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Highlights

2007 Legislative Updates

Below are summaries of real estate and land use legislation passed in 2007 by the Oregon Legislative Assembly. The Real Estate and Land Use Section thanks the Oregon State Bar and the authors for granting permission to reprint the summaries, which were originally published in ***2007 Oregon Legislation Highlights*** **(OSB CLE 2007)**. If you are interested in purchasing this book, which contains a review of important 2007 legislation covering a wide range of topics, please call the Bar at (503) 684-7413 or visit www.osbar.org.

LAND USE

I. INTRODUCTION

As in the 2005 legislative session, much of the 2007 Legislative Assembly's attention was focused on responding to Measure 37 (ORS 197.352). Unlike 2005, the 2007 Legislature took action and referred to the ballot a measure that substantially revises Measure 37. This measure—HB 3540—will appear on the ballot as Ballot Measure 49 at a special statewide election held on November 6, 2007, and is described in greater detail below.

Beyond Measure 37, the legislature tackled a number of issues, including funding for school facilities (SB 1036), illegal land divisions (HB 2723), and review of final plats (HB 3025). These measures and others of significance to lawyers are described below.

II. MEASURE 37

A. HB 3540 (BM 49) Revision of Measure 37

HB 3540 substantially revises the substance and procedures for obtaining relief under ORS 197.352 (2005 Or Laws ch 1 (Measure 37)). The revisions can be roughly divided into three categories: (1) revisions that apply to all Measure 37 claims generally, (2) revisions that apply to claims filed before June 28, 2007 (the last day of the 2007 legislative

session), regardless of whether a decision has been issued on the claim, and (3) revisions that apply to claims filed after June 28, 2007. This summary will review the general revisions first, then the retroactive revisions, and finally the prospective revisions.

1. General Provisions

HB 3540 allows a claim under Measure 37 only for land use regulations that restrict residential use of property and for limitations on the use of property imposed under the Forest Practices Act (ORS 527.610–527.770). Claims for nonresidential uses are eliminated, although the bill allows these claims to be converted into claims for residential use. HB 3540, §4 (amending ORS 197.352). The bill clarifies that a person's acquisition date is the date shown on the deed, and it allows a surviving spouse to claim the decedent's acquisition date. HB 3540, §21. Owner is defined to include only the owner of fee title as shown in the deed records, a contract purchaser, or the settler of a revocable trust (until the trust becomes irrevocable, at which time the trustee becomes the owner).
HB 3540, §2(16).

Significantly, the bill provides a methodology for determining when a regulation causes a "reduction in the fair market value," based on the value of the property one year before and one year after the regulation was enacted, plus interest and adjustments for tax consequences (e.g., beneficial assessment or severance taxes). HB 3540, §§7(6), 9(6), 12(2). An appraisal is required to establish a reduction in value.
HB 3540, §§7(7), 9(7), 12(2).

Finally, the bill authorizes the state and local governments to adopt a process for reviewing claims. The process is similar to current land use process, including fee, completeness review, and notice requirements. A writ of review must be used to seek judicial review of decisions by local governments on claims (ORS 34.010 –34.100). Decisions by state agencies on claims may be challenged by filing a petition to review an order other than contested case under the Administrative Procedures Act (ORS 183.484).
HB 3540, §16(1).

2. Retroactive Provisions (§§5–11)

For claims filed before June 28, 2007, HB 3540 provides different standards and remedies for claims filed on high-value farmland and forestland (HVF/F) and for land inside urban growth boundaries (UGBs). For most purposes, HVF/F includes areas that have been designated as critical groundwater areas and groundwater limited areas.

For claims on HVF/F, the bill retroactively limits approved claims to three new lots or parcels with a dwelling on each lot or parcel. HB 3540, §6. The claimant is not required to demonstrate that the subject land use regulations reduce the value of the property. For claims on non-HVF/F, the affected government may approve up to 10 new lots with a dwelling on each, but the claimant is required to demonstrate that the regulations reduced the value of the property using the methodology provided in the bill. HB 3540, §7(6).

Inside UGBs, a claimant is limited to 10 new lots with a dwelling on each, and the claimant is required to demonstrate a reduction in value according to the prescribed methodology. HB 3540, §9. The bill imposes a total statewide cap of 20 new lots for any single claimant.
HB 3540, §11(5).

For claims that have already been approved, local governments (cities, counties, Metro) are required to review the claims to determine whether relief is due and to request additional information from the claimant if the local government is unable to decide. Notice of a tentative decision is required within 240 days of claim, and final decision within 300 days. HB 3540, §10. For pending claims, the bill similarly requires notice to the claimants and requires the claimants to respond and provide any additional information within 120 days. Notice of the tentative decision is required within 120 days and the final decision within 180 days.

With respect to transferability, the rights established in a waiver attach to and run with the land. HB 3540, §11(6). However, if the property is conveyed to a person other than the claimant's spouse or a revocable trust, the rights must be exercised within 10 years of the conveyance. Finally, an owner who has a claim approved is prohibited from bringing any new claims by reason of any regulation in effect on January 1, 2007.
HB 3540, §11(7).

3. Prospective Provisions (§§12–15)

Claims may be filed after July 28, 2007 (the last day of the 2007 legislative session), only for land use regulations that are adopted after January 1, 2007, and any waiver may be limited to the amount the property value was reduced. HB 3540, §12. The bill then establishes a process for reviewing the claims that mirrors the existing process for land use applications, including a fee, completeness review, and notice requirements. A final decision on a claim is required within 180 days.
HB 3540, §13(5).

Finally, all new claims must be filed within five years after the land use regulation is enacted.
HB 3540, §13(4).

4. Effective Date

HB 3540 was referred to the November ballot by HB 2640. The election is scheduled for November 6, 2007.

B. HB 3546 (ch 133) Additional Time to Process Claims

HB 3546 gives state and local governments an additional 360 days to process Measure 37 claims. This will allow these jurisdictions to wait until the November 2007 election determines whether HB 3540 (2007 Ballot Measure 49, amending Measure 37) will go into effect.

PRACTICE TIP: Due to the volume of claims, it is likely that state agencies will continue to process claims and issue decisions throughout the extended period.

HB 3546 took effect on May 10, 2007.

III. ILLEGAL LAND DIVISIONS

HB 2723 (ch 866) Validation of Illegally Created Parcels

HB 2723 addresses the problem of illegal land divisions that

resulted in the creation of unlawful lots and parcels before January 1, 2007. Most cities and counties will not approve a development permit for these properties, thereby inhibiting the development potential and value of the property. The bill may be analyzed in two parts: retroactive provisions and prospective provisions.

The retroactive provisions of HB 2723 allow a city or county to approve an application to validate an existing property under the standards in effect at the time the property was unlawfully divided. The new parcel's "date of creation" is the date the validation application is approved, not the date the property was first divided.

In addition, and notwithstanding the standards in effect at the time the property was first divided, the bill also allows a city or county to validate a parcel if the city or county earlier approved a building permit for a dwelling on the property. Finally, retroactive validation is available only for properties that were unlawfully divided before January 1, 2007.
HB 2723, §2.

The bill's prospective provisions attempt to prevent the creation of illegal parcels in the future by adding to the property disclosure statement in ORS 105.464 a question regarding whether the property was lawfully established. HB 2723, §8. Furthermore, the bill requires a person partitioning or subdividing property to include on the deed for each resulting lot or parcel a reference to the recorded plat or other document evidencing the lawful creation of the property.
HB 2723, §3.

Finally, the bill amends ORS 92.018 to require an award of attorney fees to the prevailing party in an action by the buyer against the seller of an illegal unit of land. HB 2723, §5.

PRACTICE TIP: For subdivisions and partitions approved after January 1, 2008, the first recorded deed for each new lot or parcel must contain a reference to the recorded plat or other instrument that created the lot or parcel.

IV. LOCAL PROCEDURE

A. HB 2713 (ch 652) Private Utility Easements

HB 2713, §1, amends the definition of utility easement in ORS 92.010 to include private utility infrastructure. Under HB 2713, the laws governing public utility infrastructure easements will also govern private utility infrastructure easements. The bill also prohibits the placement of utility infrastructure within one foot of a survey monument. HB 2713, §2 (amending ORS 92.044(7)). Finally, it allows streets dedicated to the public to be encumbered by private utility easements.
HB 2713, §3 (amending ORS 92.090(3)(a)).

B. HB 3025 (ch 459) Land Use Decisions

HB 3025 excludes from the definitions of land use decision and limited land use decision in ORS 197.015 a local government's decision on whether a proposed final plat conforms to the tentative subdivision or partition plan.

