attorney-client privilege would not normally attach to communications between former employees and counsel for the former employer in the absence of “a continuing duty to the corporation” based on agency principles); *Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 306 (E.D. Mich. 2000) (recognizing “there may be situations where the former employee retains a present connection or agency relationship with the client corporation” that would justify application of the privilege).

3 The Restatement recognizes that in general privileged communications are temporally limited to the duration of a principal-agent relationship:

[A] person making a privileged communication to a lawyer for an organization must then be acting as agent of the principal-organization. The objective of the organizational privilege is to encourage the organization to have its agents communicate with its lawyer . . . [. ] Generally, that premise implies that persons be agents of the organization at the time of communicating. *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 cmt. e. The Restatement comment acknowledges the privilege may extend to postemployment communications in limited circumstances, based on the agency principles discussed in note 2 of this opinion. Id.*
process” by extending the old privilege. United States v. Tedder, 801 F.2d 1437, 1441 (4th Cir. 1986) (citing United States v. (Under Seal), 748 F.2d 871, 875 (4th Cir. 1984)).

The superior court properly rejected Highland’s argument that former employees should be treated the same as current employees. The court appropriately allowed Highland to assert its attorney-client privilege over communications with the former coaches only during the time Highland’s counsel purportedly represented them at their depositions. We therefore affirm the superior court’s decision to deny Highland’s motion for a protective order and lift the temporary stay of discovery issued by our commissioner.

2. Attorney Fees on Appeal

We deny Newman’s request for attorney fees on appeal. Newman requests fees under CR 26(c) and CR 37(a)(4) for successfully challenging Highland’s claim of attorney-client privilege. Br. of Resp’ts at 33. We deny Newman’s request because Highland’s opposition to discovery was reasonable given that the question of whether the corporate attorney-client privilege extends to former employees was a novel legal question of first impression in Washington. CR 37(a)(4) (mandatory award of expenses and attorney fees for successfully challenging a motion becomes discretionary if “the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust”). For these same reasons, we also exercise our discretion to deny Newman’s request for fees pursuant to chapter 7.21 RCW (2001).4

CONCLUSION

We affirm and lift the temporary stay of discovery. The superior court properly denied Highland’s motion for a protective order shielding from discovery its postemployment communications with former employees.

WIGGINS, J. (dissenting)—I agree with the majority that any communications that fall within the attorney-client privilege during employment remain protected by the privilege after employment is terminated. I also agree with the majority this court has adopted the reasoning of Upjohn Co. v. United States, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981). However, I disagree with the majority’s decision to adopt a bright-line rule that will cut off the corporate attorney-client privilege at the termination of employment, and will exclude from its scope all postemployment communications with former employees, even when those employees have relevant personal knowledge regarding the subject matter of the legal inquiry and even though had they remained employed, such communications with counsel would have been privileged under Upjohn. This temporal limitation is at odds with the functional analysis underlying the decision in Upjohn and ignores the important purposes and goals that the attorney-client privilege serves.

Instead, I would conclude the scope of the attorney-client privilege and the decision as to whether to extend its protections to former employees is based on the flexible approach articulated in Upjohn. Under this flexible analysis, I would hold that postemployment communications consisting of a factual inquiry into the former employee’s conduct and knowledge during his or her employment, made in furtherance of the corporation’s legal services, are privileged. Accordingly, I respectfully dissent.

ANALYSIS

I. The Majority’s Position Is at Odds with Upjohn’s Functional Analysis

As the majority correctly acknowledges, this court has embraced the flexible approach in Upjohn for determining the scope of the attorney-client privilege in the corporate context. Majority at 8; see also Youngs v. PeaceHealth, 179 Wn.2d 645, 653, 316 P.3d 1035 (2014). Upjohn is the leading case on the scope of corporate attorney-client privilege. In Upjohn, the Supreme Court was presented with the question of whether the attorney-client privilege in the corporate context could ever apply to communications between corporate counsel and lower-level corporate employees.

At the time the Supreme Court decided Upjohn, two competing tests had emerged in the lower courts regarding the scope of the corporate attorney-client privilege. Upjohn, 449 U.S. at 386. One such test, adopted by the lower court in Upjohn, was the “control group test,” which would have limited the corporate attorney-client privilege to the “‘control group’” of the corporation, namely “those officers, usually top management, who play a substantial role in deciding and directing the corporation’s response to the legal advice given.” United States v. Upjohn Co., 600 F.2d 1223, 1224, 1226 (6th Cir. 1979), rev’d, 449 U.S. 383. The control group test was based on the rationale that only those individuals who acted like a traditional “client” would receive the protection of the privilege, and as the lower court in Upjohn stated, it adopted the control group because the corporate client was an inanimate entity and “only the senior management, guiding and integrating the several operations, . . . can be said to possess an identity analogous to the corporation as a whole.” Id. at 1226.

On appeal, the Supreme Court unanimously rejected the narrow control group test. Upjohn, 449 U.S. at 390. Instead of looking to the identity of the individual corporate actors to see whether they possessed a sufficient identity of relationship to the corporation so as to qualify as a client—as the lower court had done—the Court looked to the nature of the communications to see whether the purposes underlying the attorney-client privilege would be furthered by its extension to the communications at issue. Id. at 391-92. The Supreme Court identified several purposes underlying the privilege, including that the privilege encourages full and frank communication between attorneys and their clients, and enables clients to take full advantage of the legal system. Id. at 389, 391. The

4 This discretionary review does not include any issue concerning the trial court’s order imposing contempt sanctions against Highland, or limit the trial court’s ability to revisit that order in light of our decision. See Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 300, 840 P.2d 860 (1992) (“Absent a proper certification, an order which adjudicates fewer than all claims or the rights and liabilities of fewer than all parties is subject to revision at any time before entry of final judgment as to all claims and the rights and liabilities of all parties.”).
The Upjohn Court declined to establish a bright-line rule regarding the scope of the attorney-client privilege in the corporate setting. \(\text{Id. at 396-97}\). Instead, the Court provided a functional framework for analyzing the scope of the attorney-client privilege on a case-by-case basis. \(\text{Id. at 394-95}\). In large part, the Court’s inquiry resolves into a single question: Would application of the privilege under the circumstances of this particular case foster the flow of information to corporate counsel regarding issues about which corporations seek legal advice? John E. Sexton, A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege, 57 N.Y.U. L. REV. 443, 459 (1982).

In Upjohn, the Court found it relevant that the communications were made by corporate employees to corporate counsel at the direction of corporate superiors, and that the communications concerned factual information that fell within the scope of the employee’s duties that was “‘not available from upper-echelon management’” and that was necessary “‘to supply a basis for legal advice.’” Youngs, 179 Wn.2d at 664 n.7 (quoting Upjohn, 449 U.S. at 394). The Court also noted that the communicating employee was aware that the interview was conducted for legal purposes and that the information would be kept confidential. \(\text{Id. at} 394\). In light of these characteristics, the Upjohn Court held that these communications were privileged because doing so was consistent with the underlying purpose of the attorney-client privilege to allow for full and frank fact-finding. Upjohn, 449 U.S. at 395.

We previously praised the Upjohn Court’s analysis and its focus on furthering the “laudable goals of the attorney-client privilege.” Wright v. Grp. Health Hosp., 103 Wn.2d 192, 202, 691 P.2d 564 (1984). In our recent decision in Youngs, we acknowledged in our discussion of the attorney-client privilege that Upjohn “defines the scope of the corporate attorney-client privilege,” 179 Wn.2d at 651, and we expressly relied on Upjohn’s reasoning after observing that Washington courts had endorsed Upjohn’s “‘flexible . . . test’” for more than 30 years, \(\text{Id. at} 662\) (alteration in original) (quoting Wright, 103 Wn.2d at 202).

The majority in this case now eschews Upjohn’s functional analysis for a bright-line rule, cutting off the privilege at the termination of employment. \(\text{See majority at 12}\). The majority argues that Upjohn supports this bright-line rule because the Court presupposed that the communications occurred within the corporate employee relationship, \(\text{Id. at} 9\). Nothing in the Upjohn decision supports the majority’s bald assertion that the decision “‘presupposed attorney-client communications taking place within the corporate employment relationship’ before the privilege would attach. \(\text{Id. at} 9\). In fact, 7 of the 86 employees interviewed by corporate counsel in Upjohn had left employment prior to being interviewed. Upjohn, 449 U.S. at 394 n.3. The Court expressly declined to decide the issue whether former employees were included in the privilege, instead providing the functional framework for lower courts to utilize in answering that precise question.\(^1\) \(\text{See id.}\)

Moreover, the majority’s focus on the formalities of the relationship between the employee and the corporation as the standard for the attorney-client privilege misses the point of the Upjohn Court’s functional framework. The Upjohn Court rejected the control group test, and the focus that test placed on the level of control and responsibilities of the specific employee, to instead adopt a framework that looked at the communications themselves and the benefits and goals of the privilege. “A primary reason that the Upjohn Court rejected the control group test was that in the Court’s eyes the restriction placed upon the relationship of the information-giver to the corporation undermined the purposes of the corporate attorney-client privilege.” Sexton, supra, at 497, “[A]n approach that focuses solely upon the status of the communicator fails to adequately meet the objectives sought to be served by the attorney-client privilege.” Samaritan Found. v. Goodfarb, 176 Ariz. 497, 501, 862 P.2d 870 (1993). By looking only at the identity of the former employee, the majority sidesteps around the important functional analysis contemplated by Upjohn.

II. The Functional Upjohn Analysis Supports Extending the Attorney-Client Privilege to Communications with Former Employees for Purposes of Factual Investigation

At issue in this case is not, as the majority puts it, “whether postemployment communications between former employees and corporate counsel should be treated the same as communications with current employees,” majority at 2 (emphasis added), but rather whether the corporate attorney-client privilege provides any protection for the communications between the former coaches and the counsel for the school district and the scope of any such protection. Though neither Upjohn nor Youngs had cause to consider whether and to what degree the privilege extends to former employees, the principles underlying these and other decisions support extending the privilege to former employees in certain circumstances based on the flexible analysis of Upjohn.

While it is well established that the attorney-client privilege attaches to corporations, the application of the privilege to corporations presents unique and special problems. Commodity Futures Trading Comm’n v. Weintraub, 471 U.S. 343, 348, 105 S. Ct. 1986, 1991, 85 L. Ed. 2d 372 (1985). Unlike an individual client, who is traditionally both the provider of information and the person who will act on a lawyer’s advice, these roles of providing information and acting are often separated within a corporation. Upjohn, 449 U.S. at 391. As an inanimate entity, a corporation can act only through its agents and thus cannot itself speak directly to its lawyers. Commodity Futures Trading Comm’n, 471 U.S. at 348. And as the Court recognized in Upjohn, it will often be the lower-

\(^1\) In a concurring opinion in Upjohn, Chief Justice Burger approved of the factors considered by the majority to conclude that the communications were privileged, but would have gone further to hold that the privilege would also protect communications with a former employee regarding conduct “within the scope of employment.” Upjohn, 449 U.S. at 403 (Burger, C.J., concurring in part and concurring in the judgment).
level employees who possess the information needed by corporate counsel in order to adequately advise the client. *Upjohn*, 449 U.S. at 391. Moreover, lower-level employees can and do, by their individual actions as agents of the corporation, embroil a corporate client in legal difficulties. *Id.* Thus, in at least some cases, the only way corporate counsel will be able to determine what the actions of its client (the corporation) were in order to provide relevant legal advice would be to speak with those lower-level employees that have knowledge of the relevant events and activities of the corporation.

Former employees, just like current employees, may possess relevant information pertaining to events occurring during their employment “needed by corporate counsel to advise the client with respect to actual or potential difficulties.” *In re Coordinated Pretrial Proceedings in Petrol Prods. Antitrust Litig.*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981). Relevant knowledge obtained by an employee during his or her period of employment does not lose relevance simply because employment has ended. When former employees have relevant knowledge about incidents that occurred while they were employed, the extension of the attorney-client privilege to cover postemployment communications may further support the privilege’s fact-finding purpose. See *id.*; *In re Allen*, 106 F.3d 582, 606 (4th Cir. 1997). “[A] formalistic distinction based solely on the timing of the interview [between corporate counsel and the knowledgeable employee] cannot make a difference if the goals of the privilege as outlined in *Upjohn* are to be achieved.” Sexton, *supra*, at 499.

The majority dismisses this “need to know” rationale as unpersuasive and as an unjustified extension of the purpose of the privilege. Majority at 11, 13. But the majority overlooks that this stated purpose—facilitating the flow of relevant and necessary information from lower-level employees to counsel—was a key function of the privilege identified by the Court in *Upjohn* and a critical reason that Court extended the privilege to lower-level employees in the first place. See *Upjohn*, 449 U.S. at 391.

Other courts have relied on *Upjohn’s* reasoning, and its acknowledgment that one purpose of the privilege is to facilitate the gathering of relevant facts by counsel, to justify extending the scope of the attorney-client privilege to cover at least some communications with former employees. See, e.g., *In re Coordinated Pretrial Proceedings*, 658 F.2d at 1361 n.7 (“Former employees, as well as current employees, may possess the relevant information needed by corporate counsel to advise the client with respect to actual or potential difficulties.”); *Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1493 (9th Cir. 1989) (“[T]he *Upjohn* rationale necessarily extended the privilege to former corporate employees. . . .”); *In re Allen*, 106 F.3d at 606 (“[W]e hold that the analysis applied by the Supreme Court in *Upjohn* to determine which employees fall within the scope of the privilege applies equally to former employees.”); *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41 (D. Conn. 1999).

However, I acknowledge that *Upjohn’s* policies and purposes do not require us to consider former employees exactly as we consider current employees. Former employees present their own unique considerations: they probably do not communicate with the corporate client such that their present or future actions could bind the corporation.

I am persuaded that the appropriate line is expressed in this simple test: Did the communications with the former employee, whenever they occurred, “relate to the former employee’s conduct and knowledge, or communication with defendant’s counsel, during his or her employment?” *Peralta*, 190 F.R.D. at 41. If so, the communications are privileged, consistent with *Upjohn*. *Id.* The *Peralta* court that adopted this test noted it was rejecting a wholesale application of the specific factors identified in *Upjohn* because former employees, unlike current employees, were not directed to speak with corporate counsel at the direction of management. *Id.* But the court relied on the rationale of *Upjohn*, which is to say the court looked to the purpose of the attorney-client privilege and whether that privilege was served by applying it to postemployment communications with a former employee—it held that the privilege applied to the extent the communications concerned the underlying facts in the case. See *id.*

The majority justifies departing from *Upjohn* on the basis that former employees “categorically differ” from current lower-level employees, such that the privilege should extend to their communications with corporate counsel. Majority at 9. The majority focuses on agency principles and the policy announced in the *Restatement (Third) of the Law Governing Lawyers* § 73 (Am. Law Inst. 2000). *Id.* I reject these positions as incorrectly framed statements of the law, and because they are inconsistent with the functional framework of *Upjohn*.

The majority gives much weight to the fact that during employment, an employer can force an employee to disclose information to the corporation, but after employment, any such duty expires. Majority at 9-10. In addition, the majority notes that current employees owe duties of loyalty and obedience to the corporation, which also expire at termination. *Id.* (citing *Restatement (Third) of Agency* § 8.11 (Am. Law Inst. 2006)). Without this continuing duty to the corporation, the majority argues that a former employee becomes a simple third-party fact witness to whom the attorney-client privilege should not attach. *Id.*

The majority’s premise is mistaken. *Upjohn* based its analysis of the attorney-client privilege on the idea that the attorney-client privilege, if applied to lower-level employees, would allow corporate counsel to obtain necessary and relevant information regarding the client, and with that information the attorney could inform the corporation’s managers and officers of the corporation’s legal duties and obligations. *Upjohn*, 449 U.S. at 392. The value the Court placed on the privilege to in effect promote the free and frank exchange of information presupposes that application of the privilege would foster communications that, but for the privilege, would never have occurred. See Sexton, *supra*, at 491; *Upjohn*, 449 U.S. at 389 (noting that a goal of the privilege is to promote “full and frank communication”). Moreover, notably missing from the Supreme Court’s analysis in *Upjohn* is any discussion of the roles that a duty of loyalty or obedience plays with respect to the attorney-client privilege. The privilege itself is not grounded in concepts of a duty on behalf of the client to disclose information to its attorney, just as its extension to lower-level employees is not based on their duty to provide information to the corporation.
Chapter 5—Attorney-Client Privilege, Work Product Doctrine, and Joint Defense Doctrine in Oregon

Concepts of agency are undoubtedly relevant to the corporate attorney-client privilege, just not as the majority applies them. The rationale behind extending the privilege beyond the control group of the corporation is that lower-level employees, by virtue of their agency relationship with the corporation, have the authority to bind the corporation and control its actions in ways that can lead to legal consequences for the corporation. See Upjohn, 449 U.S. at 391; see also Commodity Futures Trading Comm’n, 471 U.S. at 348 (noting that a corporation is an inanimate entity that can act only through its agents). It is for this reason that corporate counsel should be able to speak frankly with those employees and agents who have knowledge of the events that relate to the subject of the lawyer’s legal services, regardless of those employees’ subsequent personal employment decisions. Extending the privilege to cover communications with former employees who were knowledgeable agents of the corporation with respect to the time period and subjects discussed in the communications ensures that this remains a privilege with the corporation and distinguishes these employees from third-party witnesses. Sexton, supra, at 497.

Temporal concepts associated with the duration of agency, as they relate to the timing a communication is made to counsel, should not be dispositive of the privilege, as they bear little relationship to the goals of the privilege identified by the Supreme Court. It is for this reason that I would also reject the position articulated in the Restatement (Third) of the Law Governing Lawyers § 73(2) and comment e that the privilege be limited to those with a present and ongoing agency relationship with the corporation. Such a position is incompatible with the Upjohn Court’s focus on the nature of the communications, rather than on the formalities of the relationship to the corporation. Furthermore, as the Restatement itself acknowledges, its position with respect to former employees is inconsistent with other courts that have considered the issue. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 cmt. e (acknowledging that of the few decisions on point, several courts disagree with the Restatement’s position regarding former employees).

III. Extending the Privilege to Former Employees Will Not Burden the Legal Process

The majority implies that extending the privilege to former employees would lack predictability and would frustrate the truth seeking mission of the legal process. Majority at 12, 13. While these concerns are not insignificant, I do not believe they justify the majority’s harsh, bright-line rule.

First, we have continuously held that the attorney-client privilege extends only to communications and does not protect the underlying facts. Youngs, 179 Wn.2d at 653; Wright, 103 Wn.2d at 195. Highland has always allowed, and concedes, that Newman may continue to conduct ex parte interviews with the former coaches for the purposes of learning any facts of the incident known to the coaches. See Pet’r’s Reply Br. at 14.

