OREGON REAL ESTATE AND LAND USE DIGEST

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Highlights

Appellate Cases—Land Use

Court of Appeals Changes Standing Requirements for Appeal From LUBA Decisions

A recent decision by a closely divided Oregon Court of Appeals, *Utsey v. Coos County*, 176 Or. App. 524, 32 P.3d 933 (2001) (appeal pending), has changed the standing requirements for appeal from LUBA decisions. The probable effect is that, unless the Oregon Supreme Court overturns the Court of Appeals, statewide watchdog organizations may find it more difficult to obtain review of LUBA orders at the Court of Appeals and the Oregon Supreme Court.

In *Utsey*, the owners of a 531-acre tract of land zoned, in part, for Exclusive Farm Use (EFU), applied for a conditional use permit for an "Off-Highway Vehicle (OHV) Recreational Trail System Park," including a motocross racetrack. The owners proposed that the park be approved as a "private park," which is a conditionally permitted use in EFU zones under ORS 215.283(2)(c). The county conducted an evidentiary hearing at which neighboring property owners appeared in opposition to the application. The League of Women Voters (League) filed a letter in opposition. The letter did not explain the League's interest in the application, stating only that the League opposed the application on the basis that approval would be unlawful. The county ultimately approved the application with conditions, and certain neighbors appealed to LUBA. The League moved to intervene, as it was entitled to do under ORS 197.830, and LUBA granted the motion. Subsequently, LUBA agreed with the county that ORS 215.283(2)(c) allowed the proposed development, while remanding on other issues, and the League alone appealed to the Court of Appeals. Once again, the League provided no statement of its interest in the application. As allowed by ORS 197.850, the League relied for standing solely on the fact that it was a party to the proceedings before LUBA.

In an opinion by Judge Landau, the Court of Appeals dismissed the appeal on the ground that it lacked jurisdiction, because the claim was nonjusticiable as a matter of *state constitutional law*. Although ORS 197.850 allows any party to a proceeding before LUBA to seek judicial review of LUBA's final order in that proceeding, the Court of Appeals concluded that the legislature lacked the necessary constitutional authority to confer standing for judicial review on persons or organizations that did not demonstrate the challenged agency action would have a "practical effect" on the person challenging it. In other words, although the League had complied with the statutory requirements, it had not complied with an *additional* state constitutional requirement.

The court's analysis is lengthy and complex and relies, in part, on the context of federal constitutional law. The court concludes at the outset that the numerous Oregon Supreme Court and Court of Appeals precedents regarding standing are inconsistent, which justifies a fresh analysis of the Oregon Constitution. As the court views them, these precedents strictly required a demonstration of "practical effect" until the 1970s and 1980s, when they became "murky." However, in the appellate opinions of the 1990s, the court sees a return to the earlier strict standard. The court "endeavors to return to first principles, so that we may evaluate which among the prior cases represents the interpretation of the Oregon Constitution that is consistent with the meaning likely intended by those who ratified it." It then reasons that without some demonstration that a challenged agency action (and in *Utsey*, LUBA is the agency) will have a practical effect on the person challenging it, such a case amounts to "no more than a request for an unconstitutional advisory opinion."

What is a "practical effect?" As the court notes, prior decisions offer examples of what suffices, without defining the "outer boundaries." One such decision is *Eckles v. State of Oregon*, 306 Or. 380, 760 P.2d 846 (1988), where the court found a practical effect on taxpayers who allege that the challenged government action will have an effect on their taxes (a "present or foreseeable financial interest"), on users of a road, and on voters who may have "a legally recognized interest beyond an abstract interest in the correct application or the validity of a law." In contrast, a taxpayer who alleged only an interest in the proper expenditure of public funds without alleging that the challenged government action would have an effect on his taxes was held to have no standing, *Gruber v. Lincoln Hospital District*, 285 Or 3, 588 P2d 1281 (1979); and parents whose son had been murdered had no standing to obtain a declaration setting forth limits on the Governor's power to commute the death sentence of their child's murderer, *Eacret et ux v. Holmes*, 215 Or. 121, 333 P.2d 741 (1958).

Although there are no Oregon cases before *Utsey* where an appellate court has flatly concluded that a statute conferring standing is unconstitutional as applied, the *Utsey* court finds that the court's reference in *People for Ethical Treatment v. Inst. Animal Care*, 312 Or.

95, 817 P.2d 1299 (1991), to "certain constitutional considerations not presented by this case" supports its interpretation that the constitution imposes a separate "practical effect" requirement. "The question is whether a legislative conferral of standing is sufficient to establish the justiciability of a claim; said another way, the question is whether the constitution imposes limits on the authority of the legislature to confer a right to seek judicial review." The court perceives similar constitutional consideration in *McIntire v. Forbes*, 322 Or. 426, 909 P.2d 846 (1996), based on what Judge Landau views as an independent examination in that case of "the facts that established statutory standing to determine whether those facts also would be sufficient to establish the practical effects necessary to satisfy the constitution."

Four judges (out of nine) dissented from the *Utsey* decision, while two judges joined in a separate concurrence. Three separate, lengthy dissents were written by Judge Deits, whose dissent was joined by Judge Armstrong; Judge Armstrong, writing separately; and Judge Brewer, whose dissent was joined by Judge Wollheim. The dissenters disagreed that existing precedents are unclear, noting that the Oregon Supreme Court has never before rejected, on constitutional grounds of nonjusticiability, a land use case that satisfied statutory requirements. All of the dissenters agreed that the legislature has the authority to define what qualifies as a legal interest for purposes of seeking judicial review from administrative decisions, such as a LUBA order, and thus to determine who has standing.

Judge Deits maintains that there are four categories of issues that are pertinent in assessing whether a justiciable controversy exists: standing, ripeness, adversity, and mootness. She notes that the case was ripe; there was adversity, meaning the opinion would not be advisory; and the question was not abstract, hypothetical, or contingent, meaning it was not moot. As for standing, she contends, "[T]he consideration of practical effects has always been in the context of satisfying the specific requirements of a statutory standing requirement, commonly the statutory requirements for bringing a declaratory judgment action, or it has been related to mootness, not standing. We have consistently equated the practical effects aspects of justiciability with mootness." In support of her argument, Judge Deits cites to many of the same cases the majority uses to buttress its conclusion that "mootness merely refers to the temporal aspect of [an] essential requirement of justiciability."

Judge Armstrong argues there are three requirements for justiciability—contestants, a dispute, and the opportunity to grant relief, and that these requirements can be adjusted by the legislature and by the courts. He strongly disagrees with the majority's position that "there is a limit imposed by the Oregon Constitution on the legislature's authority to determine who can be a contestant in an Oregon court in a case involving judicial review of a governmental action undertaken by a body charged with complying with a regulatory regime established by the legislature." He notes, "[E]motional, psychological, and aesthetic reactions to governmental actions are real even if they cannot readily be quantified in money," and reasons that these "real" reactions constitute a sufficient stake to justify legislatively conferred standing. He also contends that the price of litigation itself (whether measured in time, stress, or money) up to and including LUBA proceedings creates a stake that justifies standing for an appeal to the Court of Appeals.

According to Judge Brewer, the majority fails to recognize the public policy considerations involved in the legislature's decision to confer standing for a judicial appeal on participants in a LUBA appeal. In his view, courts have a review function, as opposed to an appeal function, with respect to administrative cases. He points out that when the Oregon Supreme Court decided, in *Jefferson Landfill Comm. v. Marion Co.*, 297 Or. 280, 686 P.2d 310 (1984), that the petitioner had standing to appeal to LUBA, the court necessarily, if implicitly, held that the statutory grant of standing for judicial appeals from LUBA orders did not exceed constitutional limits. In *Jefferson Landfill*, the court left it to the local land use decision-makers to act as a "gatekeeper," and stated that if they do not exclude someone in the local proceedings as an "interested person," "it will be assumed that when a person appears before the local body and asserts a position on the merits, the person has a recognized interest in the outcome." Judge Brewer reasons that because standing is a jurisdictional requirement, if there were a separate constitutional requirement of "practical effect" for judicial appeals from LUBA orders, the Oregon Supreme Court would have dismissed the petition in *Jefferson Landfill* on its own motion. Judge Brewer concludes, "[T]he Supreme Court has accepted legislative determinations to tie standing to seek judicial review directly to participation in the administrative proceeding as a party or statutory aggrievement. In doing so, it has recognized that administrative proceedings involve public interests, not simply disputes between opposing private parties."

It appears that until the justiciability issue prompted the dismissal of the League's appeal, the Court of Appeals was going to remand the case to LUBA. Judge Deits is the only judge to address the issues raised on appeal by the League. Her dissent contains a sharply critical analysis of the reasoning that prompted LUBA to conclude that an OHV park can be permitted under ORS 215.283(2) as a "private park" on EFU land. Judge Deits points out that LUBA's reliance on the dictionary definition of "park" "would permit, among other things, the replication of Yankee stadium or Disneyland on land zoned EFU, a construction of the statute that we take is self-evidently unlikely." Judge Deits notes that "the dictionary is only the beginning of the process of statutory construction," and reminds LUBA of the agricultural land use policy stated in ORS 215.243, which has prompted the interpretation of ORS 215.213 and ORS 215.283 restrictively.

After *Utsey,* prudent persons or organizations that seek judicial review of LUBA orders will include a statement, supported by some evidence in the record, explaining how the challenged decision will have a practical effect on their interests. This may mean as little as preparing a pro forma statement of interest or enlisting a neighbor to participate minimally as a front for the organization. It could mean more, perhaps much more.

Peter Livingston

Utsey v. Coos County, 176 Or. App. 524, 32 P.3d 933 (2001).

Free Speech and Substantial Evidence Arguments Insufficient to Overturn Rejection of Late Night Operation for Video Store

In *Oregon Entertainment Corp. v. City of Beaverton*, 172 Or. App. 361, 19 P.3d 918 (2001), the Beaverton City Council had rejected Fantasy Video's (Fantasy) conditional use permit to operate past 10 p.m. The use was allowed outright between 7 a.m. and 10 p.m. The relevant criterion for use after 10 p.m. was:

"That the location, size, design, and functional characteristics of the proposed use are such that it can be made reasonably compatible with and have minimum impact on the livability and appropriate development of other properties in the surrounding neighborhood."

The Council interpreted this standard as embodying "'subjective factors, such as the effect on neighborhood uses, vacancies, potential for criminal activity and the character of the area surrounding the use.'" The evidence was that Fantasy's neighbor, Park Plaza, had lost tenants, the parking lot was not visible from the street, there was limited lighting, and crime had occurred around two adult video

stores in other areas, one in Beaverton and the other on Sandy Boulevard in Portland.

Fantasy argued the decision was not supported by substantial evidence in the record as a whole and violated the Oregon Constitution's right of free expression, Article I, Section 8. The Land Use Board of Appeals (LUBA) rejected both claims and the Court of Appeals affirmed LUBA's decision.

Substantial Evidence: The court cast Fantasy's substantial evidence argument in two parts: relevance and weight. Fantasy argued that criminal activity at other locations is not relevant. However, the court said such activities have a tendency to show increased potential for criminal activity at the applicant's site. Since criminal activity was interpreted as being part of the criterion, the activity at other locations was relevant. As to the weight, the court pointed out that the test in *Younger v. City of Portland*, 305 Or. 346, 752 P.2d 262 (1988), does not allow LUBA or the courts to reweigh the evidence in the guise of assessing its substantiality.

Comment: The court is obviously correct in the relevance/weight distinction. More troubling is something that apparently was not argued, namely, the interpretation of the criterion. Criminal activity does not seem to have anything to do with location, size, or design. Criminal activity must, therefore, manifest itself in "functional characteristics." I would think functional characteristics could apply to traffic patterns, lighting, and other normal physical activities associated with the use. Criminal activity does not seem to be inherent in the criterion. Even given the deference required by Clark *and ORS 197.829, it still seems like a reach from my point of view.*

Free Expression. The court paraphrased Fantasy's argument to be that, because it enjoys free expression protection, it may not be made subject to the rules applicable to other businesses and it is to be given advantageous zoning treatment, for example, extended business hours. The court first looked to *State v. Robertson*, 293 Or. 402, 649 P.2d 569 (1982) as interpreted by *State v. Plowman*, 314 Or. 157, 838 P.2d 558 (1992), *cert. denied*, 508 U.S. 974 (1993). In *Robertson*, the court recognized a distinction between laws that focus on the content of speech, versus laws that focus on the pursuit or accomplishment of forbidden results. Laws that focus on content are unconstitutional.