PRACTICE TIP: After passage of HB 3025, a local government's decision on a final plat is subject to review by a circuit court using a writ of review under ORS 34.010–34.100 and is not subject to review by LUBA as a land use decision.
HB 3025 took effect on June 18, 2007.

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C. HB 3337 (ch 650) Urban Growth Boundaries in Lane County

HB 3337 requires each city in Lane County with a population larger than 50,000 (i.e., Eugene and Springfield) to establish its own "urban growth boundary, consistent with the jurisdictional area of responsibility" in its acknowledged comprehensive plan. HB 3337, §2(1). The bill requires each city to demonstrate that its comprehensive plan provides sufficient buildable lands under ORS 197.296.

D. HB 3436 (ch 689) Population Forecasting

HB 3436 provides a means by which a city can propose its own population forecast for the purpose of evaluating changes to the city's urban growth boundary. If the coordinated population forecast under ORS 195.036 is less than 10 years old but no longer provides a 20-year forecast for the urban area, the city may propose a new forecast using the same trending rates as the original population forecast. If the coordinated population forecast is more than 10 years old, the city may propose a new population forecast based on the Oregon Office of Economic Analysis starting with the year the city proposes to reevaluate the population forecast. If the "coordinating body," namely, the county, does not take action on the city's proposed revisions to the population forecast within six months of the city proposal, the city may adopt the new forecast after notice to the county and other local governments and after it adopts a comprehensive plan amendment. This forecast may be used by the proposing city to amend its urban growth boundary.
HB 3436 took effect on July 1, 2007.

E. SB 311 (ch 232) County Land Use Applications

SB 311 brings the process and timelines for county land use applications in line with the statutory changes made in 2003 for land use applications made to cities.

The bill amends ORS 215.427 to provide that land use applications submitted to a county will be determined to be complete when the county receives:

(a) All of the missing information;

(b) Some of the missing information and written notice from the applicant that no other information will be provided; or

(c) Written notice from the applicant that none of the missing information will be provided.

ORS 215.427(2) (as amended).

If the applicant was notified by the county of the missing information and fails to respond, the application is void on the 181st day after it was submitted. Finally, extension of the 150-/120-day deadlines is limited to a maximum of 215 days beyond the original 150-/120-day deadlines.

V. SCHOOL FACILITY PLANNING AND FINANCING

A. SB 336 (ch 579) School Facility Plans

SB 336 directs cities and counties that contain more than 10% of a "large school district" to include in their comprehensive plans a "school facility plan" prepared by the district in consultation with the city or county. ORS 195.110(2) (as amended). A large school district is one that has more than 2,500 students. ORS 195.110(1) (as amended). The school facility plan must cover a 10-year period and include such information as a population projection, a capital improvement plan, a site acquisition plan, and a financial plan. ORS 195.110(5) (as amended).

The measure allows school capacity as an approval criterion in local land use decisions:

A city or county may deny an application for residential development based on a lack of school capacity if:

(a) The issue is raised by the school district;

(b) The lack of school capacity is based on a school facility plan formally adopted under this section; and

(c) The city or county has considered options to address school capacity.

ORS 195.110(13) (as amended).

SB 336 directs larger school districts to work with affected cities and counties to develop a school facility plan. But the relationship is not equal; the district gets to make the final decisions on the plan. Once the plan is developed, it must be adopted by the affected cities and counties as part of their comprehensive plans. ORS 195.110(9) (as amended). After the plan amendment is adopted, a lack of school capacity may be used to deny a land use application for residential development. ORS 195.110(13) (as amended). The school district plan must be completed by December 31, 2009, although there is not a specific deadline for adopting it into the affected comprehensive plans. SB 336, §3.

NOTE: SB 336 is apparently intended to work in conjunction with SB 1036. A careful reading of the two bills leads to the conclusion that the "school facility plan" referred to in SB 336 includes the "long-term facilities plan" referred to in SB 1036. Although SB 1036 does not expressly require any action by a city, it clearly contemplates an intergovernmental agreement (or an amendment to an existing intergovernmental agreement) to clarify the roles and responsibilities of the city and school district with respect to assessing and collecting the tax. On the other hand, SB 336 expressly calls for an amendment to the city's comprehensive plan to include the school facility plan developed jointly by the city and school district. Again, once the plan amendment is adopted, lack of school capacity may be used to deny a land use application.

B. SB 1036 (ch 829) Construction Taxes for School Facilities

SB 1036 authorizes a school district to adopt "a tax on the privilege of constructing improvements to real property" for the purpose of paying for school facilities. SB 1036, §§1(1), 2. At the same time, the bill prohibits other local governments from adopting a similar tax unless the local jurisdiction adopted the tax, or began the adoption process, before May 1, 2007. SB 1036, §1(2).

The construction excise tax applies to new construction or changes to existing buildings that add additional square feet. The tax may not exceed $1 per square foot for residential construction or $0.50 for nonresidential construction. For nonresidential devel-

opment, the bill caps the tax at $25,000 per building or building permit. SB 1036, §4. Revenue from the tax may be spent only on capital improvements, not on operating costs. SB 1036, §6(1).

SB 1036 provides a number of exemptions from the tax, including public improvements, affordable housing, hospitals, private school facilities, religious facilities, and agricultural buildings. SB 1036, §3. Significantly, the bill expressly provides that the tax authorized by the bill is a "privilege" tax, and the limitations on such taxes do not apply to building permit fees, system development charges, and other forms of local fees incident to development. SB 1036, §1(3).

Before adopting the tax resolution, the school district must adopt a "long-term facilities plan for making capital improvements," SB 1036, §6(2), and "enter into an intergovernmental agreement with each local government, local service district or special government body collecting the tax," SB 1036, §5(2).

SB 1036 then specifies what must be in the intergovernmental agreement, including collection responsibilities and a cap on the amount of tax revenue the local government can retain to cover its administrative costs (1% of tax revenues). SB 1036, §5(2). However, the bill does not require local governments to collect the tax for the school district or preclude the school district from doing so on its own.

SB 1036, §2(2) ("[C]onstruction taxes imposed by a school district may be collected by another local government."). Presumably, if a local government was disinclined to collect the tax on behalf of the school district, it could decline to do so. Similarly, if the district was inclined to collect the tax itself, and avoid the 1% administrative charge, the district could do so. SB 1036 took effect on September 27, 2007.

VI. URBAN AND RURAL RESERVES

SB 1011 (ch 723) Adoption of Rural Reserves

SB 1011 authorizes counties and metropolitan service districts to designate "rural reserves" by intergovernmental agreement and establishes criteria for the reserves. SB 1011, §3. It requires concurrent adoption of urban and rural reserves by a county and the district. Consideration of the rural reserves must be coordinated with consideration of any urban reserves. SB 1011, §4(1). The bill modifies the process for designating urban reserves and exempts urban and rural reserve designations from a claim for relief under Measure 37. SB 1011, §4(4).
SB 1011 took effect on June 28, 2007.

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Unless otherwise noted, all legislation is effective January 1, 2008.

REAL PROPERTY AND LANDLORD-TENANT LAW

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D. SB 95 (ch 222) Home Inspector Certificate
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E. HB 2713 (ch 652) Private Utility Easements
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G. HB 2853 (ch 440) Adverse Possession Against Railroads
H. SB 133 (ch 483) Disclaimer of Property—Criminal Restitution
I. SB 716 (ch 468) Wheelchair-Only Parking Spaces

I. INTRODUCTION

The 2007 Legislature made a number of technical and housekeeping changes in the real estate laws as well as a few substantive ones. Two bills that stand out are HB 2723, primarily a land use bill but containing provisions for the recorder to require proof of legal separation before a deed may be recorded, and HB 2592, requiring escrow collection of state income tax in sales by nonresident sellers.

II. TECHNICAL ISSUES

A. HB 2090 (ch 186) Filings with Secretary of State HB 2090, §2, allows the secretary of state to decline filings, such as UCC statements, that disclose confidential information.
HB 2090 took effect on May 30, 2007.

B. HB 2365 (ch 64) Vesting

HB 2365, amending ORS 93.180, clarifies the law regarding tenants by the entirety. The bill makes clear that a husband and wife take title as tenants by the entirety unless otherwise stated, regardless of the language following their names.

In other words, if the grantees are in fact married at the time of the deed, the deed need not contain language such as "husband and wife" or "tenants by the entirety" to establish a tenancy by the entirety. See chapter 11 for additional discussion of HB 2365.