The attorney-client privilege exists because we recognize that the relationship between attorney and client is important and worth protecting, even at the expense of some measure of truth seeking. Lowy v. PeaceHealth, 174 Wn.2d 769, 785, 280 P.3d 1078 (2012) (“[T]he attorney-client . . . privilege[] is . . . founded on the premise that communication in th[at] relationship[] is so important that the law is willing to sacrifice its pursuit for the truth, the whole truth, and nothing but the truth.”). Where we have defined the scope or extended the attorney-client privilege, we have done so in recognition of the important purposes the privilege seeks to protect. See, e.g., Youngs, 179 Wn.2d at 650; Dietz v. John Doe, 131 Wn.2d 835, 849, 935 P.2d 611 (1997). And we have sought to equitably balance the values underlying the privilege against concerns over burdening discovery. See, e.g., Dietz, 131 Wn.2d at 849. In Dietz, we addressed the question of whether the attorney-client privilege extends to protect the disclosure of a client’s identity, when doing so may implicate the client in potential wrongdoing. Id. at 839. We noted that in such a case, application of the attorney-client privilege would stand at odds with principles of open discovery and “a general duty to give what testimony one is capable of giving.” Id. at 843 (internal quotation marks omitted) (quoting Jaffee v. Redmond, 518 U.S. 1, 9, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996)).

While we extended the privilege in Dietz, we recognized our need to keep that particular extension narrow. Id. at 849. “The privilege is imperative to preserve the sanctity of communications between clients and attorneys.” Id. at 851 (emphasis added). Moreover, the truth seeking concerns expressed by the majority are less serious here than in Dietz because application of the privilege will not prohibit discovery of relevant facts; Newman remains able to interview the former coaches. By contrast, in Dietz the privilege presented a complete obstacle to learning the identity of a potentially at-fault party. See Dietz, 131 Wn.2d at 848-49. The policies underlying the privilege support its extension in this case, and truth seeking principles do not justify a different conclusion.

Second, like the majority, I too recognize the value of predictability with respect to the boundaries of the attorney-client privilege. Because attorneys and clients must be able to predict with at least some certainty where their discussions will be protected, “[a]n uncertain privilege . . . is little better than no privilege at all.” Upjohn, 449 U.S. at 393. But such concerns do not require that we sever our analysis from the guiding principles of Upjohn; rather, we must use those principles to set clear standards for parties and courts to follow.

The distinction I would draw today should not be difficult for the parties to apply if the relevant purpose of the privilege—promoting necessary factual investigation—is kept clear. Accord Perala, 190 F.R.D. at 41. It will be incumbent on counsel to exercise caution when communicating with their client’s former employees in order to ensure communications stay within these parameters. Should disputes arise as to whether a specific communication is privileged, they should be submitted to the trial court for a determination as to whether the purposes identified today would be furthered by its application.
Chapter 5—Attorney-Client Privilege, Work Product Doctrine, and Joint Defense Doctrine in Oregon

IV. Application to the Facts of This Case

In this case, the trial court ordered Highland School District No. 203 to respond to discovery requests concerning the “disclosure of communications between defense counsel and former employees made after the employment ended and not during the time defense counsel claims to have represented the former employees for purposes of their depositions.” Clerk’s Papers at 68-70. The trial court ordered this disclosure after erroneously concluding that we have not adopted Upjohn and on the determination that the attorney-client privilege does not apply to any postemployment communications with former employees. Id. at 69-70.

Matthew Newman has brought claims against the school district based on the Lystedt act, under which coaches who know or suspect an athlete is suffering from a concussion must remove the athlete from play until the athlete receives proper medical clearance. See RCW 28A.600.190; Pet’r’s Am. Br. at 4-6; Br. of Resp’ts 6-7. Thus, Highland’s liability in this case is contingent on the actions and knowledge of its football coaches who were employed during the time Newman played football for Highland School District and were present when Newman allegedly suffered a concussion and/or injury, regardless of whether those coaches remain employed by the district today. See CP at 96-104 (Compl.).

The former coaches at issue were employed by Highland during the relevant time period when Newman was injured. See, e.g., CP at 1267. They possessed knowledge of matters “within the scope of their duties” as football coaches for the school district, such as the training they received and their interactions with and observations of Newman before and during his injury. See, e.g., CP at 230-32, 1267, 1587-89. Communications with Highland’s counsel that concerned the former coaches’ knowledge and conduct during their employment and the events surrounding Newman’s injury would be necessary to supply a basis for legal advice to the school district as to liability.

In light of these facts, the purposes underlying the privilege support its extension to communications with former coaches regarding their conduct and knowledge during employment. This extension would promote frank and open fact-finding, and enable the attorney to uncover the facts necessary to render legal advice to the client. Cf. In re Allen, 106 F.3d at 606. To the extent communication between the former coaches and Highland’s attorneys concerns a factual inquiry into the former coaches’ conduct and knowledge during his or her employment, I would hold that any such communications are privileged and Highland need not answer questions regarding these communications. I would conclude that postemployment communications between the former employer’s counsel and a former employee that constitute a relevant factual inquiry into their conduct and knowledge during employment would be privileged, consistent with Upjohn. Thus, I would hold that the trial court’s order compelling discovery is based on an incorrect interpretation of the law and should be reversed.

This conclusion, however, does not completely resolve the current dispute between the parties about the postemployment communications with former coaches. Newman contends that the communications at issue concern more than just fact-finding. Br. of Resp’ts at 25-30. Newman argues that the predisposition communications with former coaches should not be privileged because the purpose of these predisposition, postemployment communications was not fact-finding, but rather to “‘woodshed[...]' the witness and influence the witness’s testimony.” Br. of Resp’ts at 25-27, 30.

Some of this controversy stems from the unusual circumstance that Highland’s attorneys formally appeared for and represented the former coaches for purposes of their depositions. The trial court allowed this representation, and Newman did not challenge this order on appeal. Thus, Newman seeks, and the trial court order compelled, discovery of communications made only “when defense counsel did not represent the former employees for the purposes of the depositions.” CP at 68-70. The communications to prepare the former coaches for a deposition do not appear to fall within the court’s order to compel, as the actual representation of the former coaches may potentially include these predisposition meetings between defense counsel and the former coaches. See, e.g., CP at 226-27 (Dep. of Dustin Shafer) (noting that a discussion with defense counsel regarding formal representation for purposes of Shafer’s deposition occurred at a meeting with counsel one week prior to his deposition).

However, the record is unclear as to when the school district’s defense counsel represented the former coaches. Without knowing the scope of the communications at issue, whether they were limited to a factual inquiry into the former employee’s conduct and knowledge during his or her employment, and whether or not such communications occurred during the period of formal representation, it is impossible to tell whether the communications at issue meet the test I suggest today.

Accordingly, I would vacate the trial court’s order to compel. On remand, the plaintiff would not be entitled to the broad discovery of communications with former coaches during the time the coaches were represented, as he has requested. CP at 37-43. And if such broad requests are made, defendant may raise the privilege again to the extent such communications fell within the scope

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2 The trial court issued its order on January 28, 2014, just five days after our decision in Youngs, 179 Wn.2d 645. CP at 70.

3 The record and briefing indicate that each party has accused the other of witness tampering in this case. See, e.g., Br. of Resp’ts at 30; CP at 830.

4 When asked by the trial court what it meant to represent for purposes of the deposition, the attorney representing Highland stated, “It means that I can interview them, talk to them about the facts, what they recall, give them ideas as to what I think subject matters will come up so they’re somewhat prepared as to the questions.” Verbatim Report of Proceedings (VRP) at 44 (Sept. 27, 2013).

5 This issue came before the trial court on a motion to disqualify defense counsel filed by Newman. Id. at 42. The trial court expressed concerns about defense counsel’s representation of these former employees and the potential conflicts this posed. VRP at 117. The trial court concluded this was “a very poor decision” but that it was not necessarily an ethics violation. Id. The trial court ordered Highland’s counsel not to engage in any further representation of former coaches for depositions. CP at 68-70. The parties have not challenged this ruling in the present appeal, and the merits of this ruling are not properly before the court.
of the direct representation, or to the extent such communications were made as a factual inquiry concerning the former employee’s conduct and knowledge during his or her employment, relevant to the underlying case. Consequently, discovery should and would be tailored to specific questioning regarding communications falling outside the bounds of normal factual inquiry and thus is outside the scope of the attorney-client privilege with former employees.

V. Contempt Sanctions and Attorney Fees

I would also vacate the trial court’s order imposing contempt sanctions of $2,500 per day on Highland until discovery is provided. We previously placed a broad order staying all matters before the trial court related to the discovery of allegedly privileged communications, which put a stay on the contempt sanctions order. Because I would reverse the trial court’s order compelling production, I would also vacate the order imposing sanctions on Highland.

I also join in the majority’s denial of Newman’s request for attorney fees.

CONCLUSION

I would hold that the attorney-client privilege attaches to postemployment communications concerning a relevant factual inquiry into the former employee’s conduct and knowledge during his or her employment. The former coaches in this case had relevant information within the scope of their employment, and to the extent these communications concerned their knowledge and conduct during employment with Highland, such communications would be privileged. I would vacate both the trial court’s order to compel and contempt order, lift the stay of discovery, and remand for further proceedings consistent with this opinion.

I dissent.
USA v. Henke, 222 F.3d 633 (9th Cir., 2000)

222 F.3d 633 (9th Cir. 2000)

UNITED STATES OF AMERICA, Plaintiff-Appellee/Cross-Appellant,
v.

STEVEN J. HENKE, Defendant-Appellant/Cross-Appellee.

UNITED STATES OF AMERICA, Plaintiff-Appellee/Cross-Appellant,
v.

CHAN M. DESAIGOODAR, Defendant-Appellant/Cross-Appellee.

Nos. 99-10015, 99-10050

Office of the Circuit Executive

U.S. Court of Appeals for the Ninth Circuit

Argued and Submitted April 10, 2000—San Francisco, California

Filed August 25, 2000

Nina Wilder, Weinberg & Wilder, San Francisco, California, and Sanford Svetcov, Landels Ripley & Diamond, LLP, San Francisco, California, for the defendants-appellants.

Laurie Kloster Gray, Assistant United States Attorney, San Francisco, California, for the plaintiff-appellee.

Appeals from the United States District Court for the Northern District of California, D.C. No. CR-97-00294-VRW; Vaughn R. Walker, District Judge, Presiding


PER CURIAM:


The defendants claim that their convictions must be set aside because a conflict of interest prevented their counsel from cross-examining a key government witness and because there was insufficient evidence to support their insider trading convictions.

They also argue that the district court erred in admitting lay opinion testimony and an out-of-court statement into evidence, and in failing to conduct an in camera review of government notes from an interview with a key government witness to ensure that the notes did not contain information that the government was required to disclose to the defense. Finally, they claim that the prosecutor committed misconduct in forcing Desaigoudar to testify that various government witnesses were lying. We agree with the defendants that a new trial is necessary because their lawyers’ ability to conduct their defense was impaired by a conflict of interest. We also agree that the district court erred in admitting lay opinion testimony on the key issue of knowledge. We disagree, however, that the evidence was insufficient to support their insider trading convictions. We therefore remand the case to the district court for a new trial.

While we address the defendants’ remaining claims because they present issues that may recur on re-trial, because we vacate the convictions and sentences, we do not address the government’s sentencing appeal.

BACKGROUND

This case arises from a false revenue reporting conspiracy carried out by Cal Micro executives in order to preserve the appearance that the company was a good investment option when in fact it was struggling financially. Cal Micro designs, manufactures, and markets electronic components and semiconductor products for the defense and electronics industries. The company was purchased in 1980 by Desaigoudar, who turned it into a multi-million dollar company during the 1980s. In addition to being Cal Micro’s largest shareholder, Desaigoudar served as its Chief Executive Officer and Chairman of the Board until he was removed in 1994.

In 1993, Cal Micro had two objectives. It hoped both to attract a strategic outside partner to invest in the company and to raise about $40 million in outside capital through a second public offering. Making the company an attractive investment option for outside companies and private investors was crucial to achieving these objectives and Desaigoudar instituted an incentive-based stock option plan to motivate officers and managers to meet revenue goals. These goals became increasingly difficult to meet, however, because Apple Computers, one of the company’s largest customers, substantially reduced its orders.

Unable to close the widening gap between revenue targets and actual sales, some Cal Micro executives devised a plan to make it appear on paper that the company was meeting its financial goals. Under Cal Micro’s stated revenue recognition policy, revenue was recognized when an order was shipped. These Cal Micro executives began to deviate from this practice in several ways. They started: (1) recognizing revenue when some orders were received, rather than when shipped; (2) shipping orders earlier than requested in order to recognize the revenue during a certain fiscal period; (3) sending unwanted shipments; (4) creating false orders; and (5) executing “title transfers” falsely reflecting that products stored at Cal Micro had been purchased by a client.
While this was occurring, Cal Micro successfully negotiated an agreement with Hitachi under which Hitachi would purchase two million shares of Cal Micro stock at $23 a share. Cal Micro and its investment bankers also put in motion plans for a second public offering.

Things then took a turn for the worse. Those involved began to worry about the implications of the revenue scheme. Moreover, the company’s plan to write off several million dollars in “bad debts” caused Cal Micro’s investment bankers to balk at a second public offering. The Board eventually instituted an investigation and ultimately ousted Desaigoudar.

Desaigoudar and Henke, a former Chief Financial Officer, Vice President, and Treasurer of Cal Micro, were indicted on charges of conspiracy, making false statements, securities fraud, and insider trading. Surendra Gupta, Cal Micro’s President during the revenue reporting scheme, was also indicted, but reached a plea agreement with the government shortly before trial was to begin. The central issue at trial was whether the defendants had early knowledge of the false revenue reporting scheme and whether they traded their stock because of this inside information. Several of Cal Micro’s executive officers, including former co-defendant Gupta, testified that the defendants did have such early knowledge. The jury believed the government’s witnesses and convicted the defendants.

CONFLICT OF INTEREST

The defendants’ principle claim is that they are entitled to a new trial because their attorneys worked under an actual conflict of interest that prohibited them from cross-examining one of the government’s key witnesses, Gupta.

Before trial, Desaigoudar, Henke, and Gupta participated in joint defense meetings during which confidential information was discussed. Communications made during these pre-trial meetings were protected by the lawyers’ duty of confidentiality imposed by a joint defense privilege agreement. Before trial was to begin, Gupta accepted a plea agreement and promised to testify for the government.

Desaigoudar’s attorney then moved for a mistrial and to withdraw because his duty of confidentiality to Gupta under the joint defense agreement prevented him from cross-examining Gupta on matters involving information he learned as a result of the privileged pre-trial meetings. Henke’s lawyer was also present at the joint defense meetings and felt that his duty to Gupta impaired his ability to adequately represent Henke.

The district court denied the motion to withdraw. It reasoned that any privileged impeaching information counsel learned about Gupta would not be known to new counsel and the defendants were therefore no worse off for being represented by their original attorneys. The court granted the motion for a mistrial to allow defense counsel to regroup after Gupta’s plea.

Once the new trial began, Gupta testified for the government. Defense counsel conducted no cross-examination for fear that the examination would lead to inquiries into material covered by the joint defense privilege.

The issue for our decision is whether the government’s use of a former defendant, with whom both Henke’s and Desaigoudar’s attorneys had an attorney-client relationship arising from a joint defense agreement, as a key witness at trial created a conflict of interest that impaired defense counsel’s ability to defend their clients.

The joint defense privilege is an extension of the attorney-client privilege. It has been recognized by this Circuit since at least 1964. Waller v. Financial Corp. of America, 828 F.2d 579, 583 n.7 (9th Cir. 1987). A joint defense agreement establishes an implied attorney-client relationship with the co-defendant, here between Henke’s and Desaigoudar’s attorneys and Gupta. See United States v. McPartlin, 595 F.2d 1321, 1337 (7th Cir. 1979); Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977). The government concedes in its brief the existence of this privilege in this case.

This privilege can also create a disqualifying conflict where information gained in confidence by an attorney becomes an issue, as it did in this case. As the court said in Abraham Construction,

Just as an attorney would not be allowed to proceed against his former client in a cause of action substantially related to the matters in which he previously represented that client, an attorney should also not be allowed to proceed against a co-defendant of a former client wherein the subject matter of the present controversy is substantially related to the matters in which the attorney was previously involved, and wherein confidential exchanges of information took place between the various codefendants in preparation of a joint defense.

559 F.2d at 253; see also Westinghouse Elec. Corp. v. KerrMcGee Corp., 580 F.2d 1311, 1319 (7th Cir. 1978) (defense attorney breaches fiduciary duty if he uses information obtained in a joint defense meeting). Here, what Gupta allegedly said in confidence during pre-trial joint defense meetings about the defendants’ presence at a critical meeting of Cal Micro executives was claimed to be at odds with his trial testimony for the government. This evidence put the two defense attorneys in a difficult position. Had they pursued the material discrepancy in some other way, a discrepancy they learned about in confidence, they could have been charged with using it against their one-time client Gupta. In fact, Gupta’s lawyers had threatened Henke’s and Desaigoudar’s attorneys with legal action if they failed to protect Gupta’s confidences. Here is the text of the letter received by defense counsel:

June 26, 1998

Re: U.S. v. Desaigoudar and Henke

Dear [attorneys for defendants Desaigoudar and Henke]:
Chapter 5—Attorney-Client Privilege, Work Product Doctrine, and Joint Defense Doctrine in Oregon

It has come to our attention you may be contemplating filing an ex parte in camera submission to Judge Walker outlining what you contend are the contradictory statements made by Mr. Gupta in what you have conceded was a joint defense privileged meeting.

Please be advised that we do not, waive, and at no point ever have waived the joint defense privilege. Please be further advised that we are aware of no legal basis upon which you have any right to breach the privilege and that we reserve Mr. Gupta’s right to pursue any and all appropriate legal remedies for any unauthorized breach of the privilege.

Please consider this letter as a formal objection to any ex parte in camera submissions to Judge Walker of any joint defense privileged information.

Yours very truly,

[Signed]

Attorneys for Suren Gupta

Under these circumstances, the district court erred in not fully acknowledging the conflict and then acting on its implications.

Nothing in our holding today is intended to suggest, however, that joint defense meetings are in and of themselves disqualifying. We stress that it was defense counsel in this case that timely moved for disqualification. As the Supreme Court said in Holloway v. Arkansas, the attorney “is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.” 435 U.S. 475, 485 (1978). There may be cases in which defense counsel’s possession of information about a former co-defendant/government witness learned through joint defense meetings will not impair defense counsel’s ability to represent the defendant or breach the duty of confidentiality to the former co-defendant. Here, however, counsel told the district court that this was not a situation where they could avoid reliance on the privileged information and still fully uphold their ethical duty to represent their clients. There is nothing in this record to suggest that the attorneys were doing anything other than attempting to adhere to their ethical duties as lawyers.

Few aspects of our criminal justice system are more vital to the assurance of fairness than the right to be defended by counsel, and this means counsel not burdened by a conflict of interest. Here, because of that conflict, the appellants’ lawyers were constrained to impair yet another primary right of their clients: the right to cross-examine a witness who testified against them. By choosing to convert Gupta into a prospective witness shortly before the trial was scheduled to start, the government—which may not have anticipated this complication when it made a deal with Gupta—caused this problem, and should not now be heard to complain.

SUFFICIENCY OF THE EVIDENCE

The defendants also challenge the sufficiency of the evidence supporting their convictions for insider trading under Section 10 of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (West 2000). Each contends that the evidence established that he sold his Cal Micro stock for innocent reasons and not because of information about the company’s false revenue reporting.

We may reverse a jury conviction for insufficient evidence only if, viewing the evidence in the light most favorable to the government, no rational jury could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979). In this case, we look to whether the evidence supports a finding that the defendants traded stock on the basis of material nonpublic information with an intent to deceive, manipulate, or defraud. See United States v. Smith, 155 F.3d 1051, 1068-69 (9th Cir. 1998), cert. denied 525 U.S. 1071 (1999).