As to the second type of law, there is a further distinction between those laws that forbid the expression to achieve the forbidden result (*i.e.*, coercion), and laws that focus on forbidden effects without regard to expression. Expression-type laws are analyzed for overbreadth, that is, is the expression protected as a privileged communication? Finally, to be successful in asserting an Article I, Section 8 claim, challenging a law that focuses on forbidden effects, the person must assert that the law is unconstitutional as applied to his expression. The court determined that a free expression challenge to Criterion 3 had to be an "as applied" claim.

Both at LUBA and before the Court of Appeals, Fantasy based its challenge to Criterion 3 on *City of Portland v. Tidyman*, 306 Or. 174, 759 P.2d 242 (1988), where Portland's ordinance prohibiting adult businesses in particular locations without specifying adverse effects was overturned. The court distinguished *Tidyman* and determined Criterion 3 was not expressly directed at free speech. The Beaverton decision, unlike the Portland decision, was supported by adjudicative findings as opposed to merely legislative findings, and Beaverton's findings were supported by substantial evidence. LUBA, as the court quoted, pointed out that Fantasy never argued that it could not operate or that the 10 p.m. cutoff was an impermissible burden on its free speech right.

The court disposed of two other challenges to LUBA's decision. First, because Beaverton had allowed a 24-hour fast food restaurant and had denied Fantasy the authority to operate after 10 p.m., Fantasy argued there was an impermissible and selective burden on

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free speech. The Court found no "meaningful similarity." Second, Fantasy argued that if criminal activity at other locations is allowed, then there could never be an after-hours permit for adult bookstores. The court said "Petitioner's contention assumes a universal result from the denial of this particular permit, and it reasons backwards from that assumption to the conclusion that the denial of this permit was unjustified on its own terms. However, in the absence of any convincing showing of pretext or of error in the denial of this permit, petitioner's inverse syllogism simply does not work."

Finally, the court quoted, with approval, LUBA's observation that even though several city council members and the Mayor had apparently said that the real reason they were denying the permit was the nature of Fantasy's business, when viewed as a whole, the record does not support a conclusion that the real reason for denial was a dislike for the nature of Fantasy's business.

Comment: As to the "inverse syllogism" analysis of the court, perhaps it understands what it means, but I do not. Deductive reasoning has its place, as the scholastics and St. Thomas Aquinas recognized. However, at least since the time of Francis Bacon, inductive reasoning has been recognized as a tool of science and educated people. That is what Brandeis briefs are all about. I must assume, however, that the court did not have before it a Brandeis brief on this subject or even several situations where after-hours use was prohibited to businesses like those of Fantasy.

As to the comments quoted to LUBA and the court from the council members and mayor, I find the court's "head in the sand" approach troubling. In the law, we ask questions about motive all the time (e.g., meeting of the minds or mens rea). Competent counsel for the City will, of course, dress a decision in the best findings possible. Yet when the intent is to flout the law and the Council knows that, it seems to me that the court and LUBA should not scuttle under the umbrella of findings and ignore comments made in the decision making process by the deciders.

Steven R. Schell

Oregon Entertainment Corp. v. City of Beaverton, 172 Or. App. 361, 19 P.3d 918 (2001).

EFU Zone Exception for "Public or Private School" Held Not to Include a "Career School"

Warburton v. Harney County, 174 Or. App. 322 (2001), is another case pivoting around statutory interpretation of undefined language. This case turned on whether a private career school that trains outdoor guides was a "public or private school" and, therefore, allowed as an outright permitted use on EFU-zoned land under ORS 215.283(1)(a).

Petitioner operated an outfitting business under a conditional use permit on a 160-acre parcel near Frenchglen, west of Steens Mountain. Petitioner applied for a site plan approval to improve the property with a school. The application called for a school building with a fourteen-room dormitory, staff quarters, a thirty-seat cafeteria, nineteen cabins for seasonal occupancy, two permanent dwellings, and a shop. Petitioner obtained a renewable license for a "career school" from the Oregon Department of Education.

Harney County granted the application, finding that a "career school" was included within the statutory term "public or private school." LUBA reversed, concluding that the text and context of the statute indicated the legislature intended to allow only elementary and secondary schools. The Court of Appeals affirmed. The analysis of statutory construction was based on *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 610–12 (1993).

Petitioner argued that the reference to "public or private schools" should be given its plain and ordinary meaning. The term would include any place or institution for learning, even beauty colleges and major universities. The court agreed that petitioner's argument was plausible, if the statute had merely said "schools." However, the court reasoned that the term "public or private" significantly modified the term schools. Because this term appears in the context of an exception to what would normally be allowed or prohibited in an EFU zone, the court declined to expansively interpret the phrase.

Reviewing the statutory history of ORS 215.283, the court found the "public or private schools" exception first appeared in 1963 as ORS 215.213(1) when counties were given authority to plan and zone land for exclusive farm use. In 1983, the legislature reorganized ORS 215 and moved the language to its present location.

Comparing other statutory references to educational institutions during 1963–1983, the court noticed that "schools" generally referred to elementary and secondary schools. In contrast, adult education centers, community colleges, and private vocational schools had specific identifying terms that could be traced consistently during this period. The "career school" petitioners sought was a direct successor to the "vocational school" of 1963. Thus, the court reasoned that since "public or private schools" did not include vocational schools in 1963, it did not include their successor in 2000.

The decision seems shaped by the court's attempt to follow the legislature's lead in limiting the use of EFU-zoned property to a narrow scope beyond farm uses. In reaching this end, the court ties the language of the statute to the ancient meanings of its words.

To the extent the reader believes the law should remain alive so that it can grow with the people it governs as language and customs change, the reasoning in this decision echoes the incidents of feudalism. When faced with an application of plain language, many of us do not herald back to "how was that term used in 1963" as the point of departure. While the court was presented with a difficult question of legislative intent, the court's approach obscures rather than illuminates how one is to garner meaning from the statutes—where does the process of retrospection, archival research, and ancient usage end, in seeking to solidify meaning from present words?

It appears what the court is really saying is that when interpreting an exception to a broad regulatory statute, the exception is to be interpreted narrowly, to mean only its most conventional and frequently thought of manifestations. The limiting effect is suggested by the court's own example—a major university. Under the court's thinking, the legislature intended Frenchglen and other EFU sites not to have major universities. While that may be leading petitioner's plans by a few decades, it indicates the limitation inherent in narrowly interpreting language. Such reaching out of human endeavor—of education universally available—is simply not possible in Frenchglen under the present law. Schooling shall stop at grade 12 in the EFU zone.

While the conclusion one could draw from this case is to apply caution in using the exceptions allowed in the EFU zone and to stay within the mainstream of the definition, this case is not strong enough to bear that conclusion. The court's reasoning appears idiosyncratic and unlikely to be duplicated.

Stephen Mountainspring

Warburton v. Harney County, 174 Or. App. 322 (2001).

What it Takes to Make Findings That Meet the Dolan Test

McClure v. City of Springfield, 175 Or. App. 425 (2001), is another important reminder of the effort that must go into findings supporting exactions in order for them to pass the *Dolan* test. Public bodies must have proposal specific supporting facts and a proportional analysis or their exactions will fail *Dolan*. It is important to remember that *Dolan* has a two part test.

In this case, the City of Springfield sought review of LUBA's remand, for the second time, of its decision to approve a land partition. The applicants, through a cross-petition for review, also appealed, but they appealed LUBA's approval of a city right-of-way exaction. The Court of Appeals affirmed LUBA in all regards.

LUBA's first remand of this matter was based on the City's failure to meet the *Dolan* requirements when imposing three exactions. LUBA determined that the City "failed to show that its exactions were roughly proportional to the legitimate needs that the City found would be created by the proposed development." On remand the City adopted additional findings to support the exactions. This decision was also appealed to LUBA and it determined that the new findings brought one of the three exactions into compliance and remanded the decision again.

The Court of Appeals first reviewed the *Dolan* test as follows:

"In *Dolan*, the [US] Supreme Court held that an exaction of real property may be sustained only when the exacting government demonstrates (1) that there is an 'essential nexus' between the government's demand on the property owner and the harm addressed by the exaction, and (2) that the exaction is 'roughly proportional' to the effects of the development."

The court then reviewed the exactions imposed and LUBA's review of the findings supporting those exactions.

The applicants requested the right to partition their property. The partition was approved, but was subject to exactions for a twenty-foot street dedication, which would have changed the street frontage for one of the lots; dedication of a five-foot right-of-way for a sidewalk with curbs; dedication of a ten-foot by ten-foot visibility "clipped corner" at one intersection; and installation of a curbed sidewalk, ADA accessible driveway approaches, and street lighting.

LUBA's decisions, in both cases, are worth review. In the first case, LUBA found that the City had failed to justify, with facts, the transportation impact and trip information upon which it based its dedication requirements. In fact, LUBA held that the city made:

> "no attempt to establish a relationship between the number of non-vehicular trips from the proposed development, . . . and its effect on the transportation system. . . . the city has not adequately explained why the increased vehicular, pedestrian, and bicycle traffic that may be expected from the additional lots . . . constitute impacts that are roughly proportional to the required dedications."

On remand, the city adopted additional findings in an attempt to meet LUBA's objections. In the second case, LUBA held these new findings were also insufficient, in the main, because they still relied on unsupported assumptions and impact goals. In addition, while LUBA found that the findings for one of the exactions sufficiently discussed the "essential nexus" between the exaction and a legitimate governmental interest, it *failed to address the second, or rough proportionality* part of the *Dolan* test. LUBA said that *after quantifying the impact, a local government must still establish that the proposed exaction is "roughly proportional" to the impact reasonably anticipated from the development*. LUBA also determined that the city's decision must be based upon facts related to the proposed development and not just based upon "generalized transportation needs."

In affirming LUBA's decision, the Court of Appeals ruled the city's findings for two of the three exactions were "incomplete" because they failed to explain: 1) how two of the exactions "were relevant or proportional to the expected impacts"; 2) "how the proposed exactions further [achieved safe streets] and 3) how the exactions were "proportional" in terms of the "effects of the proposed partitioning." Without this information, the court held, "the justification required by *Dolan* is missing."

In affirming LUBA's determination that one of the exactions satisfied the *Dolan* test, the court found that the city's findings were based on an individualized determination that looked at the facts of the subject proposal, *i.e.* a traffic impact study providing a "quantified description of the proposed development's effects in terms of safety hazards." This analysis, the Court held, "constitutes substantial evidence that [the subject exaction] is a reasonable solution to the proposed development."

The court, however, rejected the applicants' demand for "a highly detailed and precise explanation of each effect produced by a proposed development and an equally detailed and precise correlation between those effects and the proposed exactions." The Court held that "that call for precision runs afoul of the plurality holding in *Dolan*."

Ruth Spetter

McClure v. City of Springfield, 175 Or. App. 425 (2001).

Applying Effluent to Trees Does Not Constitute a "Utility Facility" Under the 1997 Statute

The key issue decided in *Cox v. Polk County*, 174 Or. App. 332 (2001), was whether a poplar tree farm irrigated with treated wastewater effluent was a "utility facility." No, held the Court of Appeals, in this case of statutory interpretation.

The City of Dallas proposed to dispose of effluent from a local industrial facility by irrigating and fertilizing poplar trees, which the City would eventually sell. The tree farm project was located outside the UGB in an EFU zone. The county approved the city's application, finding that the proposed use was a farm use under ORS 215.203.

Adjacent residents appealed the county's decision to LUBA. While agreeing the project was a farm use, LUBA further concluded the project was also a "utility facility" within the meaning of ORS 215.283(1) (1997) and, therefore, subject to additional criteria in ORS 215.275. Because LUBA found the project was a utility facility, the decision was remanded to the county to determine whether it is feasible to operate the project on land inside the UGB or on non-EFU land outside the UGB.

LUBA reasoned the tree farm project was a utility facility because applying effluent to trees constituted "continuing treatment" of the effluent, including nitrogen uptake by the trees and heavy metals binding with the soil. LUBA viewed the project as an extension of the city's wastewater treatment facility.