C. HB 2723 (ch 866) Proof of Legal Lot

HB 2723 allows a parcel of land that was created without a required approval by a local government to be legalized if it "could have complied with the applicable criteria for the creation of a lawfully established unit of land in effect when the unit of land was sold." HB 2723, §2(1). The permit given for this approval is not subject to minimum lot or parcel sizes established by ORS 215.780. HB 2723, §2(4). In addition, §3 of the bill provides that the county recorder may require proof that the lot is created in compliance with land use laws before recording is allowed. This can be a major issue, and could require preparation before the closing date. There are three ways that this requirement may be met, according to the statute. First, the recorded plat or partition information could be included in the legal description.

Second, a final land use decision validating the parcel as a legally created lot might be attached. Third, a copy of a final judgment or other evidence of foreclosure might be attached.

PRACTICE TIP: This law raises a number of questions, and guidelines may be issued by some county clerks to facilitate compliance. When time is of the essence, a lawyer would be prudent, on any transaction closing after January 1, 2008, to present copies of deeds or contracts to the county recorder for review before the date of actual closing, unless it is clear that this law can be complied with.

The bill adds language to the warning required in sale agreements and deeds. It advises the person acquiring fee title to verify that the property is a lawfully established lot or parcel. HB 2723, §7 (amending ORS 93.040).

HB 2723 also amends the statutory seller's disclosure statement that must be included in all sale agreements and conveyances. The statement now includes a question regarding whether the property was lawfully established. HB 2723, §8 (amending ORS 105.464).

See chapter 18 for additional discussion of HB 2723.

D. HB 3485 (ch 691) Affordable Housing Covenants

HB 3485 allows a variety of public agencies and entities formed to provide affordable housing to establish affordable housing covenants that will apply to subsidized property or property subject to development agreements. HB 3485, §3.

The covenants, which will create affordability by controlling price, rentals, transferability, and management, may be terminated only by a positive act of or dissolution of the entity, and they cannot be removed by any of the common-law or equitable doctrines affecting the enforcement of covenants. HB 3485, §§3, 6.

E. SB 99 (ch 30) Forestland-Urban Interface

SB 99 revises the existing forestland-urban interface fire protection system. Since 1997, the Board of Forestry has operated a program to identify fire hazard areas where urban areas and forestlands intersect and to develop fire protection programs in counties with the greatest risk. Testimony before the legislature indicated that Jackson and Deschutes counties have fully implemented the program, that implementation is underway in nine

other counties, and that five additional counties have received funding to initiate a program.

Under the program, forestland-urban interface areas are identified in eachm county by a classification committee. Once interface areas are identified, a committee applies fire-risk classifications to the areas. Classifications are used by a property owner to determine the size of the fuel break that needs to be established around a structure. The Department of Forestry provides information about fuelreduction standards to forestland-urban interface property owners. The department mails each property owner a certification card, which may be signed and returned to the department after the fuel-reduction standards have been met. If a fire originates on the property of an owner who does not return the card, and the fuelreduction standards have not been met, the department may seek to recover certain fire-suppression costs. Under SB 99, the cost-recovery liability is capped at $100,000. SB 99, §9 (amending ORS 477.059).

SB 99 also allows the State Forester to enter into agreements with localgovernments and homeowners' associations in the event of an apparent conflict between their fire-prevention programs. The measure limits the frequency of revisions to landowner mitigation standards to no more than once every five years.
SB 99, §2 (amending ORS 477.023).

III. CONDOMINIUMS AND PLANNED COMMUNITIES

A. HB 2665 (ch 409) Voting; Insurance and Reserves

HB 2665 revises provisions of the Oregon Planned Community Act (ORS 94.550–94.783) and the Oregon Condominium Act (ORS chapter 100) relating to voting, electronic communication, appointment of receivers, special meetings, insurance, and reserves.

Section 2 of the bill provides for an action by an owner for a receivership if a homeowners' association is unable to organize. Section 3 of the bill provides a mechanism for the board of directors of a homeowners' association to allocate to owners responsibility for payment of the deductible amount in the event of a claim covered by the association's insurance. Section 14 amends ORS 94.675 to allow the association to override a maximum deductible amount found in the declaration or bylaws of the association. The amount of the deductible approved by the association may not exceed the lesser of $10,000 or the Federal National Mortgage Association limits.

Section 4 of HB 2665 allows notices given under the provisions of the declaration or bylaws of the association to be given by e-mail. E-mail cannot be used for notices of failure to pay an assessment, foreclosure of a lien, or imposition of a fine, and an owner can decline in writing to receive other notices by e-mail.

Section 5 of the bill provides a process for electronic ballots for voting on homeowners' association issues.

Section 6 of HB 2665 establishes rules for votes by the directors of homeowners' associations. The section indicates that an association director will be deemed to assent to a board action by silence or abstention, and a negative vote must be expressly given and recorded.

Under HB 2665, associations are now required to have both reserves and maintenance plans for all property for which the association as a whole is responsible. The reserves must be funded from the time the first lot or unit is sold.

If the declaration and bylaws give the association replacement authority for any property, the property must be insured. HB 2665, §§7, 23 (amending ORS 94.595, 100.175).

The bill provides additional specifications for proxies, with board-ordered forms prohibited and electronic submission allowed. HB 2665, §§13, 28 (amending ORS 94.660, 100.427).

Finally, the bill provides that attorney fees in actions for enforcement of association documents will be paid to the prevailing party regardless of any contrary provisions in the declaration or bylaws of the association. HB 2665, §§17, 29 (amending ORS 94.719, 100.470).
HB 2665 took effect on September 27, 2007.

B. HB 2666 (ch 410) Miscellaneous Revisions

Under HB 2666, planned communities that are subject to the Oregon Planned Community Act (ORS 94.550–94.783) can now be created by governing documents besides a declaration and bylaws. This means that if a set of covenants, conditions and restrictions, or restrictions on a plat create obligations sufficient to meet the Planned Community Act's statutory definition, the entity imposing the restrictions will be subject to the statutory requirements.

Section 2 of the bill amends ORS 94.625 to require that the declarant of a plat that transfers any property to a homeowners' association (HOA) must organize a nonprofit corporation for the HOA before recording the plat.

Section 2a of the bill amends ORS 94.630 to provide that an HOA can bring actions for claims related to both property owned by the association as well as individually owned properties for which the association is in some way financially responsible. This provision reverses the court of appeals' ruling in Quail Hollow

West v. Brownstone Quail Hollow, 206 Or App 321, 136 P3d 1139 (2006). ORS 94.630 is also amended to require homeowners' associations with control of individual utilities to give notice and opportunity to be heard before utility shutoff is allowed.

Section 4 of the bill allows declarants to amend the declaration and bylaws to meet requirements of any governmentally aligned entity that guarantees condominium financing. If the amendment occurs after turnover, approval must occur in accordance with approval provision of the declaration or by bylaws.

Some specific statutory changes affecting condominiums include:

- Window frames, doors, and doorframes, but not glass or screens, are now part of a condominium's general common elements unless otherwise provided by the condo documents; and mortgagee for purposes of the condo statute now means the holder of any real estate security interest mortgage, trust deed, or land sale contract. HB 2666, §5 (amending ORS 100.005).
- The exemption from sale regulations for nonresidential units does not apply to nonresidential units, including units

for storage and parking, that are ancillary to the sale of residential units. HB 2666, §6 (amending ORS 100.020).

- Units of a condominium may be subject to the condominium form of ownership. HB 2666, §6 (amending ORS 100.020).
- A leasehold condominium's fee title may be submitted to the condominium form of ownership by a vote of 75% of current owners, regardless of a requirement for a greater percentage or a specified person in the declaration. HB 2666, §7 (amending ORS 100.102).
- A condominium declaration must contain a 12-point type notice that the declaration and plat's square footage is based on the unit's boundary and may vary from other square-footage estimates for the unit used for other purposes. HB 2666, §8 (amending ORS 100.105).
- New condominiums that consist of more than four units can no longer be organized as an unincorporated association; they must be either a profit or a nonprofit corporation. HB 2666, §11 (amending ORS 100.405).
- An unincorporated condominium association can be incorporated as a nonprofit corporation by a resolution of its board of directors regardless of its declaration's or bylaws' requirement of a vote for that action. HB 2666, §11 (amending ORS 100.405).
- Condominium association power to grant leases and easements in general common elements remains subject to a 75% vote requirement, but that vote can be solicited in any manner the board decides (not only at a homeowners' meeting), and previous actions of associations acting to grant these interests in this manner are validated unless the declaration contains a specific prohibition against such an action. HB 2666, §11 (amending ORS 100.405).
- Condominium bylaws that are not recorded within two years of the Real Estate Commissioner's approval will now expire and need to be resubmitted for approval. HB 2666, §13 (amending ORS 100.410).
- Condominium unit boundaries have been modified in an attempt to better define air space that constitutes a unit in light of the bill's amendment relating to window frames and exterior door frames as common elements. HB 2666, §14 (amending ORS 100.510).
- The unit owner's right to make modifications entirely within the unit and the responsibility to maintain the unit has been more clearly stated. HB 2666, §15 (amending ORS 100.535).
- Common-element maintenance responsibility has been more clearly stated, and is absolute, absent specific declaration or bylaws language to the contrary. HB 2666, §16 (amending ORS 100.540).