With respect to Desaigoudar, the jury heard evidence that he sold a portion of his stock after learning of Cal Micro’s false revenue reporting scheme and that his sudden decision to “diversify” his portfolio came after receiving this information. Moreover, Desaigoudar’s financial adviser had been advising Desaigoudar to diversify since 1986, but Desaigoudar only sold his stock in 1994 after the revenue reporting scheme surfaced. This evidence permits the inference that Desaigoudar traded on the basis of inside information and acted with the requisite scienter. Although Desaigoudar sold only a small portion of his Cal Micro stock, cf. In re Worlds of Wonder Sec. Litig., 35 F.3d 1407, 1427 (9th Cir. 1994), his overall pattern of trading Cal Micro stock, when viewed in the light most favorable to the government, supports the jury’s verdict.

Henke relies on our law that when there is evidence that an investor had a preexisting pattern or plan of trading and continued to execute that plan even after coming into possession of material nonpublic information, such evidence negates an inference that the investor acted with the scienter required for an insider trading conviction. See Smith, 155 F.3d at 1068; In re Worlds of Wonder, 35 F.3d at 1427-28. In Henke’s case, however, the “preexisting pattern” of trading consisted of only two stock sales. Moreover, these sales netted him a relatively small return. The sale made after knowledge of the revenue scheme enabled him to avoid hundreds of thousands of dollars of loss in the stock’s value. In addition, Desaigoudar’s executive assistant testified that Henke told her that she would be stupid not to sell her own stock. When viewed in the light most favorable to the government, these circumstances permitted the jury to infer that the sales were the result of Henke’s insider knowledge and not an earlier plan. We therefore conclude that sufficient evidence supports both Henke’s and Desaigoudar’s insider trading convictions.

Desaigoudar also contends that some of the evidence the government presented as to when he obtained inside information varied from one of the dates alleged in the indictment. There is no material variance or even inconsistency. See United States v. Tsirnahafljinnie, 112 F.3d 988, 991 (9th Cir. 1997) (noting that a variance is immaterial where it is not of a character which could have
misled the defendant at trial and there is no danger of double jeopardy). The government proved that Desaigoudar had inside information on the date alleged in the indictment.

LAY OPINION TESTIMONY

The defendants argue that the district court erred in admitting lay opinion testimony on the issue of the defendants’ knowledge. Proving that Desaigoudar and Henke had knowledge of the false revenue reporting scheme was critical to the government’s case. Without establishing this knowledge, it could not carry its burden of proving beyond a reasonable doubt that the defendants knew that financial statements they made were false, or that they possessed material nonpublic information before trading their stock.

One of the witnesses the government used to prove knowledge was Wade Meyercord, Desaigoudar’s replacement as Chairman of Cal Micro’s Board of Directors. Over the defendants’ objections, the prosecutor systematically and repeatedly asked Meyercord about the reasons for terminating the defendants and other officers of Cal Micro. This questioning was done in order to elicit Meyercord’s conclusion that the defendants “must have known” about the revenue reporting scheme.1 The defendants claim that it was error to admit this testimony. We agree.

1 In relevant part, the testimony was as follows:
Q. [by the prosecution]: What happened next . . . ?
A. [Meyercord]: There was another Board meeting in October of ’94, so that the -later that month. I don’t recall the exact date. At which time, if I recall correctly, we removed Mr. Desaigoudar as Chairman of the company, and I was elected Chairman.
Q. Why did you remove -yeah, why did you remove Mr. Desaigoudar?
[Defense counsel]: Objection, your Honor.
The court: You can rephrase that counsel.
Q. [Prosecution]: If you know, what -how did the Board reach that decision?
[Defense counsel]: Your honor, that’s simply an opinion that they reached -conclusion that they reached.
The court: Well, no. I think the witness can testify as to the understanding that he has of the reason that the Board took that action. That’s, I think, the appropriate question. All right? With that in mind, Mr. Meyercord, what is your understanding of the reason that the Board took the action which you did in removing Mr. Desaigoudar as Chairman of the Board?
A. Because we felt there was -we removed Mr. Desaigoudar as Chairman because we felt there was a high probability that he knew that the revenues had been misstated and that we could not in good conscience leave him in that position.

Later, the prosecutor was permitted to elicit the following testimony from Meyercord concerning the Board’s decision to fire Desaigoudar and to reject Henke’s severance agreement.
Q. [Prosecution]: . . . December 1st . . . was a decision made to terminate certain employees of the company?
A. Yes.
Q. And was that made at a Board meeting?
A. Yes . . . .
Q. Do you remember who was terminated?
A. We terminated Mr. Desaigoudar. Mr. Henke had already resigned at that point. We terminated Mr. Gupta. I believe Mr. Chalaka, Mr. -who -am I missing somebody else?
Q. Was it Mr. Romito?
A. Yes, Mr. Romito.
Q. And why were these people all terminated?
[Defense counsel]: Objection, your honor.
The court: I think the witness can testify as to what is his understanding of the reason that the Board took this action.
[Meyercord]: It was our belief at that time—
[Defense counsel]: Can I just state the grounds for the objection? Relevance and opinion.
The court: Very well. Overruled. Q. [Prosecution]: You can answer.
A. It was our belief at that time based on the evidence that we had that all of those individuals had -must have known about the misstatement of revenue.

Q. What does that mean?
A. That meant that we were reasonably sure that—
[Defense counsel]: Same objection, your honor. It’s not relevant, particularly not relevant what this witness’s opinion was.
[Co-defense counsel]: And it’s very prejudicial, opinion of a Board -your honor.
The court: Well, the objection’s overruled. It is relevant. It, obviously, is reflective of the conclusions drawn by the -by the Board of Directors at the time and —
[Defense counsel]: That’s right.
The court: And, Ladies and Gentlemen [of the jury], you understand that that’s what this evidence is, that you’re going to have to make up your own mind with respect to the evidence that is submitted to you. All right.
Q. [Prosecution]: Could you explain that last sentence, what that was about?
A. That sentence says that the company would not provide money to Mr. Desaigoudar to defend himself in any action that might ensue here in any -any legal proceedings.
Q. And did you also -was -was a finding made that he had intentionally withheld information from the Board?
[Defense counsel]: Oh, this is leading, your honor.
The court: This is leading. Ms. Merchant.
Q. [Prosecution]: Does this document refer to a finding that was made -you know why —
[Defense counsel]: It’s the same —
Q. [Prosecution]: -why the Board made this decision, Mr. Meyercord? [Defense counsel]: That’s exactly the same thing, and it’s opinion -calling for opinion and conclusion.
The court: You’ve got the minutes in. You’ve got the witness’s testimony. I think that’s sufficient.
Q. [Prosecution]: There’s a reference -you made a reference earlier to the fact that Mr. Henke had resigned sometime earlier. Do you remember that?
A. Yes.
Q. And do you remember the circumstances of his resignation from your perspective as a Board member?
[Defense counsel]: Irrelevant, your honor, his perspective as a Board member.
The court: Well, why don’t you rephrase the question.
Q. [Prosecution]: Did Mr. Henke resign around this time period?
[Defense counsel]: Did Mr. Henke do what?
[Prosecution]: Resign around this time period.
[Defense counsel]: That’s been asked and answered.
The court: She’s setting the stage for the question. All right.
A. [Meyercord]: Yes, he did.
Q. And was -were you aware of the fact that he had negotiated a severance package?
A. I became aware later, yes.
Q. And do you know who he negotiated it with? Did you learn that?
A. Yes. With Mr. Desaigoudar.

... Q. . . . [C]ould you describe the nature of the compensation package that had been negotiated?
A. (reviewing document). Yes. It says here that he would have had a consulting agreement for one year at 5,400-and-some-odd dollars per month.
Q. Well, Mr. Meyercord, did the Board accept this severance packet?
A. No, we did not.
Q. Why not?
[Defense counsel]: Well, I object to it, your honor, on the same grounds that we’ve objected to the other documents, that it’s prejudicial, and it’s -actually this is testimony.
The court: Well, now, no speaking objections, Mr. Hallinan. What’s the basis of the objection?
[Defense counsel]: Well, first of all, under the circumstances, it’s so prejudicial. That’s one. Second of all, there’s no basis for it, doesn’t show any special knowledge. And third of all, it calls for an opinion of this witness.
The court: Overruled. The witness may testify as to his understanding of the reason that the Board took the action which it did.
A. [Meyercord]: The Board -the Board did not feel that a severance package for Mr. Henke was appropriate given the evidence we had in front of us.
Q. What evidence was that?
[Defense counsel]: Well, there, your honor. Object to that.
The court: Objection overruled. A. The evidence that the revenue had been misstated.
Q. Did you have an understanding as a Board -did you learn as a Board member what Mr. Henke’s role was in that?
A. I’m sorry?
[Defense counsel]: Your honor, what relevance—
[Meyercord]: I don’t understand the question.
[Defense counsel]: is that?
The court: Objection overruled.
[Meyercord]: Could you -I don’t understand the question.
Q. Did you learn in the investigation —
The court: What was the witness’s understanding of the facts?
Under Federal Rule of Evidence 701, a lay witness’s testimony in the form of an opinion is permissible only when it is helpful to understanding the witness’s testimony or to the determination of a fact in issue. If the jury already has all the information upon which the witness’s opinion is based, the opinion is not admissible. See United States v. Skeet, 665 F.2d 983, 985 (9th Cir. 1982) (“If the jury can be put into a position of equal vantage with the witness for drawing the opinion, then the witness may not give an opinion.”); Jack B. Weinstein & Margaret A. Berger, Weinstein’s Federal Evidence § 701.05 (2d ed. 2000) (“[L]ay testimony generally is not helpful on matters that are essentially a jury question, such as credibility issues.”); see also United States v. Anderskov, 88 F.3d 245, 251 (3d Cir. 1996) (holding that a witness’s testimony that a defendant “must have known” fails to meet the helpfulness requirement); United States v. Rea, 958 F.2d 1206, 1219 (2d Cir. 1992) (same).

Here the jury was in the best position to determine whether the defendants knew about the revenue scheme. Unlike Meyercord and the Board of Directors, the jury had the benefit of several years of discovery, investigation, and litigation to flesh out the facts. Moreover, it heard testimony from all of the key actors in the scheme. While Meyercord testified that the Board formed a special committee of independent directors to investigate the false revenue reporting scheme, he was not questioned about the facts that the investigation turned up or how those facts were discovered. Meyercord was simply asked about the Board’s conclusion that the defendants “must have known” about the scheme—a conclusion that went to the primary question for the jury. Because the jury was in a superior vantage point to decide this issue, Meyercord’s testimony that the defendants must have known about the revenue scheme was not helpful. Its admission was therefore error.

OTHER ISSUES THAT MAY RECUR ON RETRIAL

In the event of retrial, there are three remaining issues that may recur. The defendants claim that the district court erred in admitting an out-of-court statement and refusing to review interview notes with a key government witness in camera to ensure that the notes did not contain information the government would be constitutionally or statutorily obligated to disclose. They also contend that prosecutor misconduct occurred when the prosecutor required Desaigoudar to testify that government witnesses were lying. We address each in turn.

1. Out-of-court statement

   The first issue is whether the court properly admitted Desaigoudar’s out-of-court response—“next question please”—to an accusation in a press conference that the defendants were “cooking the books.” The district court found that the response was not unduly prejudicial and that, under the circumstances, the natural response to such an accusation would be to address or deny it. It therefore admitted the statement as an adoptive admission. See Fed. R. Evid. 801(d)(2)(B). It was within its discretion to do so. See United States v. Schaff, 948 F.2d 501, 505 (9th Cir. 1991).

2. In camera review of interview notes

   The defendants also contend that the district court erred in failing to conduct an in camera review of the government’s notes from interviews with Ron Romito, a key witness, to ensure that the notes did not contain information that should be produced as exculpatory material under Brady v. Maryland, 373 U.S. 83 (1963), as impeachment material under Giglio v. United States, 405 U.S. 150 (1972), or as witness statements under the Jencks Act, 18 U.S.C. § 3500 (West 2000). The government provided the defendants with a substantial amount of information about Romito, including FBI reports, declarations, and a copy of his plea agreement, but invoked the work-product privilege as to its pretrial interview notes. The defendants made no showing that they might discover something exculpatory or impeaching. Nor did they show that the notes were used or adopted by the witness. Accordingly, the defendants did not trigger the district court’s obligation to review the privileged notes in camera. See United States v. Boshell, 952 F.2d 1101, 1104-05 (9th Cir. 1991) (finding that the defendants failed to make a showing that notes were read or adopted by the witness and that the notes were therefore not subject to the Jencks Act production requirements).

3. Alleged prosecutorial misconduct

   Finally, the defendants claim that the government acted improperly in forcing Desaigoudar to testify on cross-examination that the government’s witnesses were lying. During Desaigoudar’s cross-examination, the prosecutor repeatedly forced him to say that several of the government’s witnesses lied on the stand. After the judgments were entered in this case, we made clear that forcing a defendant to comment on the veracity of another witness’s testimony is inappropriate. See United States v. Sanchez, 176 F.3d 1214, 121920 (9th Cir. 1999). In light of Sanchez, this line of questioning by the prosecutor was improper and must be avoided on retrial.

CONCLUSION

The judgments of conviction are reversed, the sentences vacated, and the matters remanded for new trial or other proceedings consistent with this opinion.

[Prosecution]: Right.
Q. What was your understanding of the facts as they concerned Mr. Henke?
A. My understanding of the facts were [sic] that Mr. Henke must have known about this -about the revenue misstatements.
[Defense counsel]: Well, I’ll move to strike that. That is just an opinion, he ‘must have known.’ That shouldn’t even be before the jury, your honor.
The court: Objection overruled.
[Prosecution]: No further questions, your honor.
REVERSED and REMANDED.

BEEZER, Circuit Judge (Concurring):

I join the court’s opinion only with respect to the sections entitled BACKGROUND and LAY OPINION TESTIMONY. Because the district court’s error prejudiced both defendants and was not harmless, I would reverse the defendants’ convictions and remand for a new trial. Because this ground is sufficient to order such relief, I would not address the other issues raised on appeal.

449 U.S. 383
101 S.Ct. 677
66 L.Ed.2d 584

UPJOHN COMPANY et al., Petitioners,

v.

UNITED STATES et al.

No. 79-886.

Argued Nov. 5, 1980.

Syllabus

When the General Counsel for petitioner pharmaceutical manufacturing corporation (hereafter petitioner) was informed that one of its foreign subsidiaries had made questionable payments to foreign government officials in order to secure government business, an internal investigation of such payments was initiated. As part of this investigation, petitioner’s attorneys sent a questionnaire to all foreign managers seeking detailed information concerning such payments, and the responses were returned to the General Counsel. The General Counsel and outside counsel also interviewed the recipients of the questionnaire and other company officers and employees. Subsequently, based on a report voluntarily submitted by petitioner disclosing the questionable payments, the Internal Revenue Service (IRS) began an investigation to determine the tax consequences of such payments and issued a summons pursuant to 26 U.S.C. § 7602 demanding production of, inter alia, the questionnaires and the memoranda and notes of the interviews. Petitioner refused to produce the documents on the grounds that they were protected from disclosure by the attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation. The United States then filed a petition in Federal District Court seeking enforcement of the summons. That court adopted the Magistrate’s recommendation that the summons should be enforced, the Magistrate having concluded, inter alia, that the attorney-client privilege had been waived and that the Government had made a sufficient showing of necessity to overcome the protection of the work-product doctrine. The Court of Appeals rejected the Magistrate’s finding of a waiver of the attorney-client privilege, but held that under the so-called “control group test” the privilege did not apply “[t]o the extent that the communications were made by officers and agents not responsible for directing [petitioner’s] actions in response to legal advice . . . for the simple reason that the communications were not the ‘client’s.’” The court also held that the work-product doctrine did not apply to IRS summonses.

Held:

1. The communications by petitioner’s employees to counsel are covered by the attorney-client privilege insofar as the responses to the questionnaires and any notes reflecting responses to interview questions are concerned. Pp. 389-397.

   (a) The control group test overlooks the fact that such privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. While in the case of the individual client the provider of information and the person who acts on the lawyer’s advice are one and the same, in the corporate context it will frequently be employees beyond the control group (as defined by the Court of Appeals) who will possess the information needed by the corporation’s lawyers. Middle-level—and indeed lower-level employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties. Pp. 390-392.

   (b) The control group test thus frustrates the very purpose of the attorney-client privilege by discouraging the communication of relevant information by employees of the client corporation to attorneys seeking to render legal advice to the client. The attorney’s advice will also frequently be more significant to noncontrol employees than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation’s policy. P. 392.

   (c) The narrow scope given the attorney-client privilege by the Court of Appeals not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client’s compliance with the law. P. 392-393.

   (d) Here, the communications at issue were made by petitioner’s employees to counsel for petitioner acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. Information not available from upper-echelon management was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. The communications concerned matters within the scope of the employees’ corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. Pp. 394-395.
2. The work-product doctrine applies to IRS summonses. Pp. 397-402.

(a) The obligation imposed by a tax summons remains subject to the traditional privileges and limitations, and nothing in the language or legislative history of the IRS summons provisions suggests an intent on the part of Congress to preclude application of the work-product doctrine. P. 398.

(b) The Magistrate applied the wrong standard when he concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work-product doctrine. The notes and memoranda sought by the Government constitute work product based on oral statements. If they reveal communications, they are protected by the attorney-client privilege. To the extent they do not reveal communications they reveal attorneys’ mental processes in evaluating the communications. As Federal Rule of Civil Procedure 26, which accords special protection from disclosure to work product revealing an attorney’s mental processes, and Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451, make clear, such work product cannot be disclosed simply on a showing of substantial need or inability to obtain the equivalent without undue hardship. P. 401.

600 F.2d 1223, 6 Cir., reversed and remanded.

Daniel M. Gribbon, Washington, D.C., for petitioners.

Lawrence G. Wallace, Washington, D.C., for respondents.

Justice REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case to address important questions concerning the scope of the attorney-client privilege in the corporate context and the applicability of the work-product doctrine in proceedings to enforce tax summonses. 445 U.S. 925, 100 S.Ct. 2492, 64 L.Ed.2d 860. With respect to the privilege question the parties and various amici have described our task as one of choosing between two “tests” which have gained adherents in the courts of appeals. We are acutely aware, however, that we sit to decide concrete cases and not abstract propositions of law. We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so. We can and do, however, conclude that the attorney-client privilege protects the communications involved in this case from compelled disclosure and that the work-product doctrine does apply in tax summons enforcement proceedings.