In reviewing LUBA's decision, the Court of Appeals applied the familiar methodology of statutory construction in *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 611–12 (1993), to the term "utility facility," which is undefined in the statute. The court considered other statutory occurrences of "utility" and dictionary meanings for "facility."

The court found "utility facility" to mean equipment or apparatus, whether standing alone or as part of a structure, that functions to perform or provide, in whole or in part, a service such as the production, transmission, delivery, or furnishing of electricity or natural gas, the purification of drinking water, or the treatment of solid or liquid waste. At a minimum, the facility must include some equipment or apparatus that itself performs the relevant functions.

Applying this definition to the tree farm project, the court found it was not a utility facility as a matter of law. The court noted that the irrigation equipment included in the project does not itself perform effluent treatment, rather, the treatment occurs as a natural part of a biological system, through nitrogen uptake by trees and metal binding by soil. The critical functions are naturally occurring ones. However, the court's reasoning is strained. Applying the same reasoning to a conventional sewage treatment facility, such as spraying effluent over gravel with a bacterial film, seems to yield the same conclusion as for a tree farm. In both cases the effluent treatment process is a naturally occurring process, whether it is trees taking up nitrogen, or bacteria digesting it.

The court's holding has limited use, for in 1999 ORS 215.283(1)(d) was amended to specify "wetland wastewater treatment systems" as a utility facility permitted within EFU zones, but subject to the requirements of ORS 215.275. The court expressly disclaimed any statement on the effect the 1999 amendments had on its conclusion.

The 1999 amendments will require a revisit to the *PGE* statutory construction process because the amendment clearly addresses wetland wastewater treatment systems. Reanalysis would surely include tree farm projects unless the legislative history suggests otherwise. Other means of disposing of effluent in wetland areas are very limited (sand filters? irrigated sedge fields? direct discharge into holding ponds?). Although poplar tree farms are not necessarily "wetlands" as that term is ordinarily used—they are often dry upland areas that are well irrigated—the amendment tags the legislative intent to include wastewater treatment systems. It is difficult to see how a court could come to the same conclusion as the analysis in this case under the 1999 amendment. It would not be reasonable to infer that a narrow meaning (such as irrigating sedge fields) was intended instead of the plain, broad meaning of surface application of effluent.

Stephen Mountainspring

Cox v. Polk County, 174 Or. App. 332 (2001).

Appellate Cases—Landlord Tenant

How Long Is a Landlord's 24 Hours' Notice of Entry Good For?

In *Resources Northwest, Inc. v. Rau*, 173 Or. App. 500 (2001), the Oregon Court of Appeals considered the question: *How long is a landlord's 24 hours' notice of entry good for?* In this case, the Court upheld the trial court's decision to grant the FED claim and dismiss defendants' Residential Landlord Tenant Act counterclaims. In upholding the trial court decision, the Court of Appeals did not give a definite answer to the question above, but declined to find an implicit time limit applied to the effectiveness of a landlord's notice of entry required by ORS 90.322(1)(e).

Both defendants, William Rau and Debra Dirks, had been tenants living in plaintiff RNI's mobile home park for several years. Their rental contracts provided that RNI would provide water and sewer services. In December 1997, RNI sent a notice to its tenants that tenants would be responsible for their own water and sewer charges beginning April 1, 1998. RNI retained the services of Energy Billing Services (EBS) to install water meters, to monitor water usage, and to send bills to the tenants. RNI sent another notice to its tenants on March 30, 1998, which advised the tenants that water meters would be installed for each mobile home during the month of April 1998. In late April 1998, workers installed meters on the skirting of both Rau's and Dirks's mobile homes.

After receiving bills from EBS, defendants complained about having to pay for water and sewer service, as did several other tenants in the park. In response, RNI rescinded its decision to require tenants to pay separately for water and sewer service in August 1998. RNI gave notice to the tenants that it would increase rent effective November 1998. Several tenants, including defendants, refused to permit RNI to enter their property for the purpose of reading the water meters. On September 1, 1998, the secretary of a tenants' association delivered to RNI written statements denying RNI access to the property from a number of tenants, including Rau and Dirks's roommate. Defendants refused to pay the rent increase, and RNI initiated separate FED actions in response, which were ultimately consolidated.

Defendants denied the allegations of the FED and asserted a counterclaim for violation of the Residential Landlord Tenant Act (RLTA) with a number of counts, of which two were considered by the Court of Appeals. First, defendants claimed that RNI unlawfully entered their premises to install the water meters without giving proper notice. Although Defendants admitted that RNI had provided 24 hours notice, Defendants argued that the notice was too open-ended because the statute should be read to include an implicit time limit on the effectiveness of notices of entry. Defendants also maintained that, even if the notice was effective, Defendants exercised their right to object and RNI violated the law by entering their premises to install the water meters. Rau testified that he contacted RNI to object to the installation of a water meter to his home. Dirks testified that she contacted EBS and told them that she did not want them to install a water meter. In response, RNI argued that Rau and Dirks had actually objected to the idea of water meters being installed, not to the entry on their premises.

Second, Defendants claimed that RNI unlawfully entered their premises to read the water meters without proper notice. Again they contended that, even if the notices were effective, Defendants had exercised their right to object, and RNI violated the law by entering their premises to read the water meters. Both defendants testified that they had notified RNI or EBS of their objections to any entry on their property for meter-reading purposes. Defendants also introduced written evidence of objections to entry for the purpose of reading meters. RNI did not offer any contrary evidence in response to that counterclaim, but argued that defendants failed to establish that RNI actually had entered their property to read the meters after the September notice. RNI also maintained that Defendants' testimony regarding the issue was simply not credible.

The trial court ruled in favor of RNI on the FED claim. The trial court found that Defendants did not object in a timely manner to the installation of the meters and that RNI did not abuse any right to access. In regard to the second issue, the trial court found that Defendants were notified as required by the statute and that there was no violation of the RTLA. The defendants were permitted to remain in possession of the premises because they had deposited the amount of rent that RNI claimed was due with the court.

The Oregon Court of Appeals first considered Defendants' contention that RNI failed to provide adequate notice of its intent to enter their premises to install the water meters and later to read the meters. Defendants argued that the law implicitly imposes an expiration date on a landlord's 24 hours' notice of entry. Under ORS 90.322(1)(e), the landlord is required to give the tenant "at least 24 hours' actual notice of the intent of the landlord to enter." Although the statute expresses no maximum time limitation on the effectiveness of the notice, Defendants argued that such a limitation should be implied based on the context of the statute. Under ORS

90.322(1)(c), if a tenant requests repairs or maintenance, the landlord is authorized to enter the premises, but the authorization "expires after seven days, unless the repairs are in progress and the landlord is making reasonable effort to complete the repairs in a timely manner." Defendants asserted that the language of this subsection strongly suggested that the landlord's notice required under subsection (1)(e) should expire after seven days as well. "There is no cogent argument that the landlord's notice should be good for any longer than seven days, much less that such notice should be good forever." 173 Or. App. at 505.

However, the Court of Appeals disagreed with that conclusion. The court first noted that there is no maximum time limitation on the effectiveness of the notice required under subsection (1)(e). The only limitations contained in ORS 90.322 on a landlord's right of entry after proper notice are the tenant's right to reasonably withhold consent and the landlord's obligation not to abuse the right of entry. *Id.* The court also noted that the time limitation contained in subsection (1)(c) is not found elsewhere in the statute. The court rejected Defendants' argument, concluding that "when the legislature wants to impose a limitation on the effectiveness of a right of entry, it knows how to do so." *Id.* at 505–06. The court declined to find an implicit time limitation.

The court next considered Defendants' contention that the trial court erred because there was undisputed evidence that they had exercised their right to object to both the installation and reading of the meters. In regards to the standard of review, the court stated it "will not disturb the trial court's findings if there is any evidence to support them." *Id.* at 506 (citing *Illingworth v. Bushong*, 297 Or. 675, 694, 688 P.2d 379 (1984)). RNI asserted that Defendants had merely complained about the installation of the meters to charge them for water and sewer services, rather than specifically to deny access to the premises. In reviewing the testimony of Defendants, the difference between objecting to entry and objecting to the purpose of the entry could become an exercise in semantics. However, given the standard of review, the court needed only to find that there was evidence to support the trial court's findings. In regards to the conclusion that Defendants complained but did not deny access, the court remarked, "[t]hat is, indeed, what defendants said; at least, that is how the trial court reasonably could have construed their testimony." *Id.* at 506. The court therefore concluded there was evidence to support the trial court's decision as to the installation of the water meters.

The court next turned to the evidence of the denial of access to read the meters. Again, the court examined the record for any evidence to support the trial court's findings. The court found uncontradicted evidence that Defendants had provided written notice to RNI of their denial of access to their premises. However, the court did not find such uncontradicted evidence that RNI entered their property to read the meters after receipt of the notice. The court noted that the circumstantial evidence of improper entry presented by Defendants was not conclusive. Additionally, the court deferred to the trial court in the matter of witness credibility on the issue. "Generally, the trier of fact is the exclusive judge of the credibility of witnesses." *Id.* at 507 (citing *Bend Tarp and Liner, Inc. v. Rundy*, 154 Or. App. 372, 378 n.4, 961 P.2d 857 (1998)). Therefore, the Court of Appeals concluded that the trial court did not err in dismissing Defendants' RLTA counterclaims and affirmed the decision.

Although the Court of Appeals declined to create a time limitation on the effectiveness of a landlord's 24 hours' notice given pursuant to ORS 90.322(1)(e), one should not conclude that once given "such notice should be good forever." At some point, a landlord's reliance on notice given in the distant past could be considered abuse of the right of entry under subsection (2). The events in this case take place over several months, which under circumstances seems normal and reasonable. In event of a significant delay in entering tenant premises after providing notice, the better practice would be to provide another 24 hours' notice to the tenant prior to entry.

Raymond Greycloud

Resources Northwest, Inc. v. Rau, 173 Or. App. 500 (2001).

Appellate Cases—Real Estate

Court of Appeals Applies Hornbook Law to Complicated Facts in Land Sale

Lang v. Oregon-Idaho Annual Conference of the United Methodist Church, 173 Or. App. 389, 21 P.3d 1116 (2001), applies complicated facts to hornbook law. The result is instructive because the facts will likely ring familiar. Plaintiff sought specific performance of two alleged land sale agreements (neither were reduced to a definitive writing). The trial court granted summary judgment in defendant's favor on both agreements. The court of appeals reversed, ruling that plaintiff had alleged sufficient facts that the trier of facts might reasonably find either of the two agreements enforceable.

The parties' dealings started with defendant rejecting several offers from plaintiff for defendant's property in September 1997. Defendant eventually offered to sell the property to plaintiff for $350,000, if defendant did not receive a higher offer by a specified date. Plaintiff responded to defendant's offer with a letter agreeing to defendant's price of $350,000, but setting forth additional terms, including a provision that the parties were to execute a "Standard Earnest Money Agreement." By its terms, the letter automatically expired if not accepted in writing by a specified date.

On the date of plaintiff's deadline, defendant's Board of Trustees met. The Board minutes recite that the Board resolved to "accept" plaintiff's offer, if defendant did not receive a better offer within the next thirty days. After the meeting, a Board member called plaintiff with the news. Plaintiff claims that the Board member told him that defendant accepted his offer, subject to the condition that defendant could receive and accept a higher offer within the next thirty days. Plaintiff said he agreed to the terms and agreed that defendant's attorney was to prepare the purchase contract (the 1997 Agreement).

On the day that defendant's right to accept a higher offer was to expire, defendant's attorney sent a draft purchase-and-sale agreement to plaintiff. Plaintiff considered several terms in the draft "beyond the terms of [a] standard earnest money agreement," as his written offer had required. Plaintiff deleted the clause containing a release of environmental liability from the draft agreement, then signed and returned the agreement. Defendant rejected the deletion.

After the parties unsuccessfully negotiated for more than four months, defendant's attorney sent plaintiff a draft, stating that it was "probably the final" agreement that defendant would offer to plaintiff (the final offer). The transmittal letter required that the final offer be signed and returned by a specific date. Plaintiff did not sign it.