HB 2666 took effect on September 27, 2007.

C. HB 3186 (ch 705) Condominium Conversion

HB 3186 creates a new notice that must be given to tenants when rental units are converted to condominiums. Giving the notice begins a 120-day period during which a tenant cannot be given the normal 30-day notice of termination or be subject to any rent increases or consumer price index rent increases. The notice must provide information about possible financial help for acquisition of the unit that may be available from government agencies, and it must provide information about the rights of tenants regarding purchase of the property. The notice must be sent to the mayor or county governing body of the jurisdiction to start the 120-day period.
HB 3186, §1 (amending ORS 100.305).

During the 120-day period, construction activities are limited to 11 hours per day (8:00 a.m. to 7:00 p.m.). Failure to abide by the restrictions can lead to litigation against a declarant for one month's rent. HB 3186, §2 (amending ORS 100.315).

If a condominium declaration is recorded for apartments without the 120-day notice, or if evictions or rent increases prohibited by the law occur during the 120-day period, a tenant has a cause of action against the declarant, and the court may award the tenant six months' rent or twice actual damages if the actions are adjudged to be for the purpose of avoiding the statute's requirements. The action may be brought within one year after the declaration's recording. HB 3186, §6.

D. SB 543 (ch 340) Homeowners' Association Investment

Under SB 543, amending ORS 94.670 and 100.480, homeowners' associations and associations of condominium unit owners are now allowed to invest association funds in federally insured institutions (as long as the institution is not an extranational institution) rather than maintain those funds in an Oregon account.

Records of these accounts must be "sufficient for proper accounting purposes." ORS 100.480(2) (as amended).
SB 543 took effect on June 11, 2007.

IV. REAL ESTATE TAXATION AND ASSESSMENT

A. HB 2229 (ch 545) Interest on Tax Refunds

HB 2229, amending ORS 311.812, limits interest on a refund for property tax overpayment to the portion of the refund that is not attributable to inaccurate taxpayer reports.
HB 2229 took effect on September 27, 2007.

B. HB 2231 (ch 450) Reassessment Filing Deadline

HB 2231, amending ORS chapter 308, extends the deadline for filing an application for reassessment of real or personal property based on destruction or damage of property to 60 days after the property is destroyed or damaged, or August 1, whichever is later.

C. HB 2236 (ch 364) Property Tax Refunds

HB 2236, amending ORS 311.806, allows counties to pay a contested refund before conclusion of an appeal.
HB 2236 took effect on September 27, 2007.

D. SB 43 (ch 791) Delinquent Tax Collection

SB 43 amends ORS 311.790 to authorize a tax collector to petition a county court for authority to cancel uncollectible taxes on certain real property upon the property's disqualification from special assessment under ORS 308A.703 (exclusive farm use, designated forestland, etc.).

E. SB 514 (ch 809) Assessment on Conservation Easement

SB 514 allows land currently in farm or forest deferral to be transferred to conservation easement assessment without payment of additional tax. The bill requires certification to be filed with the county assessor. SB 514, §3.

F. SB 697 (ch 516) Assessed Value Reduction

SB 697 amends ORS 308.146 and 308.153 to allow reduction of the maximum assessed value of property when buildings are demolished or removed. It allows the taxpayer to petition to correct the assessment roll. SB 697, §3 (amending ORS 311.234).

G. SB 777 (ch 469) Rehabilitated Property Tax Abatement

SB 777, amending ORS chapter 308, extends the sunset for the Rehabilitated Property Tax Abatement Program to January 1, 2017. It requires completion of rehabilitation within two years of application.

H. SB 814 (ch 590) Tax Roll Correction

SB 814 allows a tax roll officer to correct a valuation judgment during appeal to the tax court if correction results in a reduced tax. SB 814 took effect on September 27, 2007.

I. SB 815 (ch 524) Transfers from and to Tax-Exempt Parties

SB 815, amending ORS 311.410, provides that property is taxable for the ensuing tax year if it is transferred from an exempt entity to a nonexempt entity before July 1. For transfers of real property, the transferee must give notice of the transfer to the county assessor.

J. SB 1036 (ch 829) Construction Excise Tax

SB 1036 allows school districts to impose a new construction excise tax and dedicates the revenue to capital construction. The bill authorizes pledging of taxes to payment of capital improvement bonds. Imposition of the tax is optional with the district. The amount of the tax is limited to $1.00 per square foot on residential construction and $0.50 per square foot on commercial construction, with a maximum of $25,000 per structure or building permit. For a detailed discussion of SB 1036, see chapter 18. SB 1036 took effect on September 27, 2007.

V. GOVERNMENT PROPERTY, CONDEMNATION, AND FORFEITURE

A. HB 2095 (ch 606) Housing Authority Property Ownership and Management

HB 2095 clarifies that a housing authority can provide the full range of services necessary to provide housing for people who meet the current federal housing assistance income requirements and to improve blighted areas. This authority includes developing, owning, operating, or managing mixed-income housing projects, leasing properties, and joining other entities in joint ventures created to provide this type of housing. HB 2095, §8 (amending ORS 456.120). Housing authorities are now explicitly authorized to use property to provide statutorily defined community services. The bill replaces the existing annual reporting requirement with a requirement of annual audits. HB 2095, §2. For further discussion of HB 2095, see chapter 1.

B. HB 3313 (ch 673) Drug-Manufacturing Sites

HB 3313 allows local governments to acquire a first-priority lien for decontaminating drug-manufacturing property if other lienholders do not respond to a notice of decontamination within 60 days, or complete a plan proposed for decontamination within eight months.
HB 3313 took effect on June 27, 2007.

C. SJR 18 Forfeiture

SJR 18 is a proposed constitutional amendment to article XV, §10 (the Oregon Property Protection Act), that generally requires, before forfeiture can take place, that a person be convicted of a crime and that real property be shown by clear and convincing evidence to be an instrumentality or proceeds of that crime or of other similar crimes committed by the claimant. The constitutional amendment would conform article XV, §10, to ORS chapter 475A as that chapter was amended by the 2005 Legislative Assembly.

For personal property, the constitutional amendment will still require a criminal conviction, but the property need only be shown by a preponderance of the evidence to be an instrumentality or proceeds of the crime. Property will also be subject to forfeiture if the claimant took the property with the intent of defeating the forfeiture, took the property and knew or should have known that the property was proceeds or an instrumentality of a crime, or acquiesced in the criminal conduct. Financial institutions retain the right to protect their security interests in property. SJR 18 is scheduled to be submitted to the voters for approval or rejection at the May 2008 primary election.

VI. MANUFACTURED DWELLINGS, HOUSEBOATS, AND LANDLORD-TENANT LAW

A. HB 2096 (ch 607) Manufactured Dwelling Park Nonprofit Cooperatives

HB 2096 authorizes formation of manufactured dwelling park nonprofit cooperatives by persons dwelling in these parks. HB 2096, §§3–5. The bill will allow these cooperatives to borrow money with insurance from the Housing and

Community Services Department on low-income qualifying loans. HB 2096, §9. HB 2096 enables preservation of a park if residents are able to secure financing and competitively bid for the property as a resident cooperative. The measure makes loans from state programs available, makes loans from private lenders less risky by increasing the portion of a loan that may be guaranteed by the state, and allows the department to provide "gap" financing for amounts over what the private market typically lends.

B. HB 2233 (ch 363) Senior Tax Deferral on Manufactured and Floating Homes

HB 2233, amending ORS chapter 311, allows the Department of Revenue (DOR) to record with the Department of Consumer and Business Services (DCBS) a lien for deferred taxes on a manufactured home. Existing law is unclear regarding whether the recording should be made with the county or with DCBS. The bill clarifies that DOR has a lien not only for the deferred taxes, but also for interest on the deferred taxes. The bill makes a similar change to clarify that DOR should record a lien for deferred taxes on a floating home with the secretary of state.