I

Petitioner Upjohn Co. manufactures and sells pharmaceuticals here and abroad. In January 1976 independent accountants conducting an audit of one of Upjohn’s foreign subsidiaries discovered that the subsidiary made payments to or for the benefit of foreign government officials in order to secure government business. The accountants, so informed petitioner, Mr. Gerard Thomas, Upjohn’s Vice President, Secretary, and General Counsel. Thomas is a member of the Michigan and New York Bars, and has been Upjohn’s General Counsel for 20 years. He consulted with outside counsel and R. T. Parfet, Jr., Upjohn’s Chairman of the Board. It was decided that the company would conduct an internal investigation of what were termed “questionable payments.” As part of this investigation the attorneys prepared a letter containing a questionnaire which was sent to “All Foreign General and Area Managers” over the Chairman’s signature. The letter began by noting recent disclosures that several American companies made “possibly illegal” payments to foreign government officials and emphasized that the management needed full information concerning any such payments made by Upjohn. The letter indicated that the Chairman had asked Thomas, identified as “the company’s General Counsel,” “to conduct an investigation for the purpose of determining the nature and magnitude of any payments made by the Upjohn Company or any of its subsidiaries to any employee or official of a foreign government.” The questionnaire sought detailed information concerning such payments. Managers were instructed to treat the investigation as “highly confidential” and not to discuss it with anyone other than Upjohn employees who might be helpful in providing the requested information. Responses were to be sent directly to Thomas. Thomas and outside counsel also interviewed the recipients of the questionnaire and some 33 other Upjohn officers or employees as part of the investigation.

On March 26, 1976, the company voluntarily submitted a preliminary report to the Securities and Exchange Commission on Form 8-K disclosing certain questionable payments. A copy of the report was simultaneously submitted to the Internal Revenue Service, which immediately began an investigation to determine the tax consequences of the payments. Special agents conducting the investigation were given lists by Upjohn of all those interviewed and all who had responded to the questionnaire. On November 23, 1976, the Service issued a summons pursuant to 26 U.S.C. § 7602 demanding production of:

“All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments and any political contributions made by the Upjohn Company or any of its affiliates since January 1, 1971 and to determine whether any funds of the Upjohn Company had been improperly accounted for on the corporate books during the same period.

“The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company’s foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries.” App. 17a-18a.

1 On July 28, 1976, the company filed an amendment to this report disclosing further payments.
The company declined to produce the documents specified in the second paragraph on the grounds that they were protected from disclosure by the attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation. On August 31, 1977, the United States filed a petition seeking enforcement of the summons under 26 U.S.C. §§ 7402(b) and 7604(a) in the United States District Court for the Western District of Michigan. That court adopted the recommendation of a Magistrate who concluded that the summons should be enforced. Petitioners appealed to the Court of Appeals for the Sixth Circuit which rejected the Magistrate’s finding of a waiver of the attorney-client privilege, 600 F.2d 1223, 1227, n. 12, but agreed that the privilege did not apply “[t]o the extent that the communications were made by officers and agents not responsible for directing Upjohn’s actions in response to legal advice . . . for the simple reason that the communications were not the ‘client’s.’” Id., at 1225. The court reasoned that accepting petitioners’ claim for a broader application of the privilege would encourage upper-echelon management to ignore unpleasant facts and create too broad a “zone of silence.” Noting that Upjohn’s counsel had interviewed officials such as the Chairman and President, the Court of Appeals remanded to the District Court so that a determination of who was within the “control group” could be made. In a concluding footnote the court stated that the work-product doctrine “is not applicable to administrative summonses issued under 26 U.S.C. § 7602.” Id., at 1228, n. 13.

II

Federal Rule of Evidence 501 provides that “the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience.” The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client. As we stated last Term in Trammel v. United States, 445 U.S. 40, 51, 100 S.Ct. 906, 913, 63 L.Ed.2d 186 (1980): “The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out.” And in Fisher v. United States, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976), we recognized the purpose of the privilege to be “to encourage clients to make full disclosure to their attorneys.” This rationale for the privilege has long been recognized by the Court, see Hunt v. Blackburn, 128 U.S. 464, 470, 9 S.Ct. 125, 127, 32 L.Ed. 488 (1888) (privilege “is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure”). Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation. United States v. Louisville & Nashville R. Co., 236 U.S. 318, 336, 35 S.Ct. 363, 369, 59 L.Ed. 598 (1915), and the Government does not contest the general proposition.

The Court of Appeals, however, considered the application of the privilege in the corporate context to present a “different problem,” since the client was an inanimate entity and “only the senior management, guiding and integrating the several operations, . . . can be said to possess an identity analogous to the corporation as a whole.” 600 F.2d at 1226. The first case to articulate the so-called “control group test” adopted by the court below, Philadelphia v. Westinghouse Electric Corp., 210 F.Supp. 483, 485 (ED Pa.), petition for mandamus and prohibition denied sub nom. General Electric Co. v. Kirkpatrick, 312 F.2d 742 (CA3 1962), cert. denied, 372 U.S. 943, 83 S.Ct. 937, 9 L.Ed.2d 969 (1963), reflected a similar conceptual approach:

“Keeping in mind that the question is, Is it the corporation which is seeking the lawyer’s advice when the asserted privileged communication is made?, the most satisfactory solution, I think, is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, . . . then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply.”

(Emphasis supplied.)

Such a view, we think, overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. See Trammel, supra, at 51, 100 S.Ct., at 913; Fisher, supra, at 403, 96 S.Ct., at 1577. The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant. See ABA Code of Professional Responsibility, Ethical Consideration 4-1:

“A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.”


In the case of the individual client the provider of information and the person who acts on the lawyer’s advice are one and the same. In the corporate context, however, it will frequently be employees beyond the control group as defined by the court below—“officers and agents . . . responsible for directing [the company’s] actions in response to legal advice”—who will possess the information needed by the corporation’s lawyers. Middle-level—and indeed lower-level—employees can, by actions within the scope
of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties. This fact was noted in Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (CA8 1978) (en banc):

“In a corporation, it may be necessary to glean information relevant to a legal problem from middle management or non-management personnel as well as from top executives. The attorney dealing with a complex legal problem ‘is thus faced with a “Hobson’s choice”’. If he interviews employees not having “the very highest authority”, their communications to him will not be privileged. If, on the other hand, he interviews only those employees with the “very highest authority”, he may find it extremely difficult, if not impossible, to determine what happened.” Id., at 608-609 (quoting Weinschel Corporate Employee Interviews and the Attorney-Client Privilege, 12 B.C.Ind. & Com. L.Rev. 873, 876 (1971)).

The control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney’s advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation’s policy. See, e. g., Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1164 (DSC 1974) (“After the lawyer forms his or her opinion, it is of no immediate benefit to the Chairman of the Board or the President. It must be given to the corporate personnel who will apply it”).

The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client’s compliance with the law. In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, “constantley go to lawyers to find out how to obey the law,” Burnham, The Attorney-Client Privilege in the Corporate Arena, 24 Bus.Law. 901, 913 (1969), particularly since compliance with the law in this area is hardly an instinctive matter, see, e. g., United States v. United States Gypsum Co., 438 U.S. 422, 440-441, 98 S.Ct. 2864, 2875-2876, 57 L.Ed.2d 854 (1978) (“the behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct”). The test adopted by the court below is difficult to apply in practice, though no abstractly formulated and unvarying “test” will necessarily enable courts to decide questions such as this with mathematical precision. But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. The very terms of the test adopted by the court below suggest the unpredictability of its application. The test restricts the availability of the privilege to those officers who play a “substantial role” in deciding and directing a corporation’s legal response. Disparate decisions in cases applying this test illustrate its unpredictability. Compare, e. g., Hogan v. Zletz, 43 F.R.D. 308, 315-316 (ND Okl.1967), aff’d in part sub nom. Natta v. Hogan, 392 F.2d 686 (CA10 1968) (control group includes managers and assistant managers of patent division and research and development department), with Congoleum Industries, Inc. v. GAF Corp., 49 F.R.D. 82, 83-85 (ED Pa.1969), aff’d, 478 F.2d 1398 (CA3 1973) (control group includes only division and corporate vice presidents, and not two directors of research and vice president for production and research).

The communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. As the Magistrate found, “Mr. Thomas consulted with the Chairman of the Board and outside counsel and thereafter conducted a factual investigation to determine the nature and extent of the questionable payments and to be in a position to give legal advice to the company with respect to the payments.” (Emphasis supplied.) 78-1 USTC ¶ 9277, pp. 83,598, 83,599. Information, not available from upper-echelon management, was needed to supply a basis for legal advice concerning securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. The communications concerned matters within the scope of the employees’ corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. The questionnaire identified Thomas as “the company’s General Counsel” and referred in its opening sentence to the possible illegality of payments such as the ones on which information was sought. App. 40a. A statement of policy accompanying the questionnaire clearly indicated the legal implications of the investigation. The policy statement was issued “in order that there be no uncertainty in the future as to the policy with respect to the practices which are the subject of this investigation.” It began “Upjohn will comply with all laws and regulations,” and stated that commissions or payments “will not be used as a subterfuge for bribes or

2 The Government argues that the risk of civil or criminal liability suffices to ensure that corporations will seek legal advice in the absence of the protection of the privilege. This response ignores the fact that the depth and quality of any investigations, to ensure compliance with the law would suffer, even were they undertaken. The response also proves too much, since it applies to all communications covered by the privilege; an individual trying to comply with the law or faced with a legal problem also has strong incentive to disclose information to his lawyer, yet the common law has recognized the value of the privilege in further facilitating communications.

3 Seven of the eighty-six employees interviewed by counsel had terminated their employment with Upjohn at the time of the interview. App. 33a-38a. Petitioners argue that the privilege should nonetheless apply to communications by these former employees concerning activities during their period of employment. Neither the District Court nor the Court of Appeals had occasion to address this issue, and we decline to decide it without the benefit of treatment below.

4 See id., at 26a-27a, 103a, 123a-124a. See also In re Grand Jury Investigation, 599 F.2d 1224, 1229 (CA3 1979); In re Grand Jury Subpoena, 599 F.2d 504, 511 (CA2 1979).
illegal payments” and that all payments must be “proper and legal.” Any future agreements with foreign distributors or agents were to be approved “by a company attorney” and any questions concerning the policy were to be referred “to the company’s General Counsel.” Id., at 165a-166a. This statement was issued to Upjohn employees worldwide, so that even those interviewees not receiving a questionnaire were aware of the legal implications of the interviews. Pursuant to explicit instructions from the Chairman of the Board, the communications were considered “highly confidential” when made, id., at 39a, 43a, and have been kept confidential by the company.5 Consistent with the underlying purposes of the attorney-client privilege, these communications must be protected against compelled disclosure.

The Court of Appeals declined to extend the attorney-client privilege beyond the limits of the control group test for fear that doing so would entail severe burdens on discovery and create a broad “zone of silence” over corporate affairs. Application of the attorney-client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney:

“[T]he protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, ‘What did you say or write to the attorney?’ but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.”


See also Diversified Industries, 572 F.2d., at 611; State ex rel. Dudek v. Circuit Court, 34 Wis.2d 559, 580, 150 N.W.2d 387, 399 (1967) (“the courts have noted that a party cannot conceal a fact merely by revealing it to his lawyer”). Here the Government was free to question the employees who communicated with Thomas and outside counsel. Upjohn has provided the IRS with a list of such employees, and the IRS has already interviewed some 25 of them. While it would probably be more convenient for the Government to secure the results of petitioner’s internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner’s attorneys, such considerations of convenience do not overcome the policies served by the attorney-client privilege. As Justice Jackson noted in his concurring opinion in Hickman v. Taylor, 329 U.S., at 516, 67 S.Ct., at 396: “Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary.”

 Needless to say, we decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas. Any such approach would violate the spirit of Federal Rule of Evidence 501. See S.Rep. No. 93-1277, p. 13 (1974) (“the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis”); Trammel, 445 U.S., at 47, 100 S.Ct., at 910-911; United States v. Gillock, 445 U.S. 360, 367, 100 S.Ct. 1185, 1190, 63 L.Ed.2d 454 (1980). While such a “case-by-case” basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege, it obeys the spirit of the Rules. At the same time we conclude that the narrow “control group test” sanctioned by the Court of Appeals, in this case cannot, consistent with “the principles of the common law as . . . interpreted . . . in the light of reason and experience,” Fed. Rule Evid. 501, govern the development of the law in this area.

III

Our decision that the communications by Upjohn employees to counsel are covered by the attorney-client privilege disposes of the case so far as the responses to the questionnaires and any notes reflecting responses to interview questions are concerned. The summons reaches further, however, and Thomas has testified that his notes and memoranda of interviews go beyond recording client’s questions concerning the policy were to be referred “to the company’s General Counsel.”

The Government concedes, wisely, that the Court of Appeals erred and that the work-product doctrine does not apply to summonses issued under 26 U.S.C. § 7602.6

The Court of Appeals declined to extend the attorney-client privilege beyond the limits of the control group test for fear that doing so would entail severe burdens on discovery and create a broad “zone of silence” over corporate affairs. Application of the attorney-client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney:

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III

Our decision that the communications by Upjohn employees to counsel are covered by the attorney-client privilege disposes of the case so far as the responses to the questionnaires and any notes reflecting responses to interview questions are concerned. The summons reaches further, however, and Thomas has testified that his notes and memoranda of interviews go beyond recording responses to his questions. App. 27a-28a, 91a-93a. To the extent that the material subject to the summons is not protected by the attorney-client privilege as disclosing communications between an employee and counsel, we must reach the ruling by the Court of Appeals that the work-product doctrine does not apply to summonses issued under 26 U.S.C. § 7602.6

The Government concedes, wisely, that the Court of Appeals erred and that the work-product doctrine does apply to IRS summonses. Brief for Respondents 16, 48. This doctrine was announced by the Court over 30 years ago in Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). In that case the Court rejected “an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party’s counsel in the course of his legal duties.” Id., at 510, 67 S.Ct., at 393. The Court noted that “it is essential that a lawyer work with a certain degree of privacy” and reasoned that if discovery of the material sought were permitted

“much of what is now put down in writing would remain unwritten. An attorney’s thoughts, heretofore invidiate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.” Id., at 511, 67 S.Ct., at 393-394.
The “strong public policy” underlying the work-product doctrine was reaffirmed recently in United States v. Nobles, 422 U.S. 225, 236-240, 95 S.Ct. 2160, 2169-2171, 45 L.Ed.2d 141 (1975), and has been substantially incorporated in Federal Rule of Civil Procedure 26(b)(3).7

As we stated last Term, the obligation imposed by a tax summons remains “subject to the traditional privileges and limitations.” United States v. Eugen, 444 U.S. 707, 714, 100 S.Ct. 874, 879-880, 63 L.Ed.2d 741 (1980). Nothing in the language of the IRS summons provisions or their legislative history suggests an intent on the part of Congress to preclude application of the work-product doctrine. Rule 26(b)(3) codifies the work-product doctrine, and the Federal Rules of Civil Procedure are made applicable to summons enforcement proceedings by Rule 81(a)(3). See Donaldson v. United States, 400 U.S. 517, 528, 91 S.Ct. 534, 541, 27 L.Ed.2d 580 (1971). While conceding the applicability of the work-product doctrine, the Government asserts that it has made a sufficient showing of necessity to overcome its protections. The Magistrate apparently so found, 78-1 USTC ¶ 9277, p. 83,605. The Government relies on the following language in Hickman:

“We do not mean to say that all written materials obtained or prepared by an adversary’s counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and nonprivileged facts remain hidden in an attorney’s file and where production of those facts is essential to the preparation of one’s case, discovery may properly be had. . . . And production might be justified where the witnesses are no longer available or can be reached only with difficulty.” 329 U.S., at 511, 67 S.Ct., at 394.

The Government stresses that interviewees are scattered across the globe and that Upjohn has forbidden its employees to answer questions it considers irrelevant. The above-quoted language from Hickman, however, did not apply to “oral statements made by witnesses . . . whether presently in the form of [the attorney’s] mental impressions or memoranda.” Id., at 512, 67 S.Ct., at 394. As to such material the Court did “not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. . . . If there should be a rare situation justifying production of these matters petitioner’s case is not of that type,” Id., at 512-513, 67 S.Ct., at 394-395. See also Nobles, supra, 422 U.S., at 252-253, 95 S.Ct., at 2177 (WHITE, J., concurring). Forcing an attorney to disclose notes and memoranda of witnesses’ oral statements is particularly disfavored because it tends to reveal the attorney’s mental processes, 329 U.S., at 513, 67 S.Ct., at 394-395 (“what he saw fit to write down regarding witnesses’ remarks”); id., at 516-517, 67 S.Ct., at 396 (“the statement would be his [the attorney’s] language, permeated with his inferences”) (Jackson, J., concurring).8

Rule 26 accords special protection to work product revealing the attorney’s mental processes. The Rule permits disclosure of documents and tangible things constituting attorney work product upon a showing of substantial need and inability to obtain the equivalent without undue hardship. This was the standard applied by the Magistrate, 78-1 USTC ¶ 9277, p. 83,604. Rule 26 goes on, however, to state that “[i]n ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.” Although this language does not specifically refer to memoranda based on oral statements of witnesses, the Hickman court stressed that compelled disclosure of such memoranda would reveal the attorney’s mental processes. It is clear that this is the sort of material the draftsmen of the Rule had in mind as deserving special protection. See Notes of Advisory Committee on 1970 Amendment to Rules, 28 U.S.C.App., p. 442 (“The subdivision . . . goes on to protect against disclosure of the mental impressions, conclusions, opinions, or legal theories . . . of an attorney or other representative of a party. The Hickman opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers’ mental impressions and legal theories . . .”).

Based on the foregoing, some courts have concluded that no showing of necessity can overcome protection of work product which is based on oral statements from witnesses. See, e.g., In re Grand Jury Proceedings, 473 F.2d 840, 848 (CA8 1973) (personal recollections, notes, and memoranda pertaining to conversation with witnesses), In re Grand Jury Investigation, 412 F.Supp. 943, 949 (ED Pa.1976) (notes of conversation with witness “are so much a product of the lawyer’s thinking and so little probative of the witness’s actual words that they are absolutely protected from disclosure”). Those courts declining to adopt an absolute rule have nonetheless recognized that such material is entitled to special protection. See, e.g., In re Grand Jury Investigation, 599 F.2d 1224, 1231 (CA3 1979) (“Special considerations . . . must shape any ruling on the discoverability of interview memoranda . . . ; such documents will be discoverable only in a ‘rare situation’”); Cf. In re Grand Jury Subpoena, 599 F.2d 504, 511-512 (CA2 1979).

We do not decide the issue at this time. It is clear that the Magistrate applied the wrong standard when he concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work-product doctrine. The Magistrate applied the “substantial need” and “without undue hardship” standard articulated in the first part of Rule 26(b)(3). The notes and

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7 This provides, in pertinent part:

“[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”

8 Thomas described his notes of the interviews as containing “what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions. In some instances they might even suggest other questions that I would have to ask or things that I needed to find elsewhere.” 78-1 USTC ¶ 9277, p. 83,599.
memoranda sought by the Government here, however, are work product based on oral statements. If they reveal communications, they are, in this case, protected by the attorney-client privilege. To the extent they do not reveal communications, they reveal the attorneys’ mental processes in evaluating the communications. As Rule 26 and Hickman make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.

While we are not prepared at this juncture to say that such material is always protected by the work-product rule, we think a far stronger showing of necessity and unavailability by other means than was made by the Government or applied by the Magistrate in this case would be necessary to compel disclosure. Since the Court of Appeals thought that the work-product protection was never applicable in an enforcement proceeding such as this, and since the Magistrate whose recommendations the District Court adopted applied too lenient a standard of protection, we think the best procedure with respect to this aspect of the case would be to reverse the judgment of the Court of Appeals for the Sixth Circuit and remand the case to it for such further proceedings in connection with the work-product claim as are consistent with this opinion.