Nearly five months later, the parties met again. According to plaintiff's real estate broker, defendant offered to sell the property to plaintiff on the same terms as the final offer. Defendant's representative contends that he said that plaintiff should assume that the final offer was available "for discussion purposes only." Three days after the meeting, plaintiff accepted the final offer (the 1998 Agreement). Two days later, defendant told plaintiff that defendant had a higher offer for the property and that it would not sell to plaintiff for $350,000.

Plaintiff filed suit, alleging four claims for relief, three based on the 1997 Agreement (which plaintiff alternatively argued was oral or written) and one based on the 1998 Agreement.

The Court of Appeals agreed with the trial court that none of the writings exchanged between the parties constituted a written agreement. Each document changed at least one term from the other party's offer. The court, however, found that plaintiff had alleged sufficient facts to allow a trier of fact to conclude that the parties had reached an agreement. Plaintiff alleged that he had accepted defendant's modifications to his written offer, in the phone conversation.

Defendant argued that the 1997 Agreement 1) was not enforceable, because the parties did not intend to be bound and 2) was not specifically enforceable, because it was not definite in all material respects. The court ruled that whether the parties had left only "minor details" to future agreement was a question of fact. According to the court, defendant did not argue that the 1997 Agreement failed to specify all essential terms. Instead, defendant argued that the parties left other material terms to be decided, and therefore the 1997 Agreement was not "definite in all material respects." The court concluded that whether such remaining terms were "subordinate details"—in which case the contract could be specifically enforced—was a question of fact. The court also held that a trier of fact could find that the parties intended that a future writing would merely memorialize their binding agreement.

Defendant argued that the 1998 Agreement was barred by the statute of frauds. The court rejected two interpretations of the argument. It ruled that a trier of fact could find that defendant renewed its earlier offer. Second, the court ruled that plaintiff was entitled to rely on an earlier writing to satisfy the statute of frauds.

Tod Northman

Lang v. Oregon-Idaho Annual Conference of the United Methodist Church, 173 Or. App. 389, 21 P.3d 1116 (2001).

Court of Appeals Trend of Disfavoring Adverse Possession Claims Continues

The apparent trend of disfavoring adverse possession (and prescriptive easement) claims appears to be continuing, as set forth in *McIntyre v. Photinos,* 175 Or. App. 478 (2001). In addition, this is one of the earlier cases to be decided under the adverse possession statute (ORS 105.620). However, the initial question faced by the court was whether review was in equity (*de novo*) or at law (was trial court judgment "supported by any competent evidence" *Roesch v. Wachter*, 48 Or. App. 893, 618 P.2d 448 (1980)).

The trial court had ruled that of Plaintiff gained title by adverse possession, but the trial court judgment did not contain an order of ejectment. The Court of Appeals rejected the Plaintiff's motion to amend the order of ejectment holding that "the amended judgment entered June 11, 1999, is a final, appealable judgment in that it disposes of plaintiff's sole claim" *McIntyre*, 175 Or. App. at 481. In that the decree did not contain an order of ejectment, the court held that the standard of review was in equity, therefore, *de novo*.

The initial date to determine possession was 1986, when the owner of the two parcels in question severed them. The other significant date was 1994, when a fence separating the two parcels was removed. When the Plaintiff sent a contractor to rebuild the fence at the original location, Defendant objected, claiming ownership of the disputed strip (which was on the Plaintiff's side of the removed fence). Plaintiff filed the action after Defendant built a fence on the "true" property line and excluded Plaintiff from the disputed strip.

The evidence of Plaintiff's use of the disputed strip included occasional cutting and watering of grass, storage, or as a dumpsite for trash. The court determined that it was insufficient to establish adverse possession. The Defendant purchased the property about 1990, at which time he determined the disputed strip to be "no man's land." He testified that after the fence came down in 1994 he cleaned the area, and cut and watered the grass. The court emphasized that there was no exclusion of the defendant: "On these facts, we find that plaintiff has not proved by clear and convincing evidence that her use was a hostile assertion of possession to the *exclusion of defendant* for the required time period." (emphasis in original)

Alan Brickley

McIntyre v. Photinos, 175 Or. App. 478 (2001).

Author's Note: Although the case was decided under the statutory basis of adverse possession, it does not appear that the result would have been different under the common law requirements.

New Legislation

New Legislation

Editor's Note: The following articles were originally published as Chapters 17 and 18 of ***2001 Oregon Legislation Highlights*** *(Oregon CLE 2001). If you are interested in purchasing the book, which contains a review of important 2001 legislation covering a wide range of topics, please call the Oregon State Bar at (503) 684-7413. The Real Estate and Land Use Section thanks the Bar and the authors for granting permission to reprint these articles.*

Land Use

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Unless otherwise noted, all legislation is effective January 1, 2002.

I. INTRODUCTION

The 2001 Legislature did not adopt any significant land use reforms. The majority of bills that were approved by the legislature were directed toward resolving specific factual controversies that have arisen since the last legislative session and highlighted the need to modify the statutes.

II. LOCAL PROCEDURE AND AUTHORITY

A. SB 470 (ch 886) Regulating Places of Worship

SB 470 adds a new section to ORS chapter 215 and ORS chapter 227 to prohibit cities and counties from regulating activities traditionally associated with the operation of a church or other place of worship, with the exception of the operation of private or parochial schools. Cities and counties may continue to impose siting criteria related to the physical characteristics of the property, and may restrict uses if there is an insufficient level of public services to support the uses. Specifically, a city or county must allow the "reasonable use" of the church property for activities "customarily associated with" the church, for example, religion classes, weddings, funerals, and meal programs. §2.

SB 470 does not change the criteria for siting a church or other place of worship. City and county counsel and lawyers representing churches should be aware of this bill, however, because it limits local government's ability to regulate church activities.

B. HB 2371 (ch 397) Decision Made Without Hearing

HB 2371 amends ORS 215.416 and 227.175. Under these statutes, a local government may make a decision on certain land use applications without conducting a hearing as long as the local government gives notice of the decision to certain specified parties. Anyone who objects to the decision may appeal it to a local public hearing. HB 2371 prohibits the local government from limiting the issues that may be addressed at this first public hearing. Any relevant evidence, testimony, or argument is allowed into the record.

COMMENT: HB 2371 overturns the decision in *Johns v. City of Lincoln City,* 146 Or App 594, 933 P2d 978 (1997), in which the court held that a local government may narrow the issues on appeal from a decision made without a hearing to the issues raised in the notice of appeal. HB 2371 is intended to require the local authority at this first public hearing to allow testimony and evidence on any issue.

PRACTICE TIP: Local codes that currently allow the narrowing of issues on appeal of an administrative decision under ORS 215.416(11) or 227.175(10) will need to be amended. *See* LAND USE §§10.17, 16.60 (Oregon CLE 1994 & Supp 2000).

C. HB 2458 (ch 132) Municipal Incorporation

HB 2458 adds a new section to the statutes governing the incorporation of new cities (ORS 221.020–221.100). The amendment adds criteria for incorporating a new city located outside an existing urban growth boundary but within an urbanized area.

Under HB 2458, to incorporate a new city within an urbanized area, the county must designate the area as a "rural unincorporated community" in either the county comprehensive plan or in DLCD's "Survey of Unincorporated Communities." The incorporation petition filed with the county clerk under ORS 221.031 must contain an affidavit from the chief petitioner stating that at least 10% of the electors of the area proposed for incorporation favor incorporating, and that the chief petitioner has "engaged . . . in discussions" with cities located within three miles regarding future urban growth boundary expansions and the location of urban reserve areas. The petitioner must file an economic feasibility statement (*see* ORS 221.035) indicating the manner in which the city will provide for urban services and residential development. The economic feasibility statement also must include a proposed permanent rate limit for operating taxes to support urban services.

A "neighboring city" (i.e., one located within three miles) that objects to the incorporation may ask the county commission or county court with jurisdiction over the incorporation to terminate the incorporation proceeding. The county must hold a public hearing on a city's objections and may terminate the incorporation proceedings if it determines that the incorporation will "adversely affect" a neighboring city. The county also may terminate the proceedings if it concludes that the petitioner failed to submit a proper affidavit or economic feasibility study. An order terminating incorporation proceedings is appealable to LUBA.

D. HB 2978 (ch 557) Public Facilities

HB 2978 amends ORS 197.768 governing the adoption and implementation of public facilities strategies. HB 2978 extends the statute to include special districts and clarifies the procedure that a local government must follow when adopting a public facilities strategy. The statute now requires a public hearing on a proposed strategy and specifies the requirement for findings in support of the strategy. Currently, findings in support must demonstrate that there has been a rapid and unexpected increase in development that will exceed the capacity of existing public facilities. As amended by HB 2978, the statute now requires that the findings demonstrate that the supply of housing, commercial, and industrial facilities will not be "unreasonably restricted" by adoption of the public facilities strategy.

The bill requires 45 days' notice to DLCD before the final public hearing on a public facilities strategy and limits the strategy to an effective period of two years, with the possibility of three one-year extensions. The local government or special district may approve an extension only if it holds public hearings and adopts findings that demonstrate (1) that the problem still exists and (2) that progress is being made toward alleviating the problem. The local government or special district must give 14 days' notice to DLCD before holding a public hearing on an extension.

HB 2978 also amends ORS 221.035 to allow a person who intends to propose incorporating a new city to file with the county clerk a "notice of intent to prepare an economic feasibility statement." The law currently requires the economic feasibility statement to be filed along with the petition for incorporation. Filing a "notice of intent to prepare an economic feasibility statement" allows a proposed incorporation to go forward under the provisions of HB 2458 (incorporation of unincorporated communities) even if the area is brought inside an urban growth boundary during the incorporation process.

E. HB 3039 (ch 225) Enforcement Authority

HB 3039 amends ORS 215.185, which authorizes a county to enforce its land use regulations. As amended by HB 3039, the statute now provides that the county is not required to enforce those regulations.

F. HB 3045 (ch 876) School Facility Planning

Currently, a city or county must include a school facility plan as part of its comprehensive plan if the city or county contains a "high-growth school district" (i.e., one with more than 5,000 students and a growth rate exceeding 6% during the last three years). ORS 195.110.

As amended by HB 3045, ORS 195.110 now specifies that a school facility plan must cover a five-year period. In addition to including such information as population projections and physical improvement needs, a plan now must also describe proposed measures to increase the efficient use of existing school sites (e.g., through the use of multistory buildings) and must contain an analysis of land available within affected urban growth boundaries for school facilities.

The bill also requires a city or county to "cooperate" with a school district to identify additional land for school facilities by such means as zoning amendments, aggregating existing lots, or bringing specific sites within an urban growth boundary. Significantly, the bill does not require that such land be made available.

G. HB 3171 (ch 613) Farmworker Housing

HB 3171 makes several changes to the laws regarding the siting of "farmworker housing." First, HB 3171 substitutes the terms *farmworker* and *farmworker housing* for *seasonal farmworker, seasonal farmworker housing, seasonal and year-round farmworker housing,* and *year-round farmworker housing* in the applicable statutes.

Second, HB 3171 adds a new subsection to ORS 197.312 to mandate that farmworker housing is a permitted use in any residential or commercial zone that allows single-family dwellings or multifamily dwellings as a permitted use. Cities and counties are prohibited from

imposing zoning requirements for farmworker housing that are more restrictive than those used for other types of dwellings in the same zone. §3.

Third, HB 3171 amends ORS 197.685 to limit a local government's ability to impose additional criteria and standards for the siting of farmworker housing in rural residential zones or rural centers. §4.

Fourth, HB 3171 directs the Land Conservation and Development Commission to revise its rules regarding dwellings "customarily provided in conjunction with farm use" to allow the establishment of accessory dwellings to be used for farmworker housing. §6.

Fifth, HB 3171 amends ORS 315.164, 315.167, and 317.147 to eliminate the distinction between "seasonal" and "year-round" farmworker housing, for purposes of providing income or excise tax credits for the construction of farmworker housing. §§13–15.

COMMENT: Lawyers representing farmers and ranchers, contractors, or local governments may see a change in the standards for siting both single-family and multifamily farmworker housing, depending in part on LCDC rulemaking on this issue.

H. HB 3686 (ch 711) Subdivisions—Manufactured Dwelling Park

HB 3686 creates new statutes for subdividing a manufactured dwelling park. The stated purpose of the bill is to facilitate ownership of the land lying under a manufactured dwelling by the person who resides in the dwelling. §2.