C. HB 2735 (ch 906) Manufactured Dwelling Park or Marina Closure

HB 2735 requires landlords to make payment of between $5,000 and $9,000 to tenants when closing a manufactured dwelling park. HB 2735, §2. The bill requires reporting to the Office of Manufactured Dwelling Park Community Relations. HB 2735, §3. Section 4 prohibits local governments from modifying or amending closure laws. The bill freezes the assessment on property converted to other use for five years.

The bill also requires that the owner of a marina pay owners of floating homes the lesser of $3,500 or moving and set-up costs, if the marina is closed and the tenant is given less than 180 days' notice to vacate the premises. HB 2735, §25.
HB 2735 took effect on September 27, 2007.

D. SB 154 (ch 715) Landlord-Tenant Exemption

SB 154 provides that residence in a residential program for care, treatment, training, or support due to disability or dependency is not subject to landlord-tenant laws.

E. SB 431 (ch 565) Landlord Removal of Tenant Vehicle

SB 431 requires notice to a tenant before towing of the tenant's vehicle, except in certain circumstances. The bill allows towing of vehicles from spaces marked for tenant use only if the landlord provides parking stickers or other devices that identify authorized vehicles and enters into written agreements with tenants that allow towing. The bill requires notice of the towing company to be used. The bill also requires 72-hour notice for removal of an inoperable vehicle and prohibits removal due to expired registration.

F. SB 440 (ch 502) Manufactured Structure Ownership Document

SB 440 expands the information required on manufactured structure ownership documents. The additional information includes the manufacturer's name, name of the model, square footage, type of siding, type of roof, number of bedrooms and bathrooms, and type of heating and cooling. SB 440, §1 (amending ORS 446.566).

The bill also requires documentation to the county assessor of tax payments or cancellations when the manufactured structure is sold. SB 440, §4 (amending ORS 446.641).

G. SB 561 (ch 508) Landlord-Tenant Repairs; Termination

SB 561, §2, allows a tenant to make minor repairs if the landlord fails to timely respond after notice. The bill also allows a landlord to terminate a rental agreement for certain criminal acts, and prohibits termination because a tenant is victim of certain crimes. SB 561, §§3–4.

H. SB 1056 (ch 831) Rental or Lease of Manufactured or Floating Home

SB 1056 prohibits a tenant of a manufactured home park or floating home moorage from renting or subleasing for more than three days without the written agreement of the landlord. The bill allows the landlord to terminate a subleasing agreement with 30 days' notice. SB 1056, §2.

VII. REAL ESTATE SERVICE PROVIDERS

A. HB 2243 (ch 768) Licensing

HB 2243 amended many statutes to allow regulatory agencies to set expiration dates for licenses by rule in lieu of the fixed statutory expiration dates. Real estate–related licenses that could be affected include well-drilling licenses (§§11–12) and escrow agent licenses (§54a).
HB 2243 took effect on July 16, 2007.

B. HB 2490 (ch 289) Earnest Money Disbursement

HB 2490, amending ORS 696.581, allows an escrow agent to disburse earnest money on the basis of an agreement executed by the parties after the initial sales agreement. The bill also provides that escrow agents cannot impose additional requirements on the parties, such as a waiver of liability.

C. HB 2592 (ch 864) Foreign Seller Tax Holdback

HB 2592 requires that persons providing closing and settlement services for nonresident persons and corporations selling real property must withhold from the sale proceeds the lesser of 4% of the sales price, 4% of the proceeds, or 10% of the gain that would be includable in taxable income. The withholding need not be made if the escrow agent or other service provider receives a sworn statement that the consideration for the sale was under $100,000, that the transferee is acquiring the property by foreclosure, or that the transferor has received competent tax advice that the transaction is eligible for tax deferral under §1031 or §1033 of the Internal Revenue Code. HB 2592, §4.
HB 2592 took effect on September 27, 2007.

D. SB 95 (ch 222) Home Inspector Certificate

SB 95, amending ORS 701.350, establishes a fee of $150 for an initial home inspector certificate and increases the renewal fee to $150. The bill changes the certificate term to two years.

E. SB 166 (ch 224) Client Trust Accounts

SB 166, amending ORS 696.241, directs the Real Estate Commissioner to promulgate rules for an optional procedure by which a sole practitioner or a principal real estate broker may elect to disburse disputed funds held in relation to the sale, exchange, or purchase of real estate from a "Clients' Trust Account."

F. SB 167 (ch 319) Real Estate Licensing

SB 167 clarifies that only persons may hold real estate broker or real estate manager licenses (i.e., corporations and other legal entities may not hold licenses).

SB 167, §§1, 4 (amending ORS 696.010, 696.020). The bill directs the Real Estate Agency through rulemaking to allow maintenance of licensee records out of state and to specify how and under what circumstances inactive or suspended agents may act on their own behalf in real estate transactions. SB 167, §§4, 9a (amending ORS 696.020, 696.280). The term nonlicensed individual is defined to include persons who were never licensed, as well as those whose license is inactive, suspended, revoked, or expired, to clarify that all such persons are prohibited from engaging in professional real estate activity. SB 167, §1 (amending ORS 696.010).
SB 167 took effect on June 11, 2007.

G. SB 168 (ch 225) Escrow License Renewal

SB 168 amends ORS 696.530 to authorize the Real Estate Commissioner to allow late renewal of expired escrow licenses.

H. SB 482 (ch 337) Escrow Holdback of Realtor Compensation

SB 482, amending ORS chapter 696, requires that an escrow agent hold back any compensation, not just commissions, due a real estate licensee. The real estate licensee must provide the escrow agent with a Notice of Real Estate Compensation in the form prescribed in ORS 696.582. If the notice is given more than 10 days before a closing, the notice must be delivered by the claimant to the real estate principals named in the notice. If given less than 10 days before a closing, it can be delivered by the escrow agent at the closing and still be valid. SB 482, §1.

I. SB 725 (ch 903) Discrimination in Real Estate

SB 725 makes the substantive rights, procedures, remedies, and judicial review provisions of Oregon's statutes relating to discrimination in property transactions "substantially equivalent" with federal law. For example, SB 725 expands the definition of discrimination based on disability to include the failure to design and construct a multifamily dwelling as required by the federal Fair Housing Act.
SB 725, §3a (amending ORS 659A.145).

By making Oregon's law substantially equivalent to federal law, SB 725 will allow the Bureau of Labor and Industries (BOLI) to contract with the United States Department of Housing and Urban Development to investigate federally based housing-discrimination complaints.

Changes made to Oregon's law include:

- Prohibitions on discrimination in a multiple listing service or other real estate organization or facility by reason of disability, race, color, sex, marital status, source of income, familial status, religion, or national origin. SB 725, §§3a, 4a (amending ORS 659A.145, 659A.421).
- In connection with the sale, rental, or lease of real property, a prohibition on disclosure that a former occupant died from HIV or AIDS. SB 725, §3a (amending ORS 659A.145).
- A prohibition on representing to a person, based on the person's race, color, sex, marital status, source of income, familial status, religion, or national origin, that a dwelling is not available for inspection, sale, or rental when the dwelling in fact is available for inspection, sale, or rental. SB 725, §4a (amending ORS 659A.421).
- A requirement that BOLI give notice to a defendant within 10 days of receiving a complaint of unlawful discrimination in a real property transaction. SB 725, §6 (amending ORS 659A.820).
- A requirement that BOLI commence investigation of complaints of unlawful discrimination in real property transactions within 30 days of receiving the complaint. SB 725, §8 (amending ORS 659A.835).
- An explicit statement that BOLI may require payment of actual damages to persons found to have suffered unlawful discrimination. SB 725, §10 (amending ORS 659A.850).
- A provision allowing either party to remove a complaint from an administrative hearing to a circuit court. SB 725, §12 (amending ORS 659A.870).
- A provision increasing the maximum civil penalty for a single instance of illegal discrimination in a real property transaction from $1,000 to $11,000.

  The maximum civil penalty for repeat offenders could be as large as $55,000. SB 725, §11 (amending ORS 659A.855).
- Authorizing BOLI or the attorney general to file an action based on a pattern or practice of resistance to the real property rights protected by Oregon or federal housing law to collect a civil penalty of up to $50,000 for a first violation and $100,000 for subsequent violations. SB 725, §13 (amending ORS 659A.885).
- Requiring an award of attorney fees to BOLI if BOLI prevails in an action based on a complaint of discrimination in a real property transaction, with an optional award to a prevailing defendant under certain circumstances. SB 725, §13 (amending ORS 659A.885).

VIII. LIENS, MORTGAGES, AND TRUST DEEDS

A. HB 2155 (ch 766) VA Loan Amortization Period

HB 2155, amending ORS 407.275, increases the maximum period for veterans' home loans to 40 years.