Accordingly, the judgment of the Court of Appeals is reversed, and the case remanded for further proceedings.

It is so ordered.

Chief Justice BURGER, concurring in part and concurring in the judgment.

I join in Parts I and III of the opinion of the Court and in the judgment. As to Part II, I agree fully with the Court’s rejection of the so-called “control group” test, its reasons for doing so, and its ultimate holding that the communications at issue are privileged. As the Court states, however, “if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected.” Ante, at 393. For this very reason, I believe that we should articulate a standard that will govern similar cases and afford guidance to corporations, counsel advising them, and federal courts.

The Court properly relies on a variety of factors in concluding that the communications now before us are privileged. See ante, at 394-395. Because of the great importance of the issue, in my view the Court should make clear now that, as a general rule, a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee’s conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct. See, e. g., Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 609 (CA8 1978) (en banc); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-492 (CA7 1970), aff’d by an equally divided Court, 400 U.S. 348, 91 S.Ct. 479, 27 L.Ed.2d 433 (1971); Duplan Corp v. Deering Milliken, Inc., 397 F.Supp. 1146, 1163-1165 (DSC 1974). Other communications between employees and corporate counsel may indeed be privileged—as the petitioners and several amici have suggested in their proposed formulations—but the need for certainty does not compel us now to prescribe all the details of the privilege in this case.

Nevertheless, to say we should not reach all facets of the privilege does not mean that we should neglect our duty to provide guidance in a case that squarely presents the question in a traditional adversary context. Indeed, because Federal Rule of Evidence 501 provides that the law of privileges “shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience,” this Court has a special duty to clarify aspects of the law of privileges properly before us. Simply asserting that this failure “may to some slight extent undermine desirable certainty,” ante, at 396, neither minimizes the consequences of continuing uncertainty and confusion nor harmonizes the inherent dissonance of acknowledging that uncertainty while declining to clarify it within the frame of issues presented.

* See Brief for Petitioners 21-23, and n. 25; Brief for American Bar Association as Amicus Curiae 5-6, and n. 2; Brief for American College of Trial Lawyers and 33 Law Firms as Amici Curiae 9-10, and n. 5.
III. Work Product Rules

ORCP 36. General provisions governing discovery (excerpted)

A Discovery methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

B Scope of discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

B(1) In general. For all forms of discovery, parties may inquire regarding any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

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B(3) Trial preparation materials. Subject to the provisions of Rule 44, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection B(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that party. Upon request, a person who is not a party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person or party requesting the statement may move for a court order. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion. For purposes of this subsection, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

General Provisions Governing Discovery (excerpted)

(b) Discovery Scope and Limits.

(1) **Scope in General.** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(3) **Trial Preparation: Materials.**

(A) **Documents and Tangible Things.** Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) **Protection Against Disclosure.** If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) **Previous Statement.** Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.
In re Grand Jury Subpoena, 357 F.3d 900 (9th Cir., 2003)

357 F.3d 900

In re GRAND JURY SUBPOENA (MARK TORF/TORF ENVIRONMENTAL MANAGEMENT),
United States of America, Petitioner-Appellee,
v.
Mark Torf, Torf Environmental Management, Respondent-Appellant.
In re Grand Jury Subpoena (Mark Torf/Torf Environmental Management),
United States of America, Petitioner-Appellee,
Dennis D. Ellis, Intervenor-Appellant.
In re Grand Jury Subpoena (Mark Torf/Torf Environmental Management),
United States of America, Petitioner-Appellee,
Dennis D. Ellis, Intervenor-Appellant.
In re Grand Jury Subpoena (Mark Torf/Torf Environmental Management),
United States of America, Petitioner-Appellee,
Ponderosa Paint Manufacturing, Inc., Intervenor-Appellant.
In re Grand Jury Subpoena (Mark Torf/Torf Environmental Management),
United States of America, Petitioner-Appellee,
Ponderosa Paint Manufacturing, Inc., Intervenor-Appellant.

No. 03-30102.
No. 03-30104.
No. 03-30107.

United States Court of Appeals, Ninth Circuit.
Argued and Submitted September 8, 2003.
Filed November 26, 2003.
Amended February 9, 2004.

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John C. McCreedy, Naylor, Hales & McCreedy, Boise, ID, for appellant-Ponderosa Paint Manufacturing, Inc.
Katherine Barton, Department of Justice, Environmental & Natural Resources Division, Washington, DC, for appellee-United States.

Appeal from the United States District Court for the District of Idaho, B. Lynn Winmill, District Judge, Presiding. D.C. No. GJ-00-00036-BLW.

Before: THOMPSON, HAWKINS, and BERZON, Circuit Judges.

ORDER
IT IS HEREBY ORDERED that the opinion filed November 26, 2003 and published at 350 F.3d 1010 is amended as follows:

I
At 350 F.3d at page 1013, the paragraph which begins “We have jurisdiction over these consolidated appeals”, and which paragraph immediately precedes “BACKGROUND” is deleted, and the following paragraph is inserted in its place:

We have jurisdiction over these consolidated appeals pursuant to 28 U.S.C. § 1291. We reverse the district court’s order denying the motion to quash. Torf created the withheld documents at the direction of McCreedy, an attorney who was hired to defend Ponderosa in impending litigation with the government. The documents are protected by the work product doctrine because they were created in anticipation of litigation. The government did not contend in the district court, as it had contended before the magistrate judge and as it contends in its brief in this court, that it had either a substantial need for the documents or that it would incur undue hardship in obtaining substantially equivalent information. See Fed.R.Civ.P. 26(b)(3). We decline to consider this contention by the government in this appeal. Because the subpoena should have been quashed, we vacate the district court’s order holding Torf in civil contempt for not complying with it.

II
At 350 F.3d at page 1018, the paragraph which begins “Finally, the government contends . . .”, and which paragraph immediately precedes “CONCLUSION” is deleted, and the following paragraphs are inserted in its place:
The government contended in proceedings before the magistrate judge, as it does in its brief filed with this court, that it has a substantial need for the withheld documents and that it would incur undue hardship in obtaining substantially equivalent information. See Fed.R.Civ.P. 26(b)(3). Ponderosa responded to these arguments before the magistrate judge, asserting that it had provided the government with documents pertaining to the applicable sites pursuant to the Information Request and Consent Order, and the government’s representatives were present at those sites on several occasions. The magistrate judge resolved the dispute in favor of Ponderosa, ruling that the government had “not shown or demonstrated substantial need, hardship or unavailability necessary to overcome the qualified immunity of work product.” The government did not object in the district court to that ruling.

The failure to object to the magistrate judge’s finding of fact waives a challenge to that finding. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir.1998). The failure to object to a magistrate judge’s “pure” legal conclusion, however, may not. Id. “Rather, a failure to object to such a [pure legal] conclusion ‘is a factor to be weighed in considering the propriety of finding waiver of an issue on appeal.’” Id. quoting Martinez v. Ylst, 951 F.2d 1153, 1156 (9th Cir.1991).

As in Turner, the magistrate judge’s ruling in this case involves factual as well as legal determinations. The ruling defies classification as either a purely factual finding or a purely legal conclusion. What is clear, however, is that the ruling explicitly sets forth the magistrate judge’s decision rejecting the very arguments the government now wishes to make, and reciting the facts upon which the magistrate judge’s decision is based. What is also clear is that, with this decision in hand, the government eschewed presenting to the district court any contention of substantial need or undue hardship. Instead, it framed the issue as limited to whether the work product doctrine would protect a document if it were generated for a purpose other than litigation. The government stated:

In sum, a proper analysis as to the withheld documents must be conducted on a document by document basis. If the document would not have been generated ‘but for’ litigation, it is privileged. However, if it was generated for purposes other than litigation, even though litigation may have been a ‘real possibility’, it must be disclosed. Government’s motion for de novo review of the magistrate court’s order, filed in the district court Nov. 1, 2002, at 7 (emphasis added).

In view of the foregoing, we decline to consider the government’s contention made in its brief filed with this court, but not presented to the district court, that it has a substantial need for the withheld documents and that it would incur undue hardship in obtaining substantially equivalent information.

IT IS FURTHER ORDERED that petitions for rehearing and for rehearing en banc may be filed following the filing of this Order Amending Opinion. See Ninth Circuit General Order 5.3a.

OPINION

DAVID R. THOMPSON, Senior Circuit Judge:

In May 2000, the Environmental Protection Agency (“EPA”) informed Ponderosa Paint Manufacturing, Inc. (“Ponderosa”) that it was under investigation for violating federal waste management laws. Ponderosa hired attorney John McCreedy to advise and defend it in anticipated civil and criminal litigation with the government. McCreedy, on behalf of Ponderosa, retained Mark Torf, an environmental consultant, to assist him in preparing a legal defense for Ponderosa and as an environmental consultant on Ponderosa’s cleanup efforts at the sites that aroused the EPA’s suspicions.

Seeking to avoid litigation, Ponderosa submitted numerous documents to the EPA pursuant to an Information Request from the EPA and an Administrative Consent Order (“Consent Order”) between Ponderosa and the EPA. Many of these documents were prepared by Torf. The EPA was satisfied that Ponderosa complied with both the Information Request and the Consent Order.

On March 6, 2002, however, a grand jury investigating Ponderosa issued a subpoena to Torf for “any and all records relating in any way to any work” regarding “the disposal of waste material . . . from Ponderosa Paint[,]” Torf produced some documents relating to his environmental-consultant responsibilities, but withheld other documents, claiming on behalf of Ponderosa that the withheld documents were protected by the work product doctrine. The magistrate judge overseeing the grand jury proceedings agreed, and quashed the subpoena. The district court reversed the magistrate judge’s order, denied the motion to quash, and held Torf in civil contempt for refusing to produce the documents.

We have jurisdiction over these consolidated appeals pursuant to 28 U.S.C. § 1291. We reverse the district court’s order denying the motion to quash. Torf created the withheld documents at the direction of McCreedy, an attorney who was hired to defend Ponderosa in impending litigation with the government. The documents are protected by the work product doctrine because they were created in anticipation of litigation. The government did not contend in the district court, as it had contended before the magistrate judge and as it contends in its brief in this court, that it had either a substantial need for the documents or that it would incur undue hardship in obtaining substantially equivalent information. See Fed.R.Civ.P. 26(b)(3). We decline to consider this contention by the government in this appeal. Because the subpoena should have been quashed, we vacate the district court’s order holding Torf in civil contempt for not complying with it.
Chapter 5—Attorney-Client Privilege, Work Product Doctrine, and Joint Defense Doctrine in Oregon

BACKGROUND

A. Statutory Background

The Resource Conservation and Recovery Act of 1976 ("RCRA"), as amended, 42 U.S.C. § 6901 et seq., established a “cradle to grave” regulatory system overseeing the treatment, storage, and disposal of hazardous waste. United States v. MacDonald, 339 F.3d 1080, 1082 (9th Cir.2003). Hazardous waste may only be transported to, stored at, or disposed of at facilities in accordance with the statute. 42 U.S.C. § 6925(a). RCRA requires that records be maintained regarding the quantity, location, and storage of hazardous waste. Regulations issued pursuant to the Hazardous Materials Transportation Act of 1976 ("HMTA"), as amended, 49 U.S.C. §§ 5901-5927, also require that documentation regarding hazardous waste be kept. 49 C.F.R. Parts 100-185.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended, 42 U.S.C. §§ 9601-9675, requires persons responsible for the release of hazardous waste to pay cleanup costs. CERCLA authorizes the EPA to undertake response actions itself, or to require (through administrative or judicial orders) the responsible parties to undertake the response action. Id. § 9606(a). Pursuant to this authority, the EPA regularly executes Administrative Consent Orders, by which potentially responsible parties agree to remove hazardous waste without admitting liability. To determine the need for a response action, CERCLA authorizes the EPA to issue Information Requests, which require a person to provide relevant information or documents relating to, inter alia, “[t]he identification, nature, and quantity of materials which have been or are generated, treated, stored, or disposed of . . . or transported to” a facility as well as “[t]he nature or extent of a release or threatened release” of hazardous waste. Id. § 9604(e)(2)(A), (B).

B. Factual Background

Ponderosa manufactured paint-related products until May 2000, when it sold most of its assets and inventory. The EPA and the Department of Justice contend that Ponderosa distributed unsold, leftover products to its employees for disposal, and that this resulted in unlawful transportation and disposal of hazardous substances.

In May 2000, after being notified by the EPA that it was under investigation, Ponderosa retained attorney John McCreedy. On May 31, 2000, McCreedy hired Torf “for the purpose of assisting him in preparing a legal defense on behalf of Ponderosa.” Torf’s duties included interviewing witnesses, sampling and testing paint products, investigating properties that might include hazardous waste, and other investigative tasks.

On June 12, 2000, the EPA submitted a CERCLA Information Request to Ponderosa. The request required Ponderosa to identify any materials generated, treated, stored, disposed of, or transported to or from its property. Ponderosa responded on July 3, 2000. According to McCreedy:

In order to answer the Information Request, [he] conducted extensive interviews of former Ponderosa employees and [he] relied heavily on information obtained by Torf during the course of his inspections and interviews, and [he] relied upon those results to assist [Ponderosa] in assessing its legal rights and responsibilities.

Ponderosa informed the EPA that by responding to the Information Request it was not waiving protection under the work product doctrine.

On August 1, 2000, the EPA and Ponderosa entered into a Consent Order. Pursuant to that order, Ponderosa agreed (without admitting liability) to dispose of the potentially hazardous substances. Torf assisted Ponderosa in the cleanup effort. The Consent Order also required Ponderosa to provide access “to all records and documentation in [its] control that are related to the conditions at the Site and the actions conducted pursuant to this Order,” to “preserve all documents and information relating to work performed under this Order or relating to hazardous substances found on or released from the Site” for ten years, and to make such documents and information available to the EPA upon request. However, the order also preserved Ponderosa’s ability to invoke work product protection. The EPA does not dispute that Ponderosa fulfilled its obligations under the Information Request and the Consent Order.

On March 6, 2002, a grand jury investigating Ponderosa issued a subpoena to Torf for the production of “any and all records relating in any way to any work completed by you or your company concerning the disposal of waste material or any other material whatsoever from Ponderosa Paint . . . from January 1, 2000 through the present.” Ponderosa intervened and moved to quash the subpoena. The magistrate judge overseeing the grand jury proceedings granted the motion.1 The government sought review by the district court, and that court reversed the magistrate judge’s order. The district court concluded that the withheld documents were not covered by the work product doctrine because they would have been created even without the prospect of litigation. The district court held Torf in contempt for failing to produce the documents, but stayed its contempt order (or at least the monetary penalty) pending this appeal.

STANDARD OF REVIEW

We review for abuse of discretion a district court’s denial of a motion to quash a grand jury subpoena. United States v. Chen, 99 F.3d 1495, 1499 (9th Cir.1996). “A district court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.” Gerling Global Reinsurance Corp. v. Low, 240 F.3d 739, 743 (9th Cir.2001).

1 The magistrate judge deferred ruling on certain documents. We express no opinion on these documents.
**DISCUSSION**

The work product doctrine, codified in Federal Rule of Civil Procedure 26(b)(3), protects “from discovery documents and tangible things prepared by a party or his representative in anticipation of litigation.” *Admiral Ins. Co. v. United States District Court*, 881 F.2d 1486, 1494 (9th Cir.1989). Such documents may only be ordered produced upon an adverse party’s demonstration of “substantial need [for] the materials” and “undue hardship [in obtaining] the substantial equivalent of the materials by other means.” Fed. R.Civ.P. 26(b)(3).

The Supreme Court has held that the work product doctrine applies to documents created by investigators working for attorneys, provided the documents were created in anticipation of litigation. *United States v. Nobles*, 422 U.S. 225, 239, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975). In reaching this conclusion, the Supreme Court stated:

> At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client’s case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.

Id. at 238-39, 95 S.Ct. 2160.

We have previously held that “to qualify for protection against discovery under [Rule 26(b)(3)], documents must have two characteristics: (1) they must be ‘prepared in anticipation of litigation or for trial,’ and (2) they must be prepared ‘by or for another party or by or for that other party’s representative.’” *In re California Pub. Utils. Comm’n*, 892 F.2d 778, 780-81 (9th Cir.1989) (quoting Fed.R.Civ.P. 26(b)(3)). Here, there is no question that Ponderosa’s attorney, McCreedy, hired Torf to help him assess the company’s civil and criminal liability. The EPA had already notified Ponderosa that it was under investigation for violating federal waste management laws, and McCreedy was hired to defend Ponderosa in impending legal proceedings. The government told McCreedy that it “will not provide your client with a covenant not to sue for criminal liability and civil or administrative liability arising out of the EPA’s investigation under CERCLA.” We have not heretofore addressed the question whether protection under the work product doctrine may be extended to such “dual purpose” documents. As we consider whether such protection may be so extended, we join a growing number of our sister circuits in employing the formulation of the “because of” standard articulated in the *Wright & Miller* Federal Practice treatise. This formulation states that a document should be deemed prepared “in anticipation of litigation” and thus eligible for work product protection under Rule 26(b)(3) if “in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation.” *Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, 8 Federal Practice & Procedure § 2024 (2d ed. 1994) (“Wright & Miller”).*

The Second Circuit presented a comprehensive discussion of the “because of” standard in *United States v. Adlman*, 134 F.3d 1194 (2nd Cir.1998). At issue in *Adlman* was a memorandum prepared by an accountant and lawyer at Arthur Andersen & Co. to evaluate the tax implications of a proposed merger. The memorandum was drafted to assist the client in making a business decision, but also was prepared “because of” the almost certain prospect that the proposed merger would result in litigation with the Internal Revenue Service. The Second Circuit remanded the case to the district court to apply the Wright & Miller “because of” standard in resolving the issue of work product protection.

The “because of” standard does not consider whether litigation was a primary or secondary motive behind the creation of a document. Rather, it considers the totality of the circumstances and affords protection when it can fairly be said that the “document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation[,]” *Adlman*, 134 F.3d at 1195. Here, there is no question that all of the documents were produced in anticipation of litigation. McCreedy hired Torf because of Ponderosa’s impending litigation and Torf conducted his investigations because of that threat. The threat animated every document Torf prepared, including the documents prepared to comply with the Information Request and Consent Order, and to consult regarding the cleanup.

The government argues, however, that the withheld documents would have been created in substantially similar form in any event to comply with the Information Request and the Consent Order, and therefore are not protected by the work product doctrine. The government relies on language in *Adlman* which states: “the ‘because of’ formulation . . . withholds protection from documents

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2 While not always discussed in the context of dual purpose documents, this formulation has been adopted in *State of Maine v. U.S. Dep’t of Interior*, 298 F.3d 60, 68 (1st Cir.2002); *Montgomery County v. MicroFoste Corp.*, 175 F.3d 296, 305 (3rd Cir.1999); *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 976-77 (7th Cir.1996); *PepsiCo, Inc. v. Baird, Kurtz & Dobson LLP*, 305 F.3d 813, 817 (8th Cir. 2002); and *E.E.O.C. v. Lutheran Social Services*, 186 F.3d 959, 968 (D.C.Cir.1999).
Chapter 5—Attorney-Client Privilege, Work Product Doctrine, and Joint Defense Doctrine in Oregon

... that would have been created in essentially similar form irrespective of the litigation.” Adlman, 134 F.3d at 1202. We do not view this language as eviscerating work product protection for the documents withheld in this case.