HB 3686 allows a local government to approve the subdivision of land located in a manufactured dwelling park for the purpose of creating individual lots. The number of newly created lots may not exceed the current number of rental spaces. §3.

When the owner of a manufactured dwelling park subdivides the property and places individual lots for sale, the owner must offer the current resident 60 days to purchase the lot. If the current owner declines to purchase the lot, the owner may offer it for sale on the open market; however, the owner may not offer more favorable terms to a prospective purchaser than were offered to the current resident for at least 60 days following the date that the current resident declines to purchase the lot. §4.

The bill also places restrictions on when the owner may make improvements to the property. §4. Termination of a tenancy continues to be governed by ORS chapter 90. §4. A subdivision approved under HB 3686 is not subject to system development charges or other payments normally associated with a subdivision. §5.

HB 3686 took effect on July 2, 2001.

I. HB 3925 (ch 955) Vested Rights

HB 3925 creates a declaratory judgment action in circuit court for a determination of whether a landowner has a right to complete construction of a project that was permitted under the local code when the landowner made substantial good-faith expenditures on the construction. §1.

Under ORS 215.427(3) and 227.178(3), a person who submits a land use application becomes vested in the approval criteria that apply to the application at the time it is submitted. Even if the local code changes while the application is under review, the application continues to be reviewed under the standards and criteria that applied when it was submitted. However, some projects do not require a land use application (i.e., certain permitted uses) and, as a consequence, the landowner is not protected under these statutes against changes in the local code during construction.

Since 1983, the determination of whether the landowner has a vested right to complete the use has been made by local governments through the local administrative process. HB 3925 allows a landowner to seek this determination in circuit court, although the landowner first must obtain a final local determination regarding the owner's use.

HB 3925 took effect on August 10, 2001, and sunsets on December 31, 2003.

III. LCDC PROCEDURE AND AUTHORITY

SB 417 (ch 527) Periodic Review

SB 417 amends ORS 197.629, 197.633, and 197.636 relating to periodic review. Currently, the Director of the Land Conservation and Development Commission (LCDC) may issue an order approving a work program or a work task that is a part of a local government's periodic review, or may determine that no work program is necessary or that no further work is necessary. This decision may be appealed to LCDC, which must act on the appeal within 90 days.

Under SB 417, LCDC may extend the deadline for submitting a work program or completing a work task to allow for mediation or if it determines that the appeal presents "new or complex issues of fact or law." The deadline may be extended for a period up to one year.

IV. URBAN GROWTH MANAGEMENT

HB 2976 (ch 908) Urban Growth Boundary—Buildable Lands Inventory

HB 2976 makes several modifications to the requirements of the "20-year buildable lands inventory" of ORS 197.296. For an explanation of buildable lands inventory, see LAND USE ch 5 (Oregon CLE 1994 & Supp 2000). First, HB 2976 deletes the statutory requirement that fast-growing smaller cities (cities with less than 25,000 population) maintain a 20-year supply of land for the siting of housing. Instead, HB 2976 authorizes LCDC to establish rules to determine what cities, other than cities with populations over 25,000 and cities within the Metropolitan Service District ("Metro"), can be required to maintain a 20-year buildable lands inventory. LCDC must consider the size of a city, its rate of growth, and its proximity to other cities in making this determination.

Second, HB 2976 clarifies that the starting point for calculation of the 20-year period begins on the date initially scheduled for completion of a periodic or legislative update to the urban growth boundary by Metro or a larger city outside of Metro's jurisdiction.

Third, HB 2976 requires Metro and the larger cities to include not only the amount of buildable land needed to accommodate 20 years of growth, but also the housing capacity of the buildable lands included in the inventory and the number of dwelling units needed to accommodate the growth.

Fourth, HB 2976 provides detailed definitions for the lands that Metro or the larger cities can include as "buildable lands."

Fifth, HB 2976 requires Metro and the larger cities to base their buildable lands analysis on the residential development patterns in the jurisdiction over the last five years, unless Metro or the larger cities can demonstrate that an alternative would more accurately reflect the current and projected development pattern in the jurisdiction, at which point the alternative calculation can be used.

Sixth, once Metro or a larger city has established a 20-year buildable lands inventory, HB 2976 requires the jurisdiction to monitor development within the jurisdiction to ensure that the development patterns correspond to the projections used to establish the inventory. §1.

Seventh, HB 2976 directs Metro to amend its regional plan or functional plan within one year after determining its needs regarding a 20-year buildable land supply. §2.

PRACTICE TIP: HB 2976 appears to provide additional clarifica-

tion and specificity regarding calculation and implementation of the 20-year buildable lands statutes. Lawyers representing Metro and the larger cities should become familiar with this bill, along with lawyers representing property owners and developers with property or projects near the existing urban growth boundary.

V. FARM AND FOREST ZONES

A. SB 212 (ch 488) Wastewater Disposal

Nonfarm uses allowed on land zoned for exclusive farm use are set forth in ORS 215.213 and 215.283. SB 212 amends these statutes to authorize the application of "reclaimed water, agricultural or industrial process water or biosolids" on lands zoned for exclusive farm use, provided the application of these products is for agricultural, horticultural, or silvicultural production, or for irrigation in conjunction with a use allowed in an exclusive farm use zone. §§1–2. Obtaining a "license, permit or other approval" from the Department of Environmental Quality (DEQ) is a prerequisite to obtaining approval for the use. §3.

Section 4 of SB 212 provides criteria for the DEQ to apply when determining whether to issue a permit for the land application of reclaimed water, agricultural or industrial process water, or biosolids. The applicant must demonstrate that the use will ensure continued agricultural, horticultural, or silvicultural production on the subject tract. If a permit is authorized for a particular tract, future uses on that tract are limited, unless the tract is included within an urban growth boundary or rezoned to a zone other than exclusive farm use.

An applicant for a permit under SB 212 must address alternatives to the use of reclaimed water, agricultural or industrial process water, or biosolids proposed in a public hearing on the application and explain why those alternatives are not being used. As long as the applicant explains why the alternatives are not being implemented, however, local approval of the application will not be reversed or remanded. A county may not approve a land division to allow for the application on some, but not all, of the newly formed parcels resulting from the division.

PRACTICE TIP: SB 212 provides an opportunity for farmers and timber owners to use alternative methods to increase farm or timber production, and limits the opportunity for challenge to applications for use of wastewater or biosolid application. At the same time, a property owner choosing to apply for a permit created by SB 212 will limit future uses of the property. Lawyers for farmers and timber owners will need to be aware of the limitations on future land uses arising from this bill if a client desires to make application.

SB 212 took effect on June 21, 2001.

B. SB 715 (ch 531) Minimum Lot Size

SB 715 amends ORS 215.780 to allow an additional exception to the 80-acre minimum lot size for land zoned as forestland or mixed farm and forestland. The bill sets forth a lengthy set of criteria to be met before a county may approve a land division for a subminimum size parcel. A landowner who gains approval for a land division under the amended statute must record an irrevocable covenant prohibiting further divisions of the lot or parcel. The county then is required to maintain a list of properties subject to these covenants.

C. SB 724 (ch 532) Land Use Permits

SB 724 adds a new section to ORS chapter 215 to require that an approved permit for proposed residential development in an exclusive farm use zone, forest zone, or marginal lands remains valid for four years. An extension on a permit for the same dwelling types is valid for two years. SB 724 applies to the following dwelling types: replacement dwellings in exclusive farm use zones under ORS 215.213(1)(u) and 215.283(1)(t); dwellings in exclusive farm use zones in the marginal lands counties (Lane, Washington) under ORS 215.213(3)–(4) and 215.317; nonfarm dwellings under ORS 215.284; lot of record dwellings under ORS 215.705 and 215.720; large-tract forest dwellings under ORS 215.740; template dwellings under ORS 215.750; replacement dwellings in forest zones under ORS 215.755; and hardship dwellings under ORS 215.755.

SB 724 does not change the criteria for obtaining any of the aforementioned dwellings. It simply provides a time period under which approvals (and their extensions) are valid.

D. SB 928 (ch 467) Guest Ranches

SB 928 makes minor changes to the guest ranch provisions created by 1997 Oregon Laws chapter 728, which may be found at the end of ORS chapter 215. The sunset of the guest ranch provisions, originally scheduled for December 31, 2001, is extended to December 31, 2005.

E. HB 2463 (ch 358) Lot of Record

HB 2463 amends the "lot of record" provisions of ORS 215.705 as they apply to siting dwellings on "high-value farmland." Specifically, HB 2463 allows a property owner to choose an alternative form of determining the "center of the tract" when the tract is defined as a "flag lot."

PRACTICE TIP: This bill may provide an additional method for approving dwellings under ORS 215.705. A lawyer with a client who meets the primary criteria in ORS 215.705(1), with the exception of the "high-value farmland" criteria in ORS 215.705(1)(d), may have two alternative methods for determining the "center of the tract" under this bill.

F. HB 2502 (ch 544) Community Centers

HB 2502 amends ORS 215.263 and 215.283. Currently, these statutes allow "parks, playgrounds or community centers *owned by a governmental agency or a nonprofit community organization and operated primarily by and for residents of the local rural community"* as conditional uses in an EFU zone. HB 2502 eliminates the ownership and operational requirements for parks and playgrounds, but retains these requirements for community centers. Thus, a county now may approve a park or playground on EFU land without regard to ownership, but a community center still must be owned by a local government or nonprofit organization and operated primarily for the benefit of local residents.

G. HB 2548 (ch 149) Farm Dwellings

HB 2548 amends the farm dwelling provisions of ORS 215.213(1)(g) and 215.283(1)(f) to provide that both "primary" and "accessory" dwellings may be considered "customarily provided in conjunction with farm use" and therefore authorized under those subsections. In addition, §4 of HB 2548 contains legislative findings addressing the importance of dairies to Oregon's agricultural economy and the notion that dairies need more on-site housing than other types of farms. Finally, HB 2548 requires LCDC to modify the administrative rules concerning dwellings "customarily provided in conjunction with farm use" to allow the siting of a dwelling on a commercial dairy farm notwithstanding that the farm has not produced gross farm income before the siting of the dwelling. §5.

NOTE: This bill and the administrative rule adopted to carry out the bill may provide alternatives to siting primary and accessory farm dwellings, both for dairies and for other types of agricultural operations. The actual impact of this bill will likely be minimal, but will depend on the rulemaking done by LCDC.

H. HB 2731 (ch 401) Right to Farm

HB 2731 amends ORS 30.936. This statute currently prohibits nuisance or trespass claims against a person conducting farming activities on land that is zoned for farm or forest use and located outside an urban growth boundary. HB 2731 eliminates the requirement that the land be located outside an urban growth boundary.

I. HB 2804 (ch 676) Farm Dwellings

HB 2804 expands the definition of the types of relatives who may occupy a "farm manager's dwelling" authorized under ORS 215.213(1)(e) and 215.283(1)(e). Along with the original list of relatives who could occupy a "farm manager's dwelling" under these statutes, the new list includes stepgrandparents, stepparents, stepsiblings, nieces, nephews, and first cousins of the farm operator or the farm operator's spouse.

HB 2804 appears to be designed to make it easier for farm operators to attract family help in operating the farm.

J. HB 3123 (ch 260) Nonputrescible Waste

HB 3123 authorizes the expansion, maintenance, or enhancement of "nonputrescible solid waste" sites in exclusive farm use zones in the "marginal lands" counties (Lane, Washington). HB 3123 amends ORS 215.213. *Nonputrescible solid waste* is not defined in the bill, but presumably means solid waste that will not putrefy.

HB 3123 applies to a solid waste site approved before January 1, 2002. Lawyers representing operators of these sites have an opportunity to expand the sites for a limited period under a more relaxed standard, while lawyers for opponents to an expansion will have fewer arguments to stop the sites.

The amendment sunsets on January 1, 2004. §3.

K. HB 3326 (ch 704) Land Divisions

In general, ORS 215.780 establishes a minimum lot size of 80 acres for land in an exclusive farm use zone. HB 3326 amends ORS 215.263 to allow a county to approve certain land divisions below the 80-acre minimum, but only under very specific circumstances. HB 3326 also amends ORS 215.284 to allow a county to approve a nonfarm dwelling on a parcel created pursuant to ORS 215.263.

NOTE: Following the passage of HB 3326, ORS 215.263 and 215.284 *must* be read together.