B. HB 2159 (ch 43) VA Farm Loan Limit

HB 2159, amending ORS 407.205, eliminates the monetary limit on farm loans to veterans.

C. HB 2869 (ch 255) Garnishment Sale

HB 2869 extends the time for a sheriff's sale to 20 days. HB 2869, §1 (amending ORS 18.758). The bill also allows service of facsimile copies of eviction summons and restraining orders. HB 2869, §§3, 7 (amending ORS 105.135, 107.723).
HB 2869 took effect on June 1, 2007.

D. SB 301 (ch 165) Nonjudicial Foreclosure

ORS 86.750 requires a trustee to serve an occupant personally with notice of a nonjudicial foreclosure of a trust deed and intent to sell the property. There are times when personal service is difficult, for example, if the occupant is rarely home or uses the property for illegal purposes. In those cases, the trustee must seek a judicial foreclosure, which is more expensive and time-consuming than a nonjudicial foreclosure. SB 301, amending ORS 86.750, allows posting of a notice on the property when the occupant cannot be served in person.

E. SB 302 (ch 495) Judicial Foreclosure Sale After Owner's Death

SB 302, amending ORS 18.312, allows a foreclosure sale to occur after the death of the owner.

F. SB 345 (ch 580) Execution Sale—Title Report

SB 345 requires a creditor to instruct the sheriff to warn bidders in the notice of sale regarding investigation of priority of liens and possible limitations on use of the property. SB 345, §1 (amending ORS 18.875). The bill requires the creditor to provide the sheriff with any title report in the creditor's possession that shows interests of record. SB 345, §2 (amending ORS 18.930).

IX. MISCELLANEOUS

A. HB 2007 (ch 99) Registered Domestic Partnerships

HB 2007 essentially makes registered domestic partners the equivalent of a married couple under the law. Certificates of Registered Domestic Partnership may be issued by the county clerk. HB 2007, §5.

Lawyers should be cautious about vesting of real property in situations in which domestic partners are grantees. Vesting as registered domestic partners, or using the language of survivorship from Erickson v. Erickson, 167 Or 1, 115 P2d 172 (1941), should accomplish the desired result. Members of domestic partnerships or survivors thereof have certain inheritance rights in property equivalent to those of married persons.

B. HB 2445 (ch 372) Fee to Public Body for Land Entry

ORS 105.672–105.696 provide a limitation of liability for privately owned lands made available by their owners for recreational access, special forest products harvesting, or woodcutting. The liability limitation is not available if the landowner charges a fee for access. HB 2445, amending ORS 105.672, provides that amounts the landowner receives from a public body in return for granting public permission to enter or go on land for recreational purposes is not charged by the owner and does not affect the ability of the landowner to claim the liability limitation. (The

Oregon Department of Fish and Wildlife manages a program that pays landowners to allow public access.)
HB 2445 took effect on June 12, 2007.

C. HB 2498 (ch 639) Owner Exemption from CCB Licensing

HB 2498 exempts property owners who contract for renovation work that does not require a building permit on no more than three existing residential structures in one year from Construction Contractors Board licensing requirements If a building permit is required, there is no exemption unless the work is done by or under the direction of a licensed general contractor. HB 2498, §1 (amending ORS 701.010).

D. HB 2676 (ch 552) Adverse Possession Against Schools

HB 2676 prohibits an adverse possession claim against any public education facility without regard to when the party asserting the claim entered into possession of the claimed property.

E. HB 2713 (ch 652) Private Utility Easements

HB 2713, §1, amends the definition of utility easement in ORS 92.010 to include private utility infrastructure. Under HB 2713, the laws governing public utility infrastructure easements will also govern private utility infrastructure easements. The bill also prohibits the placement of utility infrastructure within one foot of a survey monument. HB 2713, §2 (amending ORS 92.044). Finally, it allows streets dedicated to the public to be encumbered by private utility easements.
HB 2713, §3 (amending ORS 92.090).

F. HB 2792 (ch 211) Water Utility Notice to Owner

HB 2792, amending ORS 757.069, allows a water utility to mail notice of a delinquent water bill to the owner of rental property only if the utility asserts that the owner is responsible for bill.

G. HB 2853 (ch 440) Adverse Possession Against Railroads

HB 2853 prohibits adversely possessing property owned or used by a railroad.

H. SB 133 (ch 483) Disclaimer of Property—Criminal Restitution

SB 133 amends the Uniform Disclaimer of Property Act (ORS 105.623–105.649) to prohibit disclaimers of property when the

purpose or effect of the disclaimer is to prevent application of property against restitution required by a criminal judgment.

I. SB 716 (ch 468) Wheelchair-Only Parking Spaces

SB 716 requires wheelchair-only parking spaces in public parking areas. It applies to new construction or repainting of accessible parking spaces on or after January 1, 2008. SB 716, §2. The bill also provides for "Wheelchair User" placards or decals, and it prohibits parking in designated spaces unless such a placard or decal is displayed.

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Unless otherwise noted, all legislation is effective January 1, 2008.

Appellate Cases – Land Use

■ NINTH CIRCUIT UPHOLDS INVALIDATION OF TIMBER SALVAGE SALE

In *Oregon Natural Resources Council Fund v. Brong*, 492 F.3d 1120 (2007), the Ninth Circuit considered an appeal of a decision by the Department of Interior's Bureau of Land Management (BLM) regarding its proposed Timbered Rock Fire Salvage and Elk Creek Watershed Restoration Project. The court ultimately upheld the district court's decision to enjoin the project from going forward, finding that it violated the Federal Land Policy and Management Act (FLPMA) and the National Environmental Policy Act (NEPA).

In 2002 the BLM's Medford District was heavily damaged by the "Timbered Rock" fire, which burned roughly 12,000 acres in the district's Elk Creek Watershed. The BLM considered a variety of options to address the damage and revitalize the area. After considering the impacts of various alternatives, the BLM drafted the Timbered Rock Project and issued a Final Environmental Impact Statement (FEIS) and a Record of Decision in March 2004.

The Timbered Rock Project proposed to log roughly 961 acres of lands designated "Late-Successional Reserve" and entitled to heightened environmental protections. If implemented the project would have allowed over 23 million board feet to be sold to timber companies. The Oregon Natural Resources Council (ONRC) successfully argued that the project violated the Medford District Bureau of Resource Management Plan as amended by the Northwest Forest Plan (NFP). The BLM is required to follow the NFP under FLPMA. The ONRC also convinced the court that the project violated NEPA because it did not consider the cumulative effects of the project in the watershed and it did not correctly calculate the project's effect on certain species.

With respect to the FLPMA claim, the court declared the BLM's interpretation of the NFP to be "plainly inconsistent" with the NFP's terms. The NFP creates hierarchical categories of lands covered by the plan, where certain lands are subject to more stringent environmental protections. For the lands at issue in this case, logging is permitted only pursuant to certain narrow exceptions, such as massive fires.

Even in those cases, logging is to be circumscribed because certain consequences of fires are seen to benefit wildlife habitat, a key goal of the NFP. The project would have allowed for the removal of a significant number of large standing dead or dying trees, known as "snags." The court found the large number of snags slated for removal to be inconsistent with the NFP. It stated that the BLM's decision was flawed because it "neglects to explain why the snag removal it *does* authorize, which indisputably harms [the area's] habitat in the short term, will somehow maintain overall habitat suitability now or in the future, as expressly required by the NFP." 492 F.3d at 1129 (emphasis in original).

Turning to the NEPA claim, the court concluded the BLM's analysis of the cumulative environmental effects of the activities proposed under the Timbered Rock project was inadequate. To

be adequate, consideration of cumulative effects must contain "a *useful analysis* of the cumulative impacts of past, present, and future projects." 492 F.3d at 1133 (emphasis original) The BLM's decision did not satisfy this standard because it contained a table summarizing cumulative effects in only a generalized way. Additionally, it failed to consider the combined effect of the Project's activities and past fire suppression and salvage logging activities. Based on its determination that the BLM's decision violated the FLPMA and NEPA, the court affirmed the district court's decision to enjoin the Project.

David F. Doughman

Oregon Natural Resources Council Fund v. Brong, 492 F.3d 1120 (2007).

■ NINTH CIRCUIT UPHOLDS ROCK CLIMBING BAN ON SACRED MOUNTAIN

The Access Fund v. U.S. Department of Agriculture, 499 F.3d 1036 (9th Cir. 2007) involved a challenge to defendant's rule prohibiting all climbing on Cave Rock on the eastern shore of Lake Tahoe. The site is sacred to the Washoe Tribe and also has historical and archaeological importance. The Access Fund, a climber's advocacy group, challenged the ban on First Amendment Establishment Clause grounds and contended that the decision was arbitrary and capricious under the Federal Administrative Procedures Act (APA).