The question of entitlement to work product protection cannot be decided simply by looking at one motive that contributed to a document’s preparation. The circumstances surrounding the document’s preparation must also be considered. In the “because of” Wright & Miller formulation, “the nature of the document and the factual situation of the particular case” are key to a determination of whether work product protection applies. Wright & Miller § 2024 (emphasis added). When there is a true independent purpose for creating a document, work product protection is less likely, but when two purposes are profoundly interconnected, the analysis is more complicated.

Here, Ponderosa’s response to the Information Request and its accession to the Consent Order were done under the direction of an attorney in anticipation of litigation. By cooperating with the EPA, Ponderosa sought to avoid litigation with the government. See United States v. Chapman, 146 F.3d 1166, 1175 (9th Cir. 1998). Having chosen to pursue a criminal investigation, the government now seeks to capitalize on Ponderosa’s earlier cooperation and obtain all of Torf’s documents pertaining to the disposal of Ponderosa’s waste material. The withheld documents, however, just like the others, were prepared by Torf, at least in part, to help McCreedy advise and defend Ponderosa in anticipated litigation with the government. Thus, the withheld documents fall within the broad category of documents that were prepared for the overall purpose of anticipated litigation.

To the extent that Adlman suggests there is no work product protection when, viewed in isolation of the facts of the case, a document can be said to have been created for a nonlitigation purpose, we believe the better view is set forth in two Seventh Circuit cases. In the first, In re Special September 1978 Grand Jury, 640 F.2d 49 (7th Cir.1980) (“Special September”), the court extended work product protection to materials that were produced both in anticipation of litigation and for the filing of Board of Elections reports required under state law. Work product protection was proper because, by the time the law firm’s client received the Board’s request for the required reports, the client had already received a subpoena from a federal grand jury. The so-called “independent” purpose of complying with the Board’s request was grounded in the same set of facts that created the anticipation of litigation, and it was the anticipation of litigation that prompted the law firm’s work in the first place.

In the later case, United States v. Frederick, 182 F.3d 496, 501-02 (7th Cir.1999), the Seventh Circuit held that “a dual-purpose document — a document prepared for use in preparing tax returns and for use in litigation — is not privileged; otherwise, people in or contemplating litigation would be able to invoke, in effect, an accountant’s privilege, provided that they used their lawyer to fill out their tax returns.” Frederick does not discuss or distinguish Special September, but the two cases can be reconciled by the extent to which the so-called independent purpose is truly separable from the anticipation of litigation. In Frederick, at issue were accountants’ worksheets, albeit prepared by a lawyer, in preparation of his clients’ tax returns. Although his clients were under investigation (which the court acknowledged was a “complicating factor”), work product protection was ultimately inappropriate because tax return preparation is a readily separable purpose from litigation preparation and “using a lawyer in lieu of another form of tax preparer” does nothing to blur that distinction. Frederick, 182 F.3d at 501. In Special September, on the other hand, the materials used to prepare the Board of Elections reports were compiled by lawyers and were necessarily created in the first place because of impending litigation.

Similarly here, by hiring McCreedy who in turn hired Torf, Ponderosa was not assigning an attorney a task that could just as well have been performed by a non-lawyer. The company hired McCreedy only after learning that the federal government was investigating its criminal wrongdoing; a circumstance virtually necessitating legal representation. Torf assisted McCreedy in preparing Ponderosa’s defense. He also acted as an environmental consultant on the cleanup. Although in that capacity he could have been retained by Ponderosa directly, this circumstance does not preclude the application of the work-product privilege to documents produced in that capacity, if the documents were also produced “because of” litigation. The challenged documents were prepared under the direction of McCreedy, who was providing legal advice to Ponderosa in anticipation of the impending litigation.

We conclude that the withheld documents, notwithstanding their dual purpose character, fall within the ambit of the work product doctrine. The documents are entitled to work product protection because, taking into account the facts surrounding their creation, their litigation purpose so permeates any non-litigation purpose that the two purposes cannot be discretely separated from the factual nexus as a whole.

The government contended in proceedings before the magistrate judge, as it does in its brief filed with this court, that it has a substantial need for the withheld documents and that it would incur undue hardship in obtaining substantially equivalent information. See Fed.R.Civ.P. 26(b)(3). Ponderosa responded to these arguments before the magistrate judge, asserting that it had provided the government with documents pertaining to the applicable sites pursuant to the Information Request and Consent Order, and the government’s representatives were present at those sites on several occasions. The magistrate judge resolved the dispute in favor of Ponderosa, ruling that the government had “not shown or demonstrated substantial need, hardship or unavailability necessary to overcome the qualified immunity of work product.” The government did not object in the district court to that ruling.

The failure to object in the district court to a magistrate judge’s finding of fact waives a challenge to that finding. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir.1998). The failure to object to a magistrate judge’s “pure” legal conclusion, however, may not. Id. “Rather, a failure to object to such a [pure legal] conclusion ‘is a factor to be weighed in considering the propriety of finding waiver of an issue on appeal.’” Id. quoting Martinez v. Ylst, 951 F.2d 1153, 1156 (9th Cir.1991).
As in *Turner*, the magistrate judge’s ruling in this case involves factual as well as legal determinations. The ruling defies classification as either a purely factual finding or a purely legal conclusion. What is clear, however, is that the ruling explicitly sets forth the magistrate judge’s decision rejecting the very arguments the government now wishes to make, and reciting the facts upon which the magistrate judge’s decision is based. What is also clear is that, with this decision in hand, the government eschewed presenting to the district court any contention of substantial need or undue hardship. Instead, it framed the issue as limited to whether the work product doctrine would protect a document if it were generated for a purpose other than litigation. The government stated:

In sum, a proper analysis as to the withheld documents must be conducted on a document by document basis. *If the document would not have been generated ‘but for’ litigation, it is privileged*. However, if it was generated for purposes other than litigation, even though litigation may have been a ‘real possibility’, it must be disclosed. Government’s motion for de novo review of the magistrate court’s order, filed in the district court Nov. 1, 2002, at 7 (emphasis added).

In view of the foregoing, we decline to consider the government’s contention made in its brief filed with this court, but not presented to the district court, that it has a substantial need for the withheld documents and that it would incur undue hardship in obtaining substantially equivalent information.

**CONCLUSION**

Because the withheld documents are protected from disclosure by the work product doctrine, we reverse the district court’s order denying the motion to quash, and vacate the district court’s order holding Torf in civil contempt. We also remand to the district court to consider whether the documents on which the magistrate judge deferred ruling were properly withheld.

**REVERSED and REMANDED.**
Chapter 6A

Oregon Consultation on the National Flood Insurance Program—Presentation Slides

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NFIP created by the National Flood Insurance Act of 1968, as amended (42 U.S.C. §§ 4001-4130)

NFIA PURPOSES (42 U.S.C. § 4001-02)
- Reduce federal (taxpayer funded) flood disaster relief through a voluntary insurance program.
- Require states/communities, as a condition of future federal assistance, to participate in the NFIP and adopt adequate floodplain ordinances consistent with federal standards.
ADDITIONAL PURPOSES

- Encourage state/local governments to constrict development of land exposed to flood damage.
- Guide development away from flood hazards.
- Provide for expeditious floodplain mapping.
- Authorize continuing studies/constantly reappraise the NFIP and its effect on land-use requirements.
- Assure that federal assistance under the NFIP is closely related to all federal flood-related programs and activities.

Legislative History – 1973

Reauthorization and Amendments

“Congress knew this was not a sound actuarial program but agreed to take that risk only because we could get land use.” Statement of Mr. Bernstein, p 36 . . . . “We are encouraged that the administration proposal continues a firm position with respect to adequate and responsive land use control measures. We consider such requirements to be absolutely essential to the long-range success of the flood insurance program. Without such provisions to control future development of flood-prone area, continuance of a viable flood insurance program could very well be in jeopardy.”

The NFIP is a “Traditional Federal Benefit Program”

- To participate, communities must adopt and enforce “adequate land use and control measures” consistent with federally promulgated standards.
- In exchange, the federal government makes flood insurance available/subsidies; provides flood maps; provides disaster assistance.
- Participation encouraged through restrictions on federal assistance, including federally-backed mortgages, for non-participating communities.
FEMA CHARGED WITH IMPLEMENTING THE NFIP

Four Program Areas
1. Floodplain mapping
2. Federal Criteria for Land Management and Use
3. Community Rating System
4. Insurance Rating/Sale of Insurance

Criteria for Land Management and Use
(42 U.S.C. § 4102)

- FEMA to develop “comprehensive criteria” “from time to time” that will –
  - Constrict development of land exposed to flood damage.
  - Guide development away from locations threatened by flood hazards.
  - Assist in reducing flood damage.
  - Otherwise improve long-range land management and use of flood-prone areas.
FEMA’s Floodplain Management Criteria

**Basic requirements 44 CFR part 60**
- Require permits for all development.
- Assure that all required federal and state permits are obtained for development.
- Ensure that all development is “reasonably safe from flooding.”
- Review all subdivision proposals to ensure that such proposals will be reasonably safe from flooding.
- Require that water supply and sewage systems are protected from infiltration of flood waters.

**Most restrictive requirements**
- All basic requirements, plus -
  - Require that subdivision proposals \( \geq 50 \) lots/5 acres provide BFE data.
  - Notify adjacent communities prior to relocating a water course.
  - Obtain FEMA approval prior to floodway encroachments that will increase BFEs.
  - *Require that new construction be elevated to or above the BFE* (allows properties to be “mapped out” of the floodplain).
FEMA/ESA History

- Originally, FEMA did not view the ESA as applying to their program
- First ESA lawsuit brought in 1990 (Florida Key Deer).
- 4 subsequent lawsuits leading to consultation

PUGET SOUND, WA

2004 - FEMA ordered to consult
2008 - Biological Opinion / RPA
2011 - FEMA uses “non-regulatory” approach to implementation
2012 – NWF sued FEMA for inadequate RPA implementation
2014 – Court ruled for FEMA, finding RPA was vague and gave FEMA discretion / FEMA not arbitrary/capricious
OREGON NFIP CONSULTATION

2009 – FEMA sued for failure to consult in Oregon

2010 – FEMA settled lawsuit by agreeing to consult

2011 – FEMA provided a BE proposing ESA revisions to the NFIP based on Washington RPA

2013 – NMFS draft biological opinion concludes Jeopardy/Adverse Modification; draft RPA included, discussions begin

2016 – NMFS issues final Jeopardy/Ad Mod biological opinion and RPA for Oregon

Rationale for Jeopardy / Adverse Modification Determinations

Fig. 7 Comparison of a single enclosure of fish reared in intertidal river habitat below floodplain (left) and a single enclosure of fish reared in the floodplain vegetation (right) after 54 days in respective habitats at the end of the second year of the study

Photo from "Ephemeral floodplain habitats provide best growth conditions for juvenile Chinook salmon in a California river" Jeffres et al 2008
FLOODPLAIN LOSS is a FACTOR for DECLINE and a LIMITING FACTOR FOR SALMONIDS

E.g., UWR Chinook Recovery Plan limiting factors:
• Degraded freshwater habitat, especially floodplain connectivity and function, channel structure and complexity, and riparian areas and large wood recruitment as a result of cumulative impacts of agriculture, forestry, and development.
• Degraded water quality and altered temperature as a result of both tributary dams and the cumulative impacts of agriculture, forestry, and urban development.

Salmon Habitat Needs

Whether in WA, OR, or CA, salmonid needs for floodplain habitat values are consistent, though some uses are species specific.

- Chum
- Coho
- Steelhead
- Chinook
- Sockeye
**Chum**

Need complex wetted areas in the near-adjacent floodplain for spawning.

Columbia River Chum

---

**Coho**

Need floodplain wetlands/off channel areas with access to the river via seasonal flooding – for overwinter rearing.

- Lower Columbia River coho;
- Oregon Coast coho;
- Southern Oregon/Northern California Coast Coho;
**Steelhead**

Need floodplain connectivity with inundation across vegetated shallows – for rearing refugia to support growth and survival over a long freshwater residency.

- Upper Columbia River steelhead;
- Snake River Basin steelhead;
- Middle Columbia River steelhead;
- Upper Willamette River steelhead;
- Lower Columbia River steelhead;

**Chinook**

Need floodplain connectivity with inundation across vegetated shallows – for rearing refugia to support growth and survival over a long freshwater residency for Spring Chinook race.

- Upper Columbia River spring-run Chinook;
- Snake River spring/summer-run Chinook;
- Upper Willamette River Chinook;
- Lower Columbia River Chinook;
Sockeye

Need complex wetted areas in the near-adjacent floodplain - for spawning; complex floodplain ponds and off-channel areas with connectivity for juvenile rearing.

Snake River sockeye

Effects of Minimum Criteria

- Allows 1ft. rise in flood elevation
- Encourages fill, development, increased storm water, decreased water quality
- Intended to protect property, habitat values not considered
Today’s Floodplain Is Not Necessarily Tomorrow’s Floodplain

If large areas of the floodplain are filled, then there will be an increase in the land area needed to store flood waters. This means your home or business may be impacted.

SHFA depicted in light blue;
Floodways depicted in red hatchmarks
**REASONABLE & PRUDENT ALTERNATIVES**

RPAs build on FEMA’s construct that divides the floodplain into 2 segments:

1) floodway (development restricted)

2) remainder of the floodplain (largely unrestricted)

---

**Puget Sound**

- **Conservation Zone** – no adverse effects to habitat
  (CZ = floodway + channel migration zone + riparian buffer)
- **Flood fringe** – mitigate all adverse effects

**Oregon**

- **High hazard area** – no new development except specified uses
  (HHA = larger floodway + channel migration/erosion zones)
- **Flood fringe** – mitigate for specified activities
**Puget Sound**
Mitigation includes:
- Balanced cut-and-fill
- Do not remove +65% of native vegetation
- LID/mitigation for impervious surface

**Oregon**
Mitigation includes:
- 1.5 to 1 cut-and-fill
- Replanting for vegetation
- LID/mitigation for impervious surface

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**What's Next?**
Chapter 6B

FEMA’s NFIP ESA Consultation in Oregon: What Is Changing and When—Presentation Slides

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FEMA
Bothell, Washington
FEMA’s NFIP ESA Consultation in Oregon

What is Changing and when

Scott Van Hoff
Sr. Floodplain Management Specialist
FEMA Region X

April 2017

Conditional Letter of Map Revisions (CLOMR-F)

- The requestor must submit written documentation with analysis showing ESA compliance
- Take (harm and harass) cannot occur
## Oregon RPA

<table>
<thead>
<tr>
<th>RPA</th>
<th>Summary</th>
<th>Timeframe</th>
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<tbody>
<tr>
<td>1.</td>
<td>Notice, education, and outreach to NFIP communities in Oregon regarding the outcome of FEMA's consultation with NMFS on the implementation of the NFIP in Oregon.</td>
<td>60 days (June 14, 2016) for letter, and September 15, 2016 for everything else</td>
</tr>
<tr>
<td>2.</td>
<td>Interim measures that FEMA and its NFIP participating communities must promptly implement to mitigate the impacts of floodplain development on natural floodplain functions needed to support listed species. These interim measures, which include extensive reporting requirements, are to be implemented prior to the implementation of the permanent elements of the RPA.</td>
<td>March 15, 2018</td>
</tr>
<tr>
<td>3.</td>
<td>Required use of more extensive and expensive mapping protocols and methodologies for the stated purpose of improving the identification of special hazard areas. Mapping a number of new areas including the future conditions floodplain through 2100, erosion zones, and channel migration zones (the RPA also requires FEMA to regulate to these new and expanded zones as well).</td>
<td>3A &amp; 3E March 15, 2018; 3B, 3C, 3D, 3F &amp; 3G are due September 15, 2019</td>
</tr>
<tr>
<td>4.</td>
<td>Revised floodplain management criteria to:</td>
<td>January 1, 2019 for components that FEMA determines do not need a regulation change</td>
</tr>
<tr>
<td></td>
<td>• Include a generally applicable ESA performance standard;</td>
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<td></td>
<td>• Prohibit almost all development in an area known as the High Hazard Area - HHA (floodway, V-Zone, LiMWA, erosion zone);</td>
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<td></td>
<td>• Prevent the re-drawing floodway to accommodate floodplain development (will drastically limit development in floodway);</td>
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<td></td>
<td>• Require a 60 year erosion setback area with very limited uses (agricultural, open space, temporary structures);</td>
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<td></td>
<td>• Expand definition of SFHA to include future conditions floodplain; and</td>
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<td></td>
<td>• Significantly restrict subdivisions of lots.</td>
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<td></td>
<td>There are extensive and prescriptive compensatory mitigation requirements that apply in the entire SFHA, including the future conditions floodplain.</td>
<td></td>
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</tbody>
</table>
## Oregon RPA

<table>
<thead>
<tr>
<th>RPA</th>
<th>Summary</th>
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</tr>
</thead>
<tbody>
<tr>
<td>5. Data Collection and Reporting</td>
<td>Data collection and reporting requirements needed to accurately track floodplain development impacts and RPA implementation.</td>
<td>March 15, 2018</td>
</tr>
<tr>
<td>6. Compliance and Enforcement</td>
<td>Compliance and enforcement strategies to ensure that effects of floodplain development pursuant to the NFIP are avoided or reduced throughout the action area.</td>
<td>March 15, 2019</td>
</tr>
</tbody>
</table>

**Timeframe Note:** Components of the RPA that require regulatory revisions – January 1, 2021

## Oregon Affected Communities

- Affects 251 of 271 Oregon Communities
- All river sub-basins in Oregon that contain ESA listed Salmon, Steelhead & Eulachon fish (excludes shaded green area)
Summary of Oregon RPA

- All 251 Affected Communities will be remapped based on new criteria and definitions.
- All communities will be required to revise/adopt local regulations with these more restrictive standards for development in the Floodplain.
- If communities fail to comply with the RPA, FEMA will have no choice but to apply existing NFIP enforcement actions.

FEMA’s View on Oregon RPA

- FEMA will work toward implementation of the RPA requirements within our legal authority.
- Or we will search for alternative methods of implementation to meet the overall goal of the RPA – working with the State, communities, Tribal Nations, and stakeholders.
Path Forward  (last Year- planning)

Strategic and programmatic partnership with Oregon DLCD

- DLCD received funding through our CAP-SSSE Grant for FY16 for technical assistance and to serve an advisory role to FEMA
- Inclusive of state goals and land use principals
- Conducted outreach/workshops
- Provided information to local floodplain administrators and biological consultants
- Coordinated work groups
- Provided clarification and help develop guidance materials/tools/data

DLCD Workgroups

- Mapping Workgroup
- Habitat Assessment and Mitigation Workgroup
- Regulatory Workgroup
- Local Permitting and Process Workgroup
Path Forward (Next Year - Implementation)

- FEMA will create implementation plan based on Tribal, State and local government input
- Model ordinance, guidance and other tools
- Offer technical assistance
- Communities adopt new ordinances

Examples of Region X WA Guidance
Summary: The Next year

Tribal and Local Government can expect:

- A seat at the table and input to the process
- By approximately April 2018, the NFIP in Oregon will look different than it does today

The Long Road Ahead
Questions

Resources

- DLCD website

- FEMA ESA comment email address
  FEMA-R10-ESAcomments@fema.dhs.gov

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FEMA Region X
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Chapter 7A
CC&Rs and Public Policy

Alan Rappleyea
Washington County Counsel
Hillsboro, Oregon

Contents

Presentation Slides ................................................................. 7A–1
Washington County Long Range Planning Issue Paper No. 2017-01, Updating the Standards of CDC Section 430-72 (Infill) ................................................................. 7A–9
CC&R’s and Public Policy

RELU Spring Forum 2017

Alan Rappleyea
Washington County Counsel*

Views expressed are my own and not my clients—rely on them at your own risk

CC&R’s and Land Use

- Local Government’s Do not Care what your private contract says
- Zoning Can Conflict with CC&R’s
- Private Right to Enforce CC&R’s
Public Policy

- **Untrammeled Use of the Land (alienability)-doubts**

- Court in *Swaggerty v. Petersen* 280 OR 739, 572 P2d 1309 (1977) upheld a density restriction. The Court cited the “untrammeled” rule and the fact it had been upheld many times and then stated: “We are doubtful, however, whether we should continue to do so. Public policy, as expressed in recent legislation, no longer favors "untrammeled land use," but requires the careful public regulation of the use of all of the land within the state. See especially, ORS chapter 197. In this case we need not inquire whether this legislative expression of public land use policy requires a new approach to the construction of private restrictions on the use of land.”