COMMENT: HB 3326 is in response to and overturns parts of *Dorvinen v. Crook County*, 153 Or App 391, 957 P2d 180 (1998), and *Friends of Douglas County v. Douglas County*, ___ Or LUBA ___, LUBA No. 2000-086 (2000). The court in *Dorvinen* established that a local government may not authorize the division of a parcel that is smaller than 80 acres. The decision in *Douglas County* extended this principle to parcels larger than 80 acres. After *Douglas County*, a local government could not approve a land division if any resulting parcel would be smaller than the minimum established under ORS 215.780. HB 3326 provides limited exceptions to this rule.

L. HB 3810 (ch 941) Judicial Partitions

ORS 215.213(1)(e) and 215.283(1)(e) allow a second dwelling to be located on a farm if it is occupied by a relative whose assistance is necessary to run the farm. HB 3810 amends these statutes in two ways. First, the bill amends the list of relatives who may occupy the dwelling. The new list is the same as provided in HB 2804, discussed above. Second, the bill provides that foreclosure on the second dwelling by a party who has a security interest in the second dwelling operates to partition the site of the second dwelling. The statute as amended expressly exempts this partition from the subdivision and partition statutes in ORS chapter 92 as well as the minimum lot size requirements of ORS 215.780.

M. HB 3924 (ch 757) Farm Stands

HB 3924 modifies and expands the scope of uses allowed under the "farm stand" criteria in ORS 215.213(1)(v) and 215.283(1)(s). The owner or operator of the farm stand may provide "fee based activity to promote the sale of farm crops or livestock sold at the farm stand." Presumably, this amendment includes activities such as hay rides, pumpkin-carving contests, etc.

PRACTICE TIP: Lawyers representing rural landowners should be aware of this bill, because it provides an additional method for generating income from traditional farming operations.

VI. MISCELLANEOUS

A. SB 763 (ch 763) Vertical Housing Zones

SB 763 authorizes cities and counties, on approval by the Director of the Economic and Community Development Department, to create "vertical housing development zones." If property within a vertical housing zone is developed as a "vertical housing development project," the property is entitled to a partial property tax exemption from the local taxing districts agreeing to participate in the designation.

A vertical housing development project is a development on which the first floor (and possibly additional floors) is used for commercial uses, with residential uses on the higher floors. §2. The amount of the property tax exemption for qualifying properties is increased as a result of the number of floors of residential housing constructed, and can reach 80% exempt. §9.

A city or county may, after creating a zone, acquire real property within the zone and develop the property independently or jointly with a private entity, if development of the property will encourage more high-density housing or the efficient use of mass transit facilities. §5.

PRACTICE TIP: Lawyers for developers and local governments should be aware of SB 763, because it provides property tax subsidies for high-density development, which may make it possible to construct projects that the market would otherwise not support.

B. HB 3057 (ch 925) Riparian Zones

ORS 308A.350–308A.383 allow an exemption from ad valorem property taxation for property that is designated and managed as riparian habitat. Currently, only land outside an urban growth boundary that is zoned forestland, agricultural land, or rangeland may qualify for exemption. HB 3057 amends these sections and creates a new section to allow land located inside an urban growth boundary to qualify for the exemption. HB 3057 requires the local government to adopt an ordinance authorizing land to be designated as riparian habitat and the land must otherwise qualify under ORS 308A.350–398A.383. Land located inside an urban growth boundary does not need to be zoned for resource use in order to qualify.

HB 3057 also creates a new statute authorizing a person to request a report from the county assessor on the tax consequences of conveying a conservation easement or highway scenic preservation easement. The request must be accompanied by an appraisal and a copy of the document creating the easement. The assessor's report must show what the assessed value of the property would have been had the easement been recorded in the prior year. The assessor may charge a fee for providing the report. *See* chapter 20, *infra*.

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Unless otherwise noted, all legislation is effective January 1, 2002.

I. INTRODUCTION

The 2001 Legislature passed more bills than usual that deal with real property and landlord-tenant law. Many of these bills fall into the "nuts and bolts" category—amendments that clarify or streamline procedures. Several bills were enacted that affect mobile homes and manufactured housing, from contracts for sale of those dwellings to sale of the lots on which they rest. Liens and mortgages were also addressed in this session of the legislature.

Note that this chapter does not address the real property legislation from the standpoint of the environment. Chapter 9, *supra,* covers that ground.

II. REAL ESTATE TECHNICAL LAW: NUTS AND BOLTS ISSUES

A. HB 2112 (ch 535) Uniform Electronic Transactions Act

HB 2112 enacts the Uniform Electronic Transactions Act (UETA). The UETA prescribes the applicability and procedures for electronic transactions, including establishing that an electronic signature or electronic record has legal effect and, except for a few exceptions, satisfies any law that requires a written signature or record on paper.

NOTE: Electronic transactions are now a reality in Broward County in Florida. Although it may be awhile before such transactions become common, they are here to stay.

For further discussion of the UETA, see chapters 2 and 5, *supra.*

HB 2112 took effect on June 22, 2001.

B. HB 2365 (ch 395) Powers of Attorney

Section 1 of HB 2365 provides that a person may not refuse to recognize the authority of an attorney-in-fact or agent under a power of attorney based solely on the passage of time since the power of attorney was executed. A person relying in good faith is not liable to any other person based on that reliance, and is not required to ensure that assets of the principal that are paid to the attorney-in-fact are properly applied. §2. Any person who has not received actual notice of revocation of a power of attorney is not liable to any other person by reason of relying on a power of attorney that has been revoked. §2.

An attorney-in-fact or agent must use the property of the principal for the benefit of the principal. §3. The power of attorney remains in effect until the power is revoked, and powers in the power of attorney are unaffected by the passage of time. This bill applies to all past and future powers of attorney. §§4–5.

PRACTICE TIP: A power of attorney may be deficient for reasons other than the passage of time. Title companies strictly construe powers of attorney and the authority in relation to the property involved. For example, if the power of attorney is to be used to sell real estate, the careful lawyer will be sure that the power to "convey" is included. The power of attorney, as always, must be acknowledged and recorded if title insurance is going to be obtained.

C. HB 2387 (ch 606) Action for Partition

Section 1 of HB 2387 amends ORS 105.210 to allow a judge in an action for partition or sale to issue an order that allows the owner of property held by tenancy in common to borrow money against the property to pay the interest of another owner, without regard to which owner opposes partition or sale.

PRACTICE TIP: Before this law was enacted, the court could issue an order permitting "the owners, objecting to the partition or sale," to borrow money on the subject property. ORS 105.210. Now the court can issue an order permitting any owner to borrow to pay off another owner. The amendment gives wider latitude to judges to exercise their judgment. The change should make it more feasible to accomplish a judicial partition in some cases.

D. HB 2536 (ch 645) Oregon Watershed Enhancement Board Grant Title Restrictions

HB 2536 requires that land purchased through a grant agreement with the Oregon Watershed Enhancement Board be subject to title restrictions, including restrictions giving the Board the authority to deny the sale of the land.

E. HB 2594 (ch 364) Way of Necessity to Certain Pioneer Cemeteries

HB 2594 amends ORS 376.197 to establish ways of necessity to certain pioneer cemeteries listed in accordance with ORS 97.782 and sets conditions for use. This bill expands ORS 376.197 (ways of necessity to historic cemeteries within exclusive farm use zones).

F. HB 2686 (ch 701) Incidents Not Material to Real Property Transactions

HB 2686 amends ORS 93.275, specifying incidents that are not material facts to a real property transaction and for which failure to disclose does not give rise to a cause of action against the owner, the owner's agent, or the transferee's agent.

G. HB 3239 (ch 173) Recorded Plats

HB 3239 amends several statutes to prohibit any correction or change to the original plat recorded with the county clerk.

H. HB 3673 (ch 713) Recording

HB 3673 amends the recording statutes to clarify that a clerk is to record all documents that legitimately affect title to real property. The bill is a compromise aimed at making the recording system available to documents that should be properly recorded, while keeping the record clear of documents that should not be recorded.

NOTE: The recording system is designed to impart notice to establish priorities among competing interests in real property. Recently, the recording system has been burdened with factual information about real estate that is not relevant to establishing the pri-

orities of rights to the property. The careful lawyer should avoid mixing documents that deal with title and priority with nontitle information.

I. HB 3915 (ch 577) Book and Docket of County Clerk

HB 3915 removes certain archaic references to the book and docket of the county clerk. This bill also eliminates the requirement that on full payment of a promissory note secured by a mortgage, the original note be recorded.

J. SB 184 (ch 63) Notarization of Subdivision Plats

SB 184 amends ORS 194.031 to allow notarization of subdivision plats, partition plats, and condominium plats without the official seal of a notary public. The amendment also specifies the information required for notarization.

K. SB 867 (ch 391) Surveys

SB 867 amends ORS 209.130 to allow a county surveyor, when maintaining or reestablishing survey corners, to establish coordinates on public land survey corners using the Oregon Coordinate System or another approved coordinate system that can be referenced directly to a geodetic position.

L. SB 872 (ch 907) Easement Holders

SB 872 amends ORS 271.715 to modify the definition of *holder* of a conservation or highway scenic preservation easement to include certain Indian tribes.

III. LANDLORD-TENANT; MOBILE HOMES; HOUSEBOATS

A. HB 2028 (ch 42) Personal Property Tax Lien on Manufactured Structure and Floating Home

HB 2028 amends ORS 311.405 and 411.410 to provide that, for property tax purposes, a lien for personal property tax attaches on the day preceding the date that a manufactured structure or floating home is removed from the county, sold, or otherwise transferred, if the removal occurs between January 1 and July 1. *See* chapter 20, *infra*.

PRACTICE TIP: The history of the location of manufactured structures and houseboats is important to determine whether a lien shows up in a county where they were previously located.

B. HB 2153 (ch 411) Manufactured Structures, Code Violations, Building Activities

Sections 2 and 4 of HB 2153 grant authority to the Department of Consumer and Business Services to impose civil penalties for violations of statutes and rules relating to mobile home and manufactured dwelling parks, manufactured dwellings, manufactured structures, and recreational vehicles. Sections 16–18 of the bill relate to the authority of a municipality to enforce specialty codes and building requirements. The remaining sections of the bill grant authority to the State Plumbing Board, the Electrical and Elevator Board, and the Board of Boiler Rules to impose penalties for violations of their rules.

C. HB 2701 (ch 112) Manufactured Dwellings, Notice to Buyers Regarding Rent

HB 2701 requires the seller of a manufactured dwelling to provide written notice to the buyer if a portion of the buyer's rent will be paid by the seller or out of the proceeds of financing. The notice must be in writing and include a statement that a portion of the rent is being paid by the seller or out of the proceeds from financing. The notice must also state the amount and duration of rent that the seller is paying. The notice goes not only to the buyer, but also to the landlord and the secured party, if any, taking a purchase-money security interest in the manufactured dwelling.

D. HB 2702 (ch 282) Notices for Tenant Improvements in Mobile Home Park

HB 2702 requires the landlord of a manufactured dwelling park to give each prospective tenant a detailed written statement of improvements that the tenant must make under the space rental agreement. A *provider* (defined as a contractor who adds improvements to a manufactured dwelling park) must give the tenant a statement of estimated costs for the improvements before the manufactured home is delivered. A prospective tenant who does not have actual notice of the total cost for an improvement has a cause of action against the provider who failed to give notice. The evidence of required tenant improvements and costs is limited to the applicable statement of estimated costs.

E. HB 2756 (ch 675) Manufactured Structures, Titles

HB 2756 provides an alternative means for obtaining or amending a certificate of title for a manufactured structure. *See* chapter 5, *supra*.

F. HB 3386 (ch 614) Payment to Landlord for Fire Protection Measures

HB 3386 allows a fire district to pay or repay a landlord not more than 50% of the cost of installing fire safety systems in existing multifamily housing. This measure is a financial incentive for landlords to install such systems in existing housing. (The state building code allows jurisdictions to require these systems in new housing.)

G. HB 3641 (ch 710) Manufactured Dwellings

Section 8 of HB 3641 authorizes the Department of Consumer and Business Services to adopt rules establishing certain fees related to manufactured dwellings.