In the mid-20th Century, two tunnels were blasted through Cave Rock for roads (U.S. Highway 50 now runs through the rock). There were also unauthorized additions to Cave Rock to facilitate recreational rock climbing, *e.g.*, permanent bolts drilled into the rock to prevent climbers from falling. The United States Forest Service ("USFS") was authorized by federal regulation to adopt management plans for its parks. In 1996, the USFS recognized Cave Rock as eligible for inclusion in the National Register of Historic Places, subsequently prohibiting new alterations to Cave Rock and beginning a formal planning process including a National Environmental Policy Act (NEPA) review. The USFS settled upon a plan that prohibited all rock climbing, but allowed hiking, fishing and sight-seeing – uses historically allowed until 1965, the date of the death of a prominent historian of the area. After an internal agency challenge failed, plaintiff brought this federal court action . On cross-motions for summary juegment, the trail court rejected the planitiff's Establishment Clause and APA challenges and granted the defendant's summary judgment motion.

The Ninth Circuit first turned to plaintiff's Establishment Clause claim, finding that the federal government must accommodate religion, rather than merely tolerate it. The trial court had used a *Lemon v. Kurtzman*, 403 U.S. 602 (1971) analysis which it, and the Ninth Circuit, found to be valid precedent. Under *Lemon*, a government action or policy violates the First Amendment when it has no secular purpose, its principal effect is to advance religion, and it involves "excessive entanglement" with religion. The court noted that the U.S..Supreme Court has often collapsed the last two prongs into one. The Ninth Circuit found the USFS satisfied the first prong because its primary objective was to preserve an historic and cultural area that was eligible for the National Register of Historic Places, separate and apart from its religious significance. As to the last two prongs of *Lemon*, the court held that the climbing ban cannot be seen as an endorsement of the Washoe tribal religion, because advocates of that religion desired no human activities on or near Cave Rock and the final decision allowed activities other than rock climbing, irrespective of the Washoe religion. It therefore appeared that the USFS accommodated religion consistent with the First Amendment. The court held that the fact that the Washoe tribe benefits in part from the USFS policy does not establish impermissible USFS endorsement of their religion. The Court further rejected the USFS's administration and enforcement of the climbing ban as an excessive entanglement of government and religion, as it relates to no particular religious doctrine. Thus, the court rejected the Establishment Clause challenge based on the historical and cultural importance of the Rock, nowithstanding its religious significance.

The court also rejected the arbitrary and capricious challenge, wherein plaintiff argued that there was no significant geological impact on Cave Rock from recreational climbing. Noting that the value of the site was not just geological, but also cultural and historical, the court upheld the rules under the Federal APA.

Senior Circuit Judge J. Clifford Wallace wrote a concurring opinion that objected to the majority's use of the *Lemon* test in evaluating the Establishment Clause claim, citing *Van Orden v. Perry*, 545 U.S. 677 (2005), a case that rejected the application of *Lemon* to a controversial Ten Commandments display on a public building. In *Van Orden*, a plurality held that the display was historical and cultural as well as religious and found no Establishment Clause violation.

This case presents an interesting analysis of two approaches to the Establishment Clause in dealing with uses on public lands.

Edward J. Sullivan

The Access Fund v. U.S. Department of Agriculture, 499 F.3d 1036 (9th Cir. 2007).

Appellate Cases – Landlord/Tenant

■ WHEN IN DOUBT, FILE WITHIN ONE YEAR IN LANDLORD-TENANT CASES

In *Waldner v. Stephens*, 213 Or App 610, 162 P.3d 342 (2007), the Oregon Court of Appeals rejected tenants' argument that their claims were not governed by the one year statute of limitations in ORS 12.125 for cases arising under the Oregon Residential Landlord Tenant Act (ORLTA). Consequently, the court affirmed the trial court's dismissal of tenants' action because tenants failed to file their lawsuit within the one-year statute of limitations.

In their complaint, tenants claimed they alerted their landlord that rainwater had seeped into the roof and walls of tenants'

duplex. Tenants also claimed that their landlord orally agreed to fix the problem, but he did not. Finally, tenants alleged that they were harmed by toxic mold because their landlord failed to fix the leaking roof as he promised.

The trial court granted the landlord's motion to dismiss for failure to state a claim (Oregon Rules of Civil Procedure (ORCP) 21 A(8)). The trial court held that tenants' action was time-barred because their claims arose under ORLTA and tenants did not file within the one-year period. Tenants then appealed, and made three assignments of error.

Tenants first and second assignments of error were based on the trial court's dismissal of their negligence and breach of agreement claims. Tenants argued that their claims were independent of the statutory duties under ORLTA, arose solely under common law, and should be governed by the two-year statute of limitations in ORS 12.110. For their third assignment of error, tenants asserted that ORS 12.160 extends the statute of limitations period for their minor children's claims.

As for tenants' first and second assignments of error, tenants partially relied on *Jones v. Bierek*, 306 Or 42, 755 P.2d 698 (1988), for the proposition that common-law negligence claims may be asserted independent from the statutory limitations of ORLTA. However, the court rejected tenants' reliance on *Jones* because that case narrowly applied to a situation where a landlord breached a general duty to both tenants and non-tenants to adequately light a common exterior stairwell. The court made the distinction that tenants' allegations were based on a breach of specific duties owed only to them as tenants, not a general duty owed both to tenants and non-tenants as in *Jones*.

Although the court recognized that not all common-law claims are necessarily displaced by the ORLTA, the court stated that the central inquiry is whether the claims arise under a rental agreement or ORS chapter 90, as stated in ORS 12.125. The court observed that "ORS 90.100(32) expressly defines a 'rental agreement' as 'all agreements, written or oral . . . embodying the terms and conditions concerning the use and occupancy of a dwelling unit . . . .'" 213 Or App at 618. The court had no difficulty determining that landlord's alleged promises to make repairs fell squarely within ORLTA's definition of a "rental agreement." Consequently, the court determined that the one year limitations period in ORS 12.125 applied to tenants' claims.

Tenants' admission that they could have filed within the statutory period, but instead chose to file after the one year period had run, did not help their cause. The court specifically quoted tenants' candid concession to the trial court that "[we] were aware of the [statute of limitations] issue from the beginning, probably the smarter thing to have done would've been [to] file within one year and eliminate the issue, but . . . it wasn't a major concern of ours . . . ." *Id*. at 619. Evidently, tenants overconfidence in their interpretation of the case law led them to take the unnecessary risk of filing outside ORLTA's limitation period. If tenants had a good reason to delay filing, it was not apparent in the court's opinion.

Finally, the court quickly dispensed with tenants' third assignment of error, in which tenants asserted that their minor children's claims against the landlord should not be time-barred because ORS 12.160 extends the limitations period in ORS 12.125 for the claims of minors. The court cited tenants' failure to raise the issue with the trial court as reason to reject tenants' third assignment of error. In addition, the court noted that that tenants asserted that their claims fell outside ORLTA, and that ORS 12.125 did not apply in the first instance. Consequently, the court declined to exercise its discretion under ORAP 5.45 to consider the issue as error apparent on the face of the record.

Glenn Fullilove

Waldner v. Stephens, 213 Or App 610, 162 P.3d 342 (2007).

Cases from Other Jurisdictions

■ WASHINGTON REAFFIRMS DATE OF BUILDING PERMIT APPLICATION AS DATE OF VESTING

It is always interesting to read a case from another jurisdiction that would have been resolved differently under Oregon law.

In *Abbey Road Group v. Bonney Lake*, 141 Wn. App. 184, 167 P.3d 1213 (2007), the Washington Court of Appeals reaffirmed its long-standing rule that an applicant must submit a building permit application to obtain a vested right to development after zoning law changes.

Abbey Road proposed to construct a 575-unit condominium complex in the City of Bonney Lake, Washington. On June 15, 2005, Abbey Road attended a pre-application meeting with city staff. At the meeting, the staff provided a letter, which contained an explanation of the land use review process. The letter explained that all information requested on the application form must be submitted in order for the application to be complete and that completion of the pre-application process would not vest any development rights.

On September 13, 2005, Abbey Road submitted its application for site development plan review. On the same day, Bonney Lake rezoned the project parcel to a zoning category that would not allow the condominium project. Bonney Lake notified Abbey Road that its project was not vested because it had not submitted a building permit application.