- Perhaps Since 1977 the courts should inquire whether a new approach is needed.

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Bad CC&R’s


- Fair Housing Act of 1968 backed up the *Shelley v. Kraemer* decision

- State Statute ORS 93.270 Race, Color etc. Unenforceable also see RCW 49.60

- ![Discrimination](image)
Public Policy Continued

- CC&R’s may be unenforceable if performance would violate an overriding public policy. *Ford v. Oregon Elect Ry Co*, 60 Or 278, 117 P 809 (1991)
- Strong public policy in favor of the rights of property owners to create and enforce covenants outweighed any policy in favor of allowing family day care homes in residential area. *Terrien v. Zwit*, 467 Mich. 56, 70–71, 648 N.W.2d 602, 610 (2002). The court will only void covenants on policy grounds where they are actually prohibited by law. *Id.* at 70.
- But . . .

Is Infill and Density an Overriding Public Policy?

- The Washington State supreme court declined to void a covenant on public policy grounds. *Viking Properties, Inc. v. Holm*, 155 Wash. 2d 112, 131, 118 P.3d 322, 331 (2005). Building company argued the neighborhood’s lot size restriction (1 home to ½ acre) was in conflict with the City’s zoning and comprehensive plan as well as the State’s Growth Management Act, which allow homes on ¼ acre lots. *Id.* at 124-25. The State Act’s overarching policy was to “concentrate development in urban growth areas.” *Id.* The court found that the density limitation did not conflict with public policy in such a way as to render it void. *Id.* at 131.
What is the public policy?

- Infill-Density—County Issue Paper Attached
- Public Cost of Infill v. Greenfields—sewer, water, storm, roads, schools, police, fire etc.
- Farm land preservation
- Elder Care-Granny Flats
- Affordable Housing
- Fair Housing

What Can Local Governments Do?

- ORS 93.270 (4) roofing materials restriction as not enforceable—add density restrictions? Impairment of contract?
- Amend Codes to Include Required Review of any CC&R
- Condition Development to Prohibit Density Restricting CC&R
- Intervene in Court Enforcement of Density CC&R’s-Argue Public Policy-Argue Violation of Laws
- Change in Circumstances-Court may refuse to enforce covenants that no longer fulfill purpose for which they were imposes because of drastic changes to the property subject to the restrictions. 
  *Ludgate v. Somerville*, 121 Or 643, 256 P 1043 (1927); *RealVest Corp v. Lane County*, 196 Or 109, 100 P3d 1109 (2004). (Rural to urban change)
Needed Housing

- ORS 197.303(1)(a) defines “needed housing” as:
- “…housing types determined to meet the need shown for housing within an urban growth boundary…including at least the following housing types: Attached and detached single family housing and multiple family housing for both owner and renter occupancy…”
- Affordable Housing Policies

Fair Housing Act

- ORS 93.270(b) “Restricting the use of the real property by any home or facility that is licensed under ORS 443.400 to 443.455 or 443.705 to 443.825 to provide residential care alone or in conjunction with treatment or training or a combination thereof” is void and unenforceable.
- Enforcement of restrictive covenant that would bar group home for mentally disabled adults from a neighborhood was a violation of the reasonable accommodation requirements of the FHA. *Martin v. Constance*, 843 F. Supp. 1321, 1326 (E.D. Mo. 1994). Homeowners were enjoined from attempting to enforce the covenant. *Id.* at 1327.
Disparate Impact

- The court allowed a claim for disparate impact of a lot size restriction on a protected class. This is a zoning case, but they are analyzed similarly to restrictive covenant cases. This case involves a zoning decision regarding lot size disparately impacting the Hispanic community: *Ave. 6E Investments, LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 504 (9th Cir.), *cert. denied*, 137 S. Ct. 295, 196 L. Ed. 2d 214 (2016). But . . .


Disparate Impact

- Could the enforcement of CC&R’s requiring large lot sizes have an disparate impact on protected classes?
Conclusion

- Most likely it will not become an issue as when the value of the property changes such that land division is significantly more profitable—most people will agree to change the CC&R’s to remove the restrictions.
LONG RANGE PLANNING
ISSUE PAPER NO. 2017-01

Updating the Standards of CDC Section 430-72 (Infill)

For Presentation at the January 24, 2017 Board Work Session

Issue
The Washington County Committee for Community Involvement (CCI) submitted a 2016 Long Range Planning Work Program request for an update of Community Development Code (CDC) Section 430-72, Infill.

The request arose out of a Hearings Officer’s decision for Casefile 13-082-S. The Hearings Officer found that the single family detached housing proposed on the development site for Casefile 13-082-S constituted “needed housing” as defined in state law. The Hearings Officer found that, in his opinion, the CDC 430-72 standards may not be applied to land use decisions for “needed housing,” because the standards are not “clear and objective” and are thus prohibited by the “needed housing” requirements of state law. The CCI requested an update of the CDC 430-72 standards to make them “clear and objective,” based on a concern that the Hearings Officer’s finding for Casefile 13-082-S invalidated the standards and prohibited staff from applying them to subsequent applications.

Staff has continued to apply the standards to infill development proposals since the decision was issued for Casefile 13-082-S, and County Counsel has noted that a Hearings Officer’s decision on a specific casefile does not have the effect of invalidating a CDC provision. County Counsel, however, concurs with the Hearings Officer’s finding that the existing CDC 430-72 standards do not appear to be clear and objective. The state’s “needed housing” rule, ORS 197.303 - 197.307, is a requirement for jurisdictions to meet the need for housing within the Urban Growth Boundary at particular price ranges and rent levels. The Department of Land Conservation and Development (DLCD) has interpreted this requirement to include all types of housing, from detached single family homes to government assisted housing, at all price ranges and rent levels. The rule was added into state law to enact several policies, including linking a demonstration of need for housing to a requirement to allow the housing in zones with sufficient buildable land. The “needed housing” rule requires local governments to apply only clear and objective standards to the development of needed housing. County Counsel expressed the opinion that if the CDC 430-72 standards were ever appealed based on non-compliance with the “needed housing” rule, the standards would be unlikely to withstand that appeal.
Staff met with the CCI Code Subcommittee at their regular meeting on May 13, 2016, and asked if the subcommittee had additional concerns about CDC 430-72. The subcommittee members expressed concerns about the privacy impacts of infill development on existing, surrounding homes. The subcommittee members requested that CDC 430-72 be amended to add specific measures to mitigate for potential privacy impacts.

Recommendation
Staff recommends that CDC 430-72 be amended to:

- Remove subjective and discretionary language from the standards so they will comply with the state’s “needed housing” rule; and,
- Add a requirement for infill development to provide one of the following clear and objective privacy enhancement measures along the side and/or rear lot lines adjacent to properties developed with existing homes:
  - A landscape buffer (evergreen hedge with a minimum height of 6 feet); or,
  - A sight-obscuring fence with a minimum height of 6 feet.

Background
The Infill and Redevelopment Code Handbook, a 1999 publication funded by the Transportation and Growth Management Program, the Oregon Department of Transportation and the Oregon Department of Land Conservation and Development, defines “infill” as the development of vacant or remnant lands passed over by previous development in urban areas.

However, the term “infill” is used in a more specific, circumscribed way in the County’s Comprehensive Framework Plan for the Urban Area (CFP) and the CDC. CFP Policy 19 (Infill) and CDC Section 430-72 (Infill) both describe infill as development on R-5 and R-6 lands that are 2 acres or less in size.

Washington County appears to be one of only three local area jurisdictions that have specific residential infill development standards. The other two jurisdictions are the city of Gresham and the city of Vancouver, Washington. The city of Portland is currently evaluating draft proposals for the development of residential infill standards.

The current text of CDC Section 430-72 is shown in Attachment A.

I. CDC Section 430-72: History and Background
The standards of CDC Section 430-72, Infill, were added to the CDC via C-Engrossed Ordinance No. 279 in 1984. Per the “Intent and Purpose” statement of CDC Section 430-72, the standards are intended to provide a means of developing vacant, bypassed lands of 2 acres or less in areas designated R-5 and R-6, and to ensure that new development is compatible with existing developed areas, with a particular emphasis on privacy. Several of the development standards within the section make references to “providing maximum privacy” and “maintaining privacy” of surrounding existing dwellings.

CDC Section 430-72 has been modified since its adoption. The most recent modifications were made in 2005, in response to a December 2004 request from the CCI for amendments to
“...ensure that infill development is compatible with existing development.” A-Engrossed Ordinance No. 645 (2005) added the following requirements to CDC 430-72:

- Submittal of additional information with the infill development application: a site plan showing the locations of setbacks of proposed dwelling units, a screening and buffering plan, and an off-site analysis; and,
- Installation of all required landscaping and fencing between proposed infill units and adjacent dwelling units prior to building occupancy and/or final building inspection approval.

The CCI’s 2004 requested amendments were to:
1. Require infill development applications to include preliminary building and site plans;
2. Require infill development applications to provide on-site screening and buffering;
3. Require infill development applications to address building orientation and other attributes, including the location of front, side and back yards, building height, deck height, and window placement;
4. Limit the allowed building height, building footprint size, building square footage, and garage square footage of the proposed infill development, based upon the existing development patterns in the neighborhood in which the infill is planned; and,
5. Require infill development applications to provide on- and off-site traffic calming measures.

In response to the CCI’s request, Long Range Planning staff completed Issue Paper No. 8, Enhancement of Design Standards, in February 2005. The issue paper recommended:

- Making limited changes to the submittal requirements for infill development, consistent with Item 1 in the above list of the CCI’s requested amendments.
- Not making the more prescriptive changes recommended by the CCI in Items 2 through 5 above. Such changes appeared to be too restrictive, given the role that residential infill development plays in the County’s planning program.
  - Infill within the R-5 and R-6 districts is a development type that the County and region want to encourage, because it makes more efficient and economic use of existing public facilities and services, and helps the County implement the housing and minimum density requirements of Metro’s Urban Growth Management Functional Plan.
  - Issues pertaining to traffic calming are more appropriately handled through the review of the transportation impacts of the development, and not through the standards of CDC Section 430-72.

The Board directed staff to file an ordinance addressing staff’s recommended changes in Issue Paper No. 8. A-Engrossed Ordinance No. 645, adopted in October 2005, made those recommended changes. There have been no further changes to CDC Section 430-72.
II. 2013 Hearings Officer Decision and CCI Work Program Requests

In 2013, the County’s Hearings Officer issued a decision for Casefile 13-082-S, a request for a subdivision approval in the R-5 District. In his decision on this case, the Hearings Officer found that single family detached housing proposed on the development site constitutes “needed housing” as defined by ORS 197.303(1)(a).

ORS 197.303(1)(a) defines “needed housing” as:

“...housing types determined to meet the need shown for housing within an urban growth boundary...including at least the following housing types: Attached and detached single family housing and multiple family housing for both owner and renter occupancy...”

Furthermore, ORS 197.307(4) states that:

“...a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of needed housing...The standards, conditions and procedures may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.”

Therefore, in his decision for Casefile 13-082-S, the Hearings Officer found that:

- The County may only apply clear and objective standards, conditions and procedures regulating development on this site.
- The infill development requirements of CDC Section 430-72.3.A are not “clear and objective” criteria.
- Requirements that a development “consider the orientation, landscaping and buffering of proposed uses...” and “provide maximum privacy to surrounding existing and future residential structures” require the exercise of discretionary judgment and subjective determinations. Therefore the infill requirements of CDC Section 430-72.3.A are prohibited by state law.
- Even if the County imposed clear and objective conditions to ensure compliance with these standards, the standards themselves are subjective and are therefore prohibited (35 Or LUBA at 160).

In 2014, the CCI submitted a Work Program request in which they expressed concern that the Hearings Officer’s finding in Casefile 13-082-S invalidated the CDC Section 430-72 standards, and prohibited the County from applying them to infill development proposals. Since the Hearings Officer’s finding stated that the CDC Section 430-72 standards could not be applied because they were not “clear and objective,” the CCI requested that the CDC Section 430-72 standards be updated to be “clear and objective.” The Board designated this topic as a Tier 2 issue in Long Range Planning’s 2015 Work Program. In November 2015, the CCI submitted a 2016 Work Program request in which they again asked for an update to the standards of CDC Section 430-72, and it moved up to a Tier 1 issue in Long Range Planning’s 2016 Work Program, with a commitment to complete an issue paper in 2016 about this topic.
During the development of this issue paper, research revealed that Current Planning staff has continued to apply the standards of CDC 430-72 to infill development proposals since the issuance of the Hearings Officer’s decision on Casefile 13-082-S.

Staff asked County Counsel the following questions about CDC 430-72:

1. Did the Hearings Officer’s findings about CDC 430-72 in Casefile 13-082-S prohibit the County from continuing to apply those standards to subsequent land use applications?

   **Counsel Response:** The Hearings Officer’s decision on Casefile 13-082-S relates only to that casefile, and does not make binding law or invalidate CDC 430-72. The decision bodies having the ability to invalidate the County’s CDC are limited to the Land Use Board of Appeals (LUBA), the Court of Appeals, and the Supreme Court. Therefore, the Hearings Officer’s decision in Casefile 13-082-S does not prohibit the county from continuing to apply the standards of CDC 430-72 to subsequent applications.

2. Does CDC 430-72 comply with the “needed housing” requirements of ORS 197.303 and 197.307?

   **Counsel Response:** The CDC 430-72 standards are largely subjective and discretionary, rather than clear and objective. ORS 197.307(4) requires a local government to apply only clear and objective standards, conditions and procedures regulating the development of needed housing. Therefore, if the CDC 430-72 standards were ever appealed based on non-compliance with the “needed housing” requirements, the standards would be unlikely to withstand the appeal.

Based on Counsel’s feedback, staff recommends that the CDC 430-72 standards be amended because they do not appear to comply with the “needed housing” requirements of ORS 197.307. Staff’s recommended amendments are discussed in the Analysis section of this issue paper.

III. CCI Code Subcommittee Feedback

On May 13, 2016, staff met with the members of the CCI Code Subcommittee at their regularly scheduled meeting and reported that an issue paper was being developed about the CCI’s work program request for CDC Section 430-72.

Staff asked the subcommittee members if they had additional concerns about the infill standards of CDC 430-72. The subcommittee members expressed concerns about the privacy impacts of infill development on existing, surrounding homes, and requested that the following requirements be added to CDC 430-72 in order to mitigate for potential privacy impacts:

- Evaluation of window placement on infill dwellings;
- Restrictions on the building height of infill dwellings; and,
• Inclusion of building elevations as part of the infill development application submittal.

It is unclear to staff whether existing property owners adjacent to proposed infill development share the privacy concerns expressed by CCI Code Subcommittee members. A review of the approximately 26 infill development applications approved in 2015 found only one application in which an adjacent property owner submitted a comment letter expressing a privacy concern. This sample suggests that adjacent property owner concerns about the privacy impacts of infill development are fairly uncommon.

For reasons explained in more detail below, staff recommends against adding requirements for evaluation of infill dwellings’ window placement, restrictions on infill dwelling height, and inclusion of building elevations as part of the infill development application. These requirements would make the standards more restrictive and could potentially result in one or more of the following adverse impacts:

• An increase in the complexity of the application review process;
• A reduction in the likelihood that infill development will occur;
• A reduction in the affordability of infill homes; and/or,
• Noncompliance with ORS 197.307(4), a subsection of the state’s “needed housing” rule, which states that standards, conditions and procedures applied to needed housing may not have the effect of discouraging needed housing through unreasonable cost or delay.

CCI Code Subcommittee members also expressed an interest in applying the CDC 430-72 standards to R-5 and R-6 properties that are larger than 2 acres in size, and to development sites in higher density residential districts. For reasons explained in more detail below, staff recommends against applying these standards to a broader array of development sites. However, if the Board wishes to take a broader look at infill requirements in the unincorporated urban area, all of the CCI Code Subcommittee’s concerns and requests could be part of that discussion.

Staff notes, however, that infill is a development type that the County, region and state want to encourage for the following reasons:

• Regional and state policies are designed to direct new residential infill development to less dense neighborhoods within the Urban Growth Boundary.
• Residential infill development within existing urban Washington County neighborhoods is desirable because it allows for more efficient and economic use of existing public facilities and services.
• Residential infill development on smaller land parcels in the urban area is an important element in helping the county implement the housing and minimum density requirements of Metro’s Urban Growth Management Functional Plan.
Therefore, staff believes that if any new restrictions on infill development are proposed, they would need to be balanced by the relaxation of other infill standards, so that infill development within the county continues to be encouraged.

The CCI Code Subcommittee’s specific requests and concerns regarding CDC 430-72 are described below, followed by staff responses:

a) Interest in requiring an evaluation of the window placement on new infill homes, to prevent the windows of new homes from having direct views into the windows of adjacent existing homes.

**Staff Response:** This request and those in Items b) and c) below, reflect concern about potential privacy impacts of infill development and its compatibility with surrounding, existing homes. While understanding this concern, staff recognizes that imposing requirements for window placement, building height restrictions or submittal of building elevations as part of single family residential infill development applications could result in adverse impacts. These include increasing the complexity of Current Planning’s application review process, reducing the likelihood that infill development will occur, and/or reducing the affordability of infill homes.

As noted earlier in the Background section, the CCI made a request in December 2004 for changes to the infill standards, including regulation of window placement, limiting the building height of infill homes, and requiring infill development applications to include preliminary building plans. Staff recommended against those proposed changes in a February 2005 issue paper, concluding that they appeared to be too restrictive given the role that residential infill plays in helping the County implement the housing and minimum density requirements of Metro’s Urban Growth Management Functional Plan. The Board concurred and did not move forward with those types of changes. Staff continues to believe that such proposed changes are too restrictive.