H. HB 3684 (ch 969) Manufactured Dwellings, Purchase Agreements

HB 3684 requires manufactured dwelling dealers to use a prescribed purchase agreement form for the sale of a manufactured dwelling. Section 2 of the bill specifies the contents of the form. A dealer's failure to use a form that complies with the new requirements may constitute an unlawful trade practice under ORS 646.608.

I. HB 3686 (ch 711) Subdivision of Existing Mobile Home Parks

HB 3686 permits subdivision of a manufactured dwelling park or mobile home park so that the owner of a manufactured dwelling can also own the lot on which it sits. This law applies only to mobile home parks that were established before the effective date of act. Certain restrictions apply. For example, the declarant must offer the lot first to the tenant who occupies the lot before offering to sell the lot to others. That initial offer lasts 60 days. See chapter 17, *supra,* for further information.

HB 3686 took effect on July 2, 2001.

J. HB 3917 (ch 917) Manufactured Dwellings, Unlawful Trade Practices

Among other provisions, HB 3917 prescribes trade practices that are unlawful in a transaction involving a manufactured dwelling. *See* chapter 5, *supra*.

K. SB 194 (ch 596) Landlord-Tenant

SB 194 makes several changes to the landlord-tenant statutes

and other statutes. First, §2 of the bill provides that, in a sale of a dwelling unit under ORS 90.110(2) (occupant is purchaser or person who succeeds to interest of purchaser), the purchaser or seller must receive 24 hours' written notice of the termination of occupancy, or a notice period set forth in the sale agreement, whichever is longer. Only then may the person be evicted. An occupancy in connection with such a sale is specifically not a landlord-tenant relationship.

Sections 3–6 of SB 194 repeal the statutory FED complaint form (ORS 105.125) and set forth new forms.

Sections 9–12 repeal ORS 105.147 (failure of defendant to perform stipulated duties; procedure by plaintiff for enforcement and restitution) and enact new provisions and a statutory form, "Defendant's Request for Hearing to Contest an Affidavit of Noncompliance."

Sections 13–21 repeal ORS 105.154 (enforcement of judgment for restitution; forms; notice of restitution; writ of execution of judgment of restitution; eviction trespass notice) and enact new provisions and forms.

Section 23 requires a rental agreement for a space for a manufactured dwelling or floating home to be month-to-month or a fixed term, and specifies that a fixed-term tenancy must be at least two years long.

Sections 25–26 repeal ORS 90.770 (confidentiality of information pertaining to facility tenants) and enacts new provisions dealing with confidentiality of information pertaining to landlords and tenants of manufactured dwelling and floating home facilities.

Sections 35 and 40 modify provisions dealing with abandonment of personal property and manufactured dwellings or floating homes.

Section 28 of SB 194 amends ORS 90.110. A tenant now may require from the landlord a written receipt or other acknowledgment to show payment of rent.

IV. CONDOMINIUMS AND PLANNED COMMUNITIES

HB 3912 (ch 756) Planned Community Act

HB 3912 is a major amendment to the Planned Community Act (ORS ch 94). It changes the definition of planned community (ORS 94.550) to include existing and future developments that have an ownership pattern where the owners are collectively responsible for maintaining any common property or the exterior maintenance of individually owned property. §§3, 5.

HB 3912 creates three classes of planned communities: Class I is residential developments with more than 12 lots and budgets of $10,000 annually or assessments of $100 per lot per year, whichever is greater. New developments of this class of planned community must comply with the Planned Community Act completely, including making provision for replacement reserves and transition committees. Class II is developments with five lots or more and annual assessments of at least $1,000. New Class II developments must comply with the provisions of the Planned Community Act, except for the reserve and transition requirements. Class III projects include all other residential and commercial projects with such an ownership pattern. New developments of this class of planned community may elect to use the provisions of the Planned Community Act for organization purposes. §5.

To the extent not inconsistent with their current documents, existing planned communities are subject to the Planned Community Act. If a planned community is not organized as an association, it may organize and become subject to the act. §3. All future planned communities must become nonprofit corporations and existing planned communities should consider it. §12.

The legislation also has provisions regarding the declaration (§8), changes to restrictions on the use of property and amendments to the documents (§9), reserves (§10), association powers (§13), bylaws (§14), recording statements of association information (§15), voting and meetings (§§16–17), transfer of information (§20), adoption of a schedule of fines for rule violations (§13), developer's payment of reserves (§21), and rule enforcement (§18). Attorney fees are the subject of §23.

Practice Tip: Existing planned communities may want to use their existing amendment procedures to bring their documents more in line with the Planned Community Act. The amendment procedures allowed by the law should make this process easier.

The condominium provisions of HB 3912 are less sweeping but require that condominiums have common elements; no unit may include any portion of the land. §25. The declaration must now describe the character of any property included in the condominium (i.e., fee, lease, easements, permits, etc.). §26. Many of the technical amendments regarding declarations and bylaws mirror as closely as possible the Planned Community Act, including the requirement that organized community meetings must be conducted according to Roberts Rules of Order (§58) and that enforcement actions by an association (except assessment enforcement) must attempt to use any available, organized means of alternative dispute resolution. §39.

V. REAL ESTATE BROKERAGE

A. SB 446 (ch 300) Real Estate Licensing and Escrow Agents

In general, SB 446 revises the licensing system for real estate professionals and escrow agents. Section 84 of SB 446 repeals the "real estate organization" license, and all real estate organization licenses are void under §7(4) of the bill. The definition of *real estate licensee* in ORS 696.010 is modified by §10 to exclude "real estate organization." The term *principal real estate broker* has replaced "real estate organization" in several statutes. (*See, e.g.*, §§11(1)(h), 16(1), 25(2).) A *principal real estate broker* is a real estate broker who is qualified to employ, engage, or otherwise supervise other real estate brokers.

Section 8 of SB 446 governs operating under a registered business name, but §8(1) clarifies that the business has no standing as a licensee independent of the broker. Brokers', licensees', and limited licensees' duties as agents are now specifically enumerated and must be followed when representing either buyers or sellers. §§45–46. No licensee has any duty to investigate beyond specified duties unless expressly accepted in writing. §§45–46. Section 41 modifies the methods of using real estate brokers' demands for commissions held in escrow.

B. SB 828 (ch 332) Real Estate Appraisers

SB 828 amends ORS 674.150 to change, from six years to five, the time that an appraiser must retain records of real estate appraisal activity. The relevant time period is at least two years after final disposition of a judicial proceeding in which testimony relating to the records was given. The applicable time period is whichever expires later.

VI. REAL ESTATE TAXATION AND ASSESSMENT; REAL ESTATE INVESTMENT TAXATION; SUBSIDIZED HOUSING

A. HB 2029 (ch 41) Tax Liens; Delinquent Taxes; Collections

HB 2029 amends several provisions in ORS chapter 311 to include "property classified as real property machinery and equipment" (not just personal property) within its purview. Section 5 amends ORS 311.656 to provide that real property machinery and

equipment cannot be foreclosed without notice to the tax collector within the county where the property resides. For further discussion, see chapter 20, *infra.*

HB 2029 takes effect on October 6, 2001.

B. HB 2031 (ch 44) Relating to Personal Property Taxation

HB 2031 increases from $3,500 to $8,000 the amount that can be recovered on a landlord's sale of an abandoned RV, manufactured dwelling, or floating home. *See* chapter 20, *infra.*

C. HB 2093 (ch 180) Sale of Property Obtained by Tax Foreclosure

HB 2093 prohibits county officers (elected or appointed), their family members, and intermediaries from purchasing property obtained through tax foreclosure. County employees, their family members, and intermediaries are likewise prohibited from making those purchases if the employee has a statutorily defined conflict of interest that specifically includes having made a discretionary as opposed to a ministerial decision regarding the property's foreclosure.

D. HB 2204 (ch 605) Tax Break for Multiunit Rental Housing

HB 2204 allows an owner of multiunit rental housing that is subject to government restriction on use to apply for specially assessed value. *See* chapter 20, *infra.*

E. HB 2205 (ch 6) Adjustment to Adjudicated Real Market Value

HB 2205 amends ORS 309.115 to permit, for property tax purposes, adjustment of adjudicated real market value if, during the year of adjudication or the five subsequent years, the property is subdivided or partitioned, or is rezoned and is used consistent with that rezoning. *See* chapter 20, *infra.*

F. HB 2206 (ch 509) Deferral of Oregon Capital Gains Tax

HB 2206 contains a legislative response to the Oregon Tax Court decision in *McLane and Fisher v. Department of Revenue,* ___ OTR ___ (Feb 13, 2001).

Until 1991, all taxpayers exchanging Oregon property pursuant to IRC §1031 (tax-deferred exchange) for out-of-state property had to pay the Oregon tax for the year of the sale. The 1991 Legislature sought to ease the burden on Oregon residents by revising ORS 314.290 to allow Oregon resident individuals, trusts, partnerships, and S corporations to elect to defer the Oregon tax until they ceased to be residents. The court in *Fisher, supra,* held that the unequal treatment of residents and nonresidents is unconstitutional and allowed the state to choose its remedy: either collect taxes from all Oregon residents the same as for nonresidents or allow nonresidents to elect a deferral.

HB 2206 allows residents and nonresidents to defer the Oregon tax on the capital gains until a sale "in which gain or loss is recognized for federal tax purposes." Furthermore, the gain Oregon will seek to tax will be adjusted to exclude the gain attributed to the replacement property in the other state.

QUERY: The formula in this act indicates the legislature's willingness to exclude capital gains accumulated on replacement property in other states after an exchange out of Oregon. Does this signify an intent to exclude gains from relinquished property in other states that had been exchanged for replacement property in Oregon?

Other highlights of HB 2206 include the following:

(1) The "election to defer taxes" under ORS 314.290 is repealed. §19. The deferral that pertains to resident and nonresident individuals, estates, trusts, partnerships, and presumably to LLCs is now in ORS chapter 316. §§14–15.

(2) The deferral is now available to corporations, and is reflected in ORS chapter 317. §§16–17.

(3) The deferral specifically applies to gain that is not recognized under IRC §§1031 (exchanges) and 1033 (involuntary conversions). §§15–17.

(4) The Oregon Department of Revenue "may adopt rules to implement reporting requirements" and "may require taxpayers [who have exchanged out of Oregon] to file an annual report on the acquired property."

COMMENT: HB 2206 does not specify that an election to defer the recognition of gain or loss be made (as under ORS 314.290). The Oregon Department of Revenue will devise reporting forms as well as the means to maintain jurisdiction over exchangers residing in different states.

COMMENT: Under HB 2206, residents and nonresidents are allowed to defer the Oregon tax when out-of-state replacement property is purchased in an exchange. This deferral applies to tax years beginning on or after January 1, 1998; and any tax year for which an amended return may be filed or notice of deficiency issued on or after October 6, 2001. This seems to preclude amending returns when the tax has been paid.

HB 2206 takes effect on October 6, 2001.

G. HB 2208 (ch 753) Department of Revenue Statutory Cleanup

HB 2208 makes technical revisions relating to recording information on property tax rolls, certification for local option taxes, and depositing tax prepayments and *de minimis* excess payments. HB 2208 also:

— Revamps property tax exemptions for inventory, certain agricultural commodities, and specified farm-related equipment.

— Revises provisions regarding elderly rental assistance and nonprofit housing assistance.

— Increases the maximum household income that individuals may have and still qualify for tax deferral for homestead property and for special assessments for local improvements.

— Extends the sunset date for property tax exemption for certain land acquired by Indian tribes.

HB 2208 takes effect on October 6, 2001.

H. HB 2261 (ch 689) Housing and Community Services Department

HB 2261 permits the Housing and Community Services Department to provide "eligible housing" by a number of procedures, including lending "qualified housing sponsors" bond money, assigning project revenue to bondholders or trustees, mortgaging projects, making contracts to build or run projects, accepting federal contracts to run projects, as well as signing instruments that secure the performance of obligations, such as letters of credit.

I. HB 2270 (ch 540) Historic Property

HB 2270 extends the property tax special assessment program for historic property, and allows certain new construction to qualify for historic property special valuation if approved by the State Historic Preservation Officer. Section 30 of the bill establishes the Historic Preservation Revolving Loan Fund to finance rehabilitation of historic property. *See* chapter 20, *infra.*

J. HB 2347 (ch 184) Homestead Tax Deferral

HB 2347 amends ORS 311.666 and 311.676 to expand the definition of *disabled person* for purposes of the homestead tax deferral.