Staff recommends against amending the CDC 430-72 standards to require an evaluation of window placement on new infill homes for the following reasons:

- **Such evaluation would require an applicant to submit information about the window placement of adjacent, existing homes as part of a development application. This could potentially result in a more complex development application submittal, the need for a more expensive house plan, and/or the need for a more customized house, which could potentially increase home construction costs and home prices. Given current housing affordability issues in the region, these are not desired outcomes.**

- **An evaluation of infill homes’ window placement could result in a more complex staff verification and review process. Given limitations on Current Planning staff resources and the relatively large number of applications subject to CDC Section 430-72 that are processed by Current Planning each year, increasing the**
b) Interest in requiring a maximum building height for new infill homes that is less than the maximum building height allowed in the development site’s land use district. The CCI Code Subcommittee was of the opinion that new infill developments do not nestle their homes within the existing site grades, but typically re-grade sites and locate new homes on the highest grade. In their opinion, the first story of the new infill home is often at the same level or higher than the tallest story of the existing homes on adjacent properties, which results in privacy impacts.

Staff Response: Staff recommends against amending the CDC 430-72 standards to limit the building height of new infill homes to less than the maximum height allowed in the R-5 and R-6 districts for the following reason:

- A height restriction on infill homes below the 35-foot maximum allowed in the R-5 and R-6 land use districts could limit infill homes to less than 2 stories, and this could have a negative effect on infill development. A CCI Code Subcommittee member with a real estate background expressed the opinion that the lot sizes required to comply with the CDC’s minimum density requirements in the R-5 and R-6 land use districts are too small to allow for a one-story home that has sufficient floor area to be marketable.

Staff believes that the CCI subcommittee’s interest in requiring building elevations as part of infill development applications is to give adjacent property owners information about future infill homes’ height and window placement. With that information, adjacent property owners could decide whether they wished to submit comments about potential privacy impacts during the application’s public comment period.

Staff recommends against amending the CDC 430-72 standards to require submittal of building elevations for the following reasons:

- At the time that an infill application (land division) is submitted, an applicant may not have determined the specific plans or elevations for future homes on the proposed lots. Requiring an applicant to commit to building elevations of future infill homes at that point in the process may not be reasonable.
If building elevations were included as part of the infill application submittal and adjacent property owners expressed privacy concerns on the basis of infill homes’ building height or window placement, it is not clear what Current Planning could do with that information.

- As noted in Item D, staff recommends against across-the-board or case-by-case height restrictions on infill homes below the 35-foot maximum allowed in the R-5 and R-6 land use districts, because such height restrictions could have a chilling effect on infill development.
- As noted in Item C, staff recommends against requiring an evaluation of infill homes’ window placement, because such evaluation could potentially increase home construction costs and home prices, and could increase the complexity of the staff verification and review process for infill development applications.

d) Concern that CDC 430-72 is applicable only to development on sites of 2 acres or less, and interest in expanding its applicability to larger development sites.

Staff Response: The Infill standards’ applicability to sites of 2 acres or less in the R-5 and R-6 districts was part of the standards when they were initially adopted in 1984 via C-Engrossed Ordinance No. 279. Although staff was unable to locate a description of the 1984 legislative intent for the Infill standards, staff’s assumption is that the standards’ applicability was limited to sites of 2 acres or less within the R-5 and R-6 districts for the following reasons:

- A proposed development is considered “infill” if the size of the development site is relatively small, and is surrounded by existing development.
- The R-5 and R-6 districts have the county’s lowest developed urban residential densities. Newer infill development is more likely to differ from the developed character of these lower-density areas than from areas with higher-density urban residential designations.
- The Infill standards were applied to the R-5 and R-6 districts to allow the opportunity to mitigate potential differences in character between new infill development and existing development in these two lower-density residential districts.

Staff recommends against applying the Infill standards to development sites larger than 2 acres for the following reasons:

- The Infill standards’ maximum 2-acre size threshold for “infill development” may be somewhat arbitrary, but staff has no factual basis upon which to conclude that it is unreasonably small.
- As the size of a development site increases, at some point it ceases to be “infill development” and instead becomes simply “new development.”
- As the size of a development site increases, there is more opportunity for subdivision lots to be laid out in a manner that is compatible with the pattern of
adjacent existing development, and less need for regulations, such as the Infill standards, to promote such compatibility.

e) Concern that CDC 430-72 is applicable only to sites in the R-5 and R-6 districts, and interest in expanding its applicability to higher density urban residential districts (R-9 and above).

**Staff Response:** Staff recommends against applying the Infill standards to higher-density residential districts (R-9 and above) for the following reasons:

- The higher-density residential districts have higher minimum densities than the R-5 and R-6 districts, so the size and development potential of individual subdivision lots in these higher-density districts is already more constrained.
- Subjecting the subdivision of land in higher-density residential districts to the additional requirements of the Infill standards would further constrain the development of homes on these lands.

IV. Problematic Infill Application Examples from the CCI

At the CCI Code Subcommittee’s May 13, 2016 meeting, staff requested examples of development applications that were subject to the standards of CDC Section 430-72 and were problematic when developed.

A CCI Code Subcommittee member provided two 2015 examples of problematic applications at the meeting. One application proposed development on a site larger than 2 acres, so the infill standards of CDC Section 430-72 did not apply. For the reasons discussed previously in the staff response for Item III.d, staff recommends against expanding the applicability of CDC 430-72 to include sites larger than 2 acres. The other application proposed development on a site with an R-24 land use designation, so the infill standards of CDC Section 430-72 did not apply. For the reasons discussed previously in the staff response for Item III.e, staff recommends against expanding the applicability of CDC 430-72 to include sites having higher density residential land use designations.

On May 20, 2016, the CPO 3 Chair submitted two letters to staff that described three approved applications that the Chair considered to be problematic. However, the Chair’s stated concerns with these applications are not related to the standards of CDC 430-72 (Infill), and are instead related to parking and access requirements, which are addressed by other CDC standards.

V. Background Summary

The key information covered in the Background section of this paper is summarized below.

The CCI’s Work Program request, and staff’s recommended response:

- The CCI requested an update of the CDC 430-72 standards to make them “clear and objective,” based on a concern that the Hearings Officer’s finding for Casefile 13-082-S invalidated the standards and prohibited staff from applying them to subsequent applications.
Current Planning has continued to apply the standards to infill development proposals since the issuance of the 2013 decision containing the Hearings Officer’s finding.

County Counsel has noted that the Hearings Officer’s decision relates only to that casefile and does not invalidate CDC 430-72, but concurs that several portions of the CDC 430-72 standards are discretionary and subjective.

County Counsel has expressed the opinion that if these standards were ever appealed based on non-compliance with the “needed housing” rule (ORS 197.307), the standards would be unlikely to withstand the appeal.

Based on Counsel’s feedback, staff recommends that the CDC 430-72 standards be amended because they do not appear to comply with the “needed housing” requirements of ORS 197.307.

The CCI Subcommittee’s concerns and requests, and staff’s recommended response:

- Concern about privacy impacts of infill development on existing, surrounding homes.

- Request for the addition of the following requirements to CDC 430-72:
  - Evaluation of window placement on infill dwellings;
  - Restrictions on the building height of infill dwellings; and,
  - Inclusion of building elevations as part of the infill development application submittal.

- Staff recommends against making the additions requested by the CCI Subcommittee, because they could result in the following potential adverse impacts:
  - Increase in the complexity of Current Planning’s application review process;
  - Reduction in the likelihood that infill development will occur;
  - Reduction in the affordability of infill homes; and/or,
  - Noncompliance with ORS 197.307(4), a subsection of the state’s “needed housing” rule, which states that standards, conditions and procedures applied to needed housing may not have the effect of discouraging needed housing through unreasonable cost or delay.

Although staff recommends against the CCI Subcommittee’s requested additions, staff agrees that specific privacy promotion measures need to be added to CDC 430-72. Such measures should be clear and objective, and should not result in any of the potential adverse impacts noted above. Staff recommends the addition of two clear and objective measures to promote privacy between infill development and existing homes, and these are discussed in the Analysis section below.

**Analysis**

The existing CDC 430-72 standards are shown in Attachment A. The standards state that building orientation, setbacks, landscaping and fencing will be considered as approaches to provide or maintain privacy. However, these standards are subjective and discretionary, and do not provide clear and objective requirements for the provision of privacy. For example, CDC 430-72.3.A reads,
When developed through a subdivision, consider the orientation, landscaping and buffering of proposed uses in order to provide maximum privacy to surrounding existing and future residential structures.”

This language is not clear and objective, because it does not state how the building orientation, landscaping and buffering of proposed uses will be considered, or how maximum privacy will be provided.

Staff recommends removing this language and other subjective language within the CDC 430-72 standards, and replacing it with clear and objective standards that will comply with the requirements of ORS 197.307, the “needed housing” rule. Based on a review of other local jurisdictions’ infill development standards, staff recommends limiting the required privacy measures in CDC 430-72 to specific requirements for landscaping and fencing, described further below. These measures can be written as clear and objective requirements, and appear unlikely to result in adverse impacts such as discouraging infill development or reducing the affordability of infill homes.

I. Require landscape buffers between infill development and adjacent existing homes.

The existing standards of CDC 430-72 allow for the consideration of landscape buffers as a privacy measure, but do not require them. CDC Section 411 (Screening and Buffering) contains landscape buffer requirements for new development, but does not require proposed R-5 and R-6 infill development to provide landscape buffering if the development is adjacent to existing developed or vacant R-5 and R-6 lands.

However, staff believes that a landscape buffer requirement for infill development could promote privacy by screening views between infill properties and adjacent existing homes. A landscape buffer requirement has the additional advantage of being a clear and objective standard, thus providing certainty to infill development applicants and adjacent property owners.

The CDC Section 411 buffer types consist of a combination of canopy trees and shrubs. Staff does not recommend these buffer types as a landscape buffer requirement for R-5 and R-6 infill development because:

- The canopy trees required by CDC Section 411 would have insufficient room to thrive in the R-5 and R-6 districts’ 5-foot side yard setbacks.
- Canopy trees placed in side or rear yard setbacks could negatively impact adjacent properties by excessively shading neighbors’ yards.
- Canopy trees are generally deciduous and do not provide visual screening during the winter months after their leaves have dropped.

Instead, staff recommends a buffer of evergreen shrubs with a minimum height at maturity of 6 feet, spaced to form a continuous screen, as the appropriate landscape buffer type to promote privacy between R-5 and R-6 infill development and adjacent properties.
II. **Require sight-obscuring fencing between infill development and adjacent existing homes.**

The existing standards of CDC 430-72 allow for the consideration of fencing as a privacy measure, but do not require it. CDC Section 411 contains fencing requirements for new development, but does not require proposed R-5 and R-6 infill development to provide sight-obscuring fencing along shared property lines if the development is adjacent to existing developed or vacant R-5 and R-6 lands.

However, staff believes that a requirement for a minimum 6-foot tall sight-obscuring fence could promote privacy by screening views between infill properties and adjacent existing homes. A fencing requirement has the additional advantage of being a clear and objective standard, thus providing certainty to infill development applicants and adjacent property owners. Another advantage is that this screening method takes up very little room on an infill development site.

Each of the above measures would promote privacy by screening views between the first floors of existing homes and infill homes, and would be much less onerous for infill developers than other potential privacy enhancement measures such as limiting the height of infill dwellings below the maximum building height for the district.

**Summary and Staff Recommendation**

Residential infill is a development type that the County, region and state want to encourage. Regional and state policies are designed to direct new residential infill development to less dense neighborhoods within the Urban Growth Boundary. Residential infill development within existing urban Washington County neighborhoods is desirable because it allows for more efficient and economic use of existing public facilities and services. Residential infill development on smaller land parcels in the urban area is an important element in helping the County implement the housing and minimum density requirements of Metro’s Urban Growth Management Functional Plan.

The CDC 430-72 standards apply to the infill development of properties that are 2 acres or less in size within the R-5 and R-6 districts. The standards’ intent is to ensure to the extent practicable that new development is compatible with existing developed areas, with a particular emphasis on privacy. However, the standards do not include specific measures to promote privacy. The CCI Code Subcommittee expressed concerns about the privacy impacts of residential infill on adjacent, existing homes and requested the addition of specific measures to promote privacy.

Several of the CDC 430-72 standards are subjective and discretionary, but the state’s “needed housing” rule, ORS 197.307, states that standards applied to “needed housing” must be clear and objective.

For the above reasons, staff recommends that CDC 430-72 be amended to:

- Remove subjective and discretionary language from the standards so they will comply with the state’s “needed housing” rule; and,
Add a requirement for infill development to provide one of the following clear and objective privacy enhancement measures along the side and/or rear lot lines adjacent to properties developed with existing homes:

- A landscape buffer (evergreen hedge with a minimum height of 6 feet); or,
- A sight-obscuring fence with a minimum height of 6 feet.
430-72 Infill

430-72.1 Intent and Purpose

The intent of this Section is to provide a means of developing vacant or underdeveloped, bypassed lands of two (2) acres or less in areas designated R-5 and R-6 by the applicable Community Plans of the Washington County Comprehensive Plan. This Section is intended to ensure, to the extent practicable, considering the allowed density of each district, that new development is compatible with existing developed areas through Development Review that emphasizes building orientation, privacy, buffering, access and circulation and provides for notification to adjacent property owners. Application of the requirements of this Section shall not preclude development to the density allowed by each district.

430-72.2 Applicability

The requirements of this Section shall apply to all properties designated by the applicable Community Plan as R-5 or R-6 which contain two (2) acres or less (excluding existing rights-of-way).

430-72.3 Development of land required to be processed through the infill provisions shall meet the following:

A. When developed through a subdivision, consider the orientation, landscaping and buffering of proposed uses in order to provide maximum privacy to surrounding existing and future residential structures; or

B. For all other development (i.e., partitions, development review for attached units) the following standards shall apply:

   (1) Complies with the intent and purpose of this Section;

   (2) The applicant shall provide a plan of complete development of the subject property and potential development of adjacent vacant parcels to the density allowed by the district;

   (3) Parcelization or placement of dwellings shall not preclude development of the subject site and surrounding properties to the density allowed by the district. Consideration shall include but not be limited to:

      (a) Access;

      (b) Circulation; and

      (c) Building location;

   (4) Buildings shall be oriented to provide maximum privacy to surrounding existing and future residential structures;

   (5) Maintain the setback requirements of the primary district unless the Review Authority determines, as part of the initial approval, that it is necessary to modify the setbacks to provide more privacy to existing and proposed structures; and

   (6) Landscaping and fencing may be required to maintain the privacy of existing dwellings on adjacent properties.
C. All required landscaping and fencing between the proposed infill dwelling units and adjacent existing dwelling units shall be installed in accordance with the approved development plans prior to building occupancy and/or final building inspection approval.

430-72.4 Submittal Requirements

In addition to all other submittal requirements, applications shall include:

A. Site plans showing locations and setbacks of each dwelling unit and, if applicable, detached garage on each new lot or parcel;

B. A screening and buffering plan showing all existing landscaping and buffering and any additional landscaping and buffering, including fencing, needed to maintain the privacy of existing dwellings on adjacent parcels. The screening and buffering plan may be incorporated into the individual site plans described under Section 430-72.4 A. above; and

C. An Off-Site Analysis as required by Section 404-1 that includes setbacks of the proposed dwelling units on the subject property from existing dwelling units on adjacent parcels.
Chapter 7B
Private Land Use Regulation Through CC&Rs—Presentation Slides

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Private Land Use Regulation through CC&Rs
RELU Spring Forum 2017

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April 28, 2017

Methods to Prevent Infill

- Use zoning laws to preserve lower density
  - Subject to opposition from city and county planners
  - If mayor Charlie Hales failed to change zoning law in his own neighborhood, what are your chances?

“Downzoning of Eastmoreland - dubbed ‘R-1 Percent’ -- dies quiet death”
Methods to Prevent Infill (cont’d.)

- Seek a historic neighborhood designation

"Historic district proposal hits a nerve in Eastmoreland"

- Rally your neighbors to fight each partition and subdivision as each land use application is filed

Covenants, Conditions and Restrictions

- No need to be part of a general plan or subdivision

- Property owners in Oregon are free to place CC&Rs on their property - See, e.g., Hawkins View Architectural Control Comm. v. Cooper, 241 Or App 269, 279, 250 P3d 380 (2011)

- CC&Rs can be created by neighbors to restrict partition or subdivision of their lots
### When Are CC&Rs a Good Choice?

**Advantages**
- Runs with the land
- No government approval required
- No change in statutes, ordinances or code required
- Courts enforce CC&Rs as contractual obligations - *Ludgate v. Somerville*, 121 OR 643, 648, 256 P 1043 (1927)

**Disadvantages**
- Only binds property of owners that sign
- No public enforcement - county and city typically will not stop infill that violates CC&Rs
- Private enforcement can be expensive
- Amendable

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### Legal Requirements for CC&Rs

- The parties intend the agreement to run with land
- The agreement touches and concerns the land (both the land benefited and burdened by the covenant)
- Privity of estate between promisor and his/her successors
  - *Johnson v. State* by and through Highway Div. of Dep’t of Transp., 27 Or App 581, 584, 556 P2d 724 (1976)
- Covenants need to be in writing - ORS 41.580; ORS 93.020
- Owners must have actual or constructive notice - ORS 93.640
Drafting CC&Rs to Prevent Infill

- Good recitals
- Language expressing intent that agreement run with the land
- Strong, clear and unambiguous restrictive language
- Accurate legal descriptions and property owner names
- Enforcement provision
- Minimum number of property owners that must sign for it to be effective
- Minimum number of property owners necessary to modify or terminate
- Fee shifting provision

Enforcement of CC&Rs

- Private enforcement required
  - City and county not required to consider CC&Rs in acting on partition or subdivision application - *Long v. Marion County*, 26 OR LUBA 132, 1993 WL 1473245, at *1 (Oct. 22, 1993)
- Provide immediate notice
- File lawsuit and seek injunctive relief
  - *Swaggerty v. Petersen*, 280 Or. 739, 748, 572 P.2d 1309, 1316 (1977) (affirming mandatory injunction that structure built after notice given and while action pending be torn down)
Common Defenses


- Change of Character
  - *Ludgate v. Somerville*, 121 Or. 643, 651, 256 P. 1043, 1046 (1927) (a change of character of the surrounding territory will not induce a court of equity to refuse to enforce the covenant)
  - *RealVest Corp. v. Lane Cnty.*, 196 Or App 109, 100 P3d 1109 (2004) (denying restriction against building on land that has since become surrounded by urban development)

- Laches
  - *Crawford v. Senosky*, 128 Or. 229, 234, 274 P. 306, 308 (1929) (“one who has willfully allowed a restrictive covenant to be broken by divers persons bound thereto cannot thereafter come into a court of equity for an injunction to restrain the violation of that covenant is a recognized principle of law”)

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**Gorman v. Krasnogorov,**
Washington County Circuit Court Case No. C160603CV
Questions or Comments?

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About the Presenters

Paul Trinchero helps clients resolve complex real estate disputes relating to the purchase and sale of real property, condemnation and eminent domain actions, commercial leases, and property tax appeals. He represents property owners and managers, commercial tenants and landlords, and local governments. Paul litigates cases in state and federal court, as well as in private arbitrations, and he also has experience assisting clients in matters involving securities laws, noncompetition agreements, False Claims Act, and shareholder class action and derivative lawsuits.

Patrick Conti litigates commercial disputes and has represented clients in federal and state cases involving breach of contract, business torts, licensing, and unfair competition class actions. He also represents companies and individuals in criminal investigations and False Claims Act cases brought by the federal government. He has significant courtroom experience and has tried multiple cases to successful jury verdicts.