The definition now includes persons who are eligible for Social Security disability benefits due to disability or blindness but who are not actually receiving the benefits. *See* chapter 20, *infra*.

K. HB 2934 (ch 855) Transient Lodging Tax

HB 2934 requires a local government that is imposing a new or increased transient lodging tax to reimburse transient lodging providers for the cost of collecting the tax. *See* chapter 20, *infra*.

L. HB 3057 (ch 925) Riparian Land; Conservation or Highway Scenic Easements

HB 3057 exempts riparian land within the boundaries of a city and an urban growth boundary from the city's and county's ad valorem property taxes under specified circumstances. Sections 11–12 permit a landowner in some circumstances to obtain a lower assessment in connection with the conveyance of a conservation or highway scenic easement. *See* chapter 20, *infra*.

M. HB 3778 (ch 738) Housing Projects

HB 3778 modifies the income cap on housing projects, housing developments, or other housing financed by the Housing and Community Services Department. §3. The bill also amends ORS 456.615 to change the definition of *housing development* for certain housing laws. §2. Section 4 amends ORS 456.625 to recognize that the Department may execute and record instruments containing restrictive covenants or equitable servitudes running with the land. Section 4 applies also to instruments recorded before January 1, 2002.

VII. LIENS; MORTGAGES; TRUST DEEDS

A. HB 2051 (ch 301) Produce Liens

HB 2051 consolidates filing an agricultural produce lien, a grain producer's lien, and an agricultural services lien into the index maintained by the Secretary of State for UCC financing statements. The bill also expands the availability, attachment, perfection, and other aspects of these liens. For further discussion, see chapter 5, *supra*.

HB 2051 took effect on June 5, 2001.

B. HB 2160 (ch 51) Forest Resource Trust

The Forest Resource Trust provides revolving loans administered by the state for reforestation and forest management. ORS 526.700. HB 2160 clarifies that contracts entered into between the State Forester and eligible landowners for forest stand improvement create covenants running with the land. These covenants are to be recorded in the county where the land is located. §1 (amending ORS 526.715).

PRACTICE TIP: The Forest Resource Trust may be a good source of funds for reforestation of poorly forested land. Interest in the storage of carbon in forests because of fears of global warming may result in more funding for this program. The loans are favorable to the landowners, but the funding historically has been minimal.

C. HB 2189 (ch 197) Construction Claims

HB 2189 is a comprehensive measure that creates new provisions and amends existing provisions in ORS chapter 701 relating to construction claims. HB 2189 establishes proper procedures for adjudicating a claim through the Construction Contractors Board against a licensed contractor, including notice and filing requirements (§§3–4), statutes of limitations (§2), and alternative procedures, depending on the size and nature of the structure (§§14–15). HB 2189 affords sureties rights to notice of any claim and rights to intervene in such action or arbitration. §4. HB 2189 also affords the Board the power to adjudicate claims through mediation, arbitration, or a contested case hearing. §§5–7b.

D. HB 2202 (ch 414) Construction Claims

HB 2202 also creates new provisions and amends existing provisions within ORS chapter 701. HB 2202 adopts provisions substantially similar to HB 2189 (described above) to set forth the procedure to file a claim when nonresidential property is involved and the total contract price is less than $25,000.

PRACTICE TIP: Note that procedures under ORS chapter 701 now vary for filing claims based on the total contract price and whether the structure is residential or commercial.

E. HB 2322 (ch 850) Construction Claims

HB 2322 preserves the authority of the Construction Contractors Board to proceed with an investigation, hearing, or disciplinary action even when a contractor has changed his or her license status. §2. The Construction Contractors Board must investigate and seek prosecution of illegal activity that warrants more than administrative action. §4. The list of activities subject to disciplinary action is expanded to include "conduct as a contractor that is dishonest or fraudulent and that the board finds injurious to the welfare of the public," §6, but repeals ORS 701.290 (required Board to enter into interagency agreement with Oregon State Police to investigate and prosecute contractor fraud).

PRACTICE TIP: HB 2322 prohibits a contract for work on a residential structure from containing a provision that limits the rights of a person to file a claim with the Construction Contractors Board. Such a contract may include a provision mandating mediation or arbitration. §3.

HB 2322 took effect on July 27, 2001.

F. HB 2610 (ch 254) Release of Trust Deeds

HB 2610 amends ORS 86.720 to streamline the process by which title companies may clear the record of trust deeds that have been paid off. Before a release is issued and recorded, the title insurance company or agent must give notice of the intention to record a release of trust deed to the grantor, the beneficiary of record, and, if different, the party to whom the full satisfaction payment was made. Prior law required notice also to the trustee (except when the title company or agent was the trustee) or the trustee's successors in interest of record. The amendments also clarify that the parties to whom notice is sent have 30 days from the date of mailing to send objections to the title insurance company.

G. HB 2764 (ch 952) Regulation of Loan Originators

HB 2764 provides for regulation of "loan originators" in the mortgage lending industry. The bill amends ORS 59.840 to include a definition of *loan originator.* In general, a loan originator is a person who is employed by or purporting to act as an agent or independent contractor for a mortgage banker or mortgage broker to negotiate with a borrower or potential borrower to establish the terms and conditions of a mortgage loan. The term specifically does not include insurance agents or insurance consultants licensed under ORS 744.002. For further discussion, see chapter 2, *supra*.

H. HB 3842 (ch 311) Seller Notice of Construction Claims

HB 3842 requires a seller of real property to provide the purchaser with (1) a list of all persons hired by the seller to provide construction materials, equipment, services, or labor within the previous two years if those persons were not fully paid or dispute full payment, (2) a copy of any notice, claim, pleading, satisfaction, or release of a construction claim received by the seller within the past two years, and (3) a cautionary notice regarding the potential of a

lien arising after sale. Violation of the law constitutes a Class B misdemeanor. *See* chapter 5, *supra*.

I. SB 171 (ch 445) UCC Revised Article 9

SB 171 replaced *former* UCC Article 9 with a revised scheme for the regulation of security interests in personal property and fixtures. See chapter 5, *supra*, for a discussion of the history of the revision and an overview of the changes in Article 9. *See also* A COMPARISON OF FORMER UCC ARTICLE 9 AND NEW ARTICLE 9, ANNOTATED FOR OREGON (Oregon CLE 2001).

Revised Article 9 generally excludes real property liens or transfers from its scope. There are, however, four express exceptions to this general exclusion (meaning that such transactions are within the scope of revised Article 9) instead of just the exclusion for fixtures under *former* Article 9. These additional transactions expressly covered by revised Article 9 include mortgages securing notes that are collateral, agricultural liens (*but see* item (2) below), and security agreements covering personal and real property. Because virtually all real property financing transactions also include personal property, revised Article 9 applies to those transactions. This summary discusses only a few aspects of revised Article 9 pertaining to real estate.

Revised Article 9 includes the following provisions:

(1) Many more definitions are set forth. For example, *mortgage* and *encumbrance* are both defined broadly enough to include deeds of trust and real estate contracts. §2.

(2) The scope of revised Article 9 was enlarged to cover statutory "agricultural liens." However, Oregon made a nonuniform change to the definition of *agricultural liens* to exclude statutory agricultural services liens, agricultural producer's liens, and grain grower's liens. *See* chapter 5, *supra*. Although the provisions involving agricultural liens are retained throughout revised Article 9, those provisions have little if any effect in Oregon due to this narrow definition.

(3) New national forms permit filing of a financing statement without the debtor's signature (provided the filing is authorized).

(4) Attachment and perfection of a security interest in a right to payment or performance (e.g., payee's rights under a note) automatically extends to a mortgage or other lien on personal or real property securing the right.

(5) A new choice-of-law rule for perfection requires that, in most cases, perfection by filing must occur in the jurisdiction where the debtor is located. However, as under *former* Article 9, security interests in fixtures, "as extracted collateral" (e.g., oil and gas), and timber to be cut are perfected by local real estate filing.

(6) Detailed rules apply regarding priority of security interests in fixtures and crops.

(7) Complex transition rules are set forth for implementation of revised Article 9.

SB 171 took effect on July 1, 2001.

J. SB 240 (ch 20) Credit Instruments

SB 240 amends ORS 86.095 and 86.155 to allow substitution of a note that changes the interest rate without affecting the priority of the lien of a credit instrument. Periodic payments under a note that changes the interest rate may be modified without affecting the priority of the lien of a credit instrument. Certain advances under a line-of-credit instrument may be made without affecting the priority of the lien of a credit instrument. The term *credit instrument* includes "a mortgage, a line of credit instrument, a deed of trust and contract for sale of real property." §1(3).

VIII. GOVERNMENT PROPERTY; CONDEMNATION; FORFEITURE

A. HB 2429 (ch 780) Civil Forfeiture of Property
HB 3642 (ch 666) Criminal Forfeiture of Property

HB 2429 and HB 3642 were enacted to bring forfeiture law into compliance with article XV, §10, of the Oregon Constitution, passed by the voters in November 2000 (Ballot Measure 3). *See* chapter 6, *supra*. That ballot measure requires a criminal conviction and proportionality in the forfeiture of property related to criminal conduct. The new statutes attempt to do this by providing that either criminal or civil forfeitures can occur. Civil forfeiture and criminal forfeiture are subject to different rules. Civil forfeiture of real property must be pursued through a civil action in rem (HB 2429 §8), while criminal forfeiture of real property must be pursued in the same criminal proceeding as the underlying offense (HB 3642 §12(4)). Note that civil forfeiture requires that the property constitute proceeds of the crime for which the person was convicted or have been instrumental in committing the crime (HB 2429 §9(1)(b)), but that criminal forfeiture requires only that the property be proceeds or an instrumentality of the crime of conviction or "past prohibited conduct that is similar to the crime of conviction" (HB 3642 §13). The legislation permits the final action in a civil forfeiture proceeding to be put off by motion of any party until immediately after completion of the relevant criminal case, when the same trier of fact will judge whether the property was proceeds or an instrumentality of the criminal act or similar criminal activity. The judge determines proportionality based on the criminal conviction. This same decision in a civil case can be made in a separate proceeding, and financial institutions that are holders of real estate security interests can effectively act in the proceeding to pursue a foreclosure on a property proposed to be forfeited, with any equity being held for supplemental proceedings after the completion of the criminal matter. Noninstitutional holders of security interests appear to remain liable to having their interests in property forfeited if they fail to take specified actions to prevent prohibited conduct when they have knowledge of it, even if criminal convictions do not result.

HB 2429 took effect on July 17, 2001.

B. HB 3556 (ch 649) Sale of Land by County

HB 3556 amends ORS 275.030 to allow a county to sell land other than by auction if it was not acquired by foreclosure for nonpayment of real property taxes.

IX. MISCELLANEOUS

A. HB 2186 (ch 157) Appraisers and Home Inspectors

HB 2186 exempts a home inspector acting within the scope of a certificate or license from licensure as an appraiser, and vice versa.

B. HB 2606 (ch 219) Noxious Weeds

HB 2606 amends ORS 570.530 to allow employees of the State Department of Agriculture to enter land with consent of the owner to deal with noxious weeds. Under this provision eradication, including use of pesticides, might be at the expense of the state.

PRACTICE TIP: Noxious weeds are nasty alien species that now grow in Oregon free of their natural enemies, which are also alien species. The state has long had the power to require that a landowner eradicate noxious weeds (ORS 570.535), a noble but sometimes almost insurmountable task. The new law gives some needed flexibility to the state in its war on weeds. In buying or managing property, persons should give thought to noxious weeds because the weeds can lower property values.

HB 2606 took effect on May 29, 2001.

C. HB 3006 (ch 206) Cordwood

HB 3006 amends ORS 105.688 to raise from $20 to $75 the amount per cord of wood that an owner of land may charge for permission to use the land for woodcutting without losing certain limitations on liability.

NOTE: A related statute, ORS 105.682, gives some protection to a landowner against tort and contract claims for allowing woodcutting and various other activities.

HB 3006 took effect on May 25, 2001.

D. SB 644 (ch 788) Water Rights During Drought

SB 644 permits the Water Resources Commission to establish, by rule, expedited notice and waiting-period requirements for the substitution of a supplemental groundwater right for a primary water right during drought. *See* chapter 9, *supra*.

SB 644 took effect on July 18, 2001.

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