Abbey Road appealed this determination to the city's hearing examiner, who upheld the determination. Abbey Road appealed under Washington's Land Use Petition Act to the superior court, arguing that Bonney Lake required the applicant to obtain site development plan approval prior to applying for a building permit, and thus the date of the site development application would be the date the project becomes vested. The superior court agreed with Abbey Road. Bonney Lake appealed, and the court of appeals reversed the superior court.

Abbey Road argued that the court of appeals should expand Washington's vested rights doctrine beyond the requirement for a building permit application in this case because Bonney Lake's procedures frustrate vesting and are unduly burdensome. The court of appeals considered the Washington Supreme Court's decision in *Erickson & Assoc. v. McLerran*, 123 Wn. 2d 864, 872

P.2d 1090 (1994), wherein that court held that the constitutional minimum to satisfy due process is a date certain on which a project may vest. In Washington, the default date of vesting is the date that an applicant submits a "fully complete building permit application." Revised Code of Washington (RCW) 19.27.095(1).

Abbey Road argued that the city of Seattle's vesting ordinance, at issue in *Erickson*, allows a developer to file a building permit application at any time and thus control the vesting date. Bonney Lake's permitting process, on the other hand, required site development plan approval prior to submitting a building permit application, and therefore failed to abide by the constitutionally mandated "date certain" rule. The court of appeals noted that a local government may specify a different date on which vesting occurs, but because Bonney Lake had not adopted its own vesting ordinance, the court of appeals determined that it must apply RCW 19.27.095(1) in this case.

The factual background of the points discussed in the case are not well-developed in the opinion, such as a dispute about whether the pre-application conference mentioned the building permit. Essentially, the court concluded that Abbey Road could have submitted a building permit application concurrent with its application for approval of the site development plan. The court observed that there is nothing in Bonney Lake's code or practice that requires an applicant to receive site development plan approval prior to submitting a building permit application.

Submittal of concurrent applications will certainly lead to future litigation over whether a building permit application is "fully complete" under RCW 19.27.095(1), particularly where the government's conditional approval of a concurrently submitted land use application requires modification of the building permit application.

Had this case arisen in Oregon, our laws would have forced a different outcome. ORS 227.178 requires that applicants be notified of missing information, affords applicants 180 days to correct the problem, and mandates that, if the applicant provides the missing information within 180 days, the application is to be approved or denied using the standards and criteria applicable at the time the application was first submitted.

Jeff Litwak

Abbey Road Group v. Bonney Lake, 141 Wn. App. 184, 167 P.3d 1213 (2007).

■ *THE WASHINGTON COURT OF APPEALS REQUIRES COUNTIES AND CITIES TO APPLY AMENDED CRITERIA UNDER THE GROWTH MANAGEMENT ACT WHEN ENGAGING IN PERIODIC REVIEW OF A COMPREHENSIVE PLAN*

In *Gold Star Resorts, Inc. v. Futurewise*, 140 Wn. App.378, P.3d 748 (2007), the Washington Court of Appeals assessed whether Whatcom County's periodic review of its comprehensive plan satisfactorily incorporated amendments to the Growth Management Act (GMA) pertaining to "limited areas of more intensive rural development" (LAMIRD). The court held that Whatcom County did not address the amendments and that the county was required to apply the new criteria in reviewing the county's comprehensive plan. This decision affects how cities and counties review their comprehensive plans in light of GMA requirements.

Under the GMA, counties and cities must periodically review their comprehensive plans to adjust for new land use laws and regulations that impact the comprehensive plan, as well as updated data such as changes in population and projected population growth. Revised Code of Washington (RCW) chapter 36.70A requires counties and cities to review and revise their comprehensive plans every seven years to ensure compliance with amendments to the GMA.

The dispute in this case arose when Futurewise, an advocacy group for responsible growth management, sought review by the Western Washington Growth Management Hearings Board ("the Board") of Whatcom County's comprehensive plan. Futurewise contended that Whatcom County should have revised the rural density designations in its comprehensive plan to comply with new LAMIRD criteria in the GMA. Since it failed to do so, Futurewise argued, the county's comprehensive plan was in violation of the GMA.

Upon review, the Board stated that a LAMIRD is "an optional planning tool which, if used, must comply with the GMA as amended." The Board ruled that Whatcom County's LAMIRD criteria did not include recent GMA amendments impacting LAMIRDs, noting that the seven-year statutory review requirement in RCW 36.70A specifically requires such inclusion. Because the county did not do this in its review process, its criteria for LAMIRDs did not comply with the amended GMA and remanded to the county for further review of the comprehensive plan.

Following this ruling, Gold Star Resorts, Inc. (Gold Star) intervened and appealed the Board's ruling to the Washington Superior Court. Gold Star owns approximately 76 acres of property in a "transportation corridor" in a LAMIRD-designated area. Gold Star contended that the issues raised by Futurewise would impact Gold Star's property if the Board required recent GMA amendments to be included in the county's comprehensive plan.

The Washington Superior Court reversed most of the Board's ruling. Specifically, the superior court held that the statutory review requirement did not require that comprehensive plans be amended to comply with the GMA and that the Board exceeded its authority or erred in applying the review requirement law by adopting a "bright line" rule. The bright line rule at issue was the Board's adoption of a rural residential density definition of no more than one dwelling unit per five acres. Under this definition, Futurewise argued that six zoning densities in the county did not comply with the GMA. Futurewise appealed.

The Washington Court of Appeals reversed the superior court's judgment and reinstated the Board's ruling. The court held that the statutory update requirement was intended by the legislature to require cities and counties to review their comprehensive plans periodically for the purpose of maintaining compliance with the GMA. Failure by a city or county to incorporate GMA amendments may result in the city or county falling out of compliance with the GMA. The court explained that "[p]lanning under the GMA is not static, and comprehensive plans and development regulations must be reviewed and

updated as necessary to maintain compliance with the GMA . . . .” 166 P.3d 248. The county's failure to revise designations of LAMIRDs and rural densities violated the review statute, the court held, and therefore the county was out of compliance with the GMA. The court explained that previous rulings indicate that the legislature viewed the general public's benefits from keeping up with changes in laws affecting growth management as more important than individual landowners' benefits of finality in land use decisions.

The court also held that the Board did not err in requiring the county to review the comprehensive plan again for compliance with the GMA, nor did the Board erroneously interpret or misapply the law in concluding that the rural density zoning criteria violated GMA density specifications. Additionally, the Board's adoption of a flexible standard (rather than the “bright line” rule offered by Gold Star) was appropriate due to the absence of legislative guidance in the matter. The court reinstated the Board's ruling and remanded to the county for additional review of its comprehensive plan under amended GMA requirements.

This decision directs all cities and counties to review and revise comprehensive plans to maintain compliance with GMA rural density requirements. In effect, this decision gives greater weight to the principles underlining growth management policies and preservation of rural areas by directing cities and counties to adjust comprehensive plans when necessary to maintain compliance with GMA guidelines.

Courtney Lords

Gold Star Resorts, Inc. v. Futurewise, 140 Wn. App.378, 166 P.3d 248 (2007).

■ *OUT OF BOUNDS: WASHINGTON COURT OF APPEALS HOLDS THAT CONDITIONING SEWER AVAILABILITY FOR LAND IN POTENTIAL ANNEXATION AREA UPON COMPLIANCE WITH CITY'S COMPREHENSIVE PLAN AMOUNTS TO UNLAWFUL ZONING*

In *MT Development, LLC v. City of Renton*, 140 Wn. App. 422, 165 P.3d 427 (2007), Division I of the Washington Court of Appeals addressed the question of whether a city can require compliance with its comprehensive plan as a condition of certifying sewer availability for land located outside the city's borders. The court held that the requirement amounted to zoning and was unlawful “because the city's zoning authority ends at its borders.” 165 P.3d at 431.

The land in controversy lies within the urban growth area of unincorporated King County and the City of Renton's Potential Annexation Area. The county allows eight dwellings per acre but requires any plat application to be accompanied by a certificate of sewer availability. MT Development, LLC (hereinafter “MT”) applied for the sewer availability certificate from the city but was denied on the grounds that the density allowed under county zoning exceeded the density limitations in the city's comprehensive plan. The city's regulations require compliance with its comprehensive plan as a condition of providing sewer service to properties that lie within its potential annexation area. MT's plat application was subsequently denied, followed by the King County Boundary Review Board approval of the city's proposed annexation. MT filed this action for a judgment declaring the city's ordinance unenforceable, a writ of mandamus directing the city to issue the certificate of sewer availability, and injunctive relief.

MT argued that because the City of Renton was an exclusive provider of sewer service, it could only deny service outside its borders for utility-related reasons—such as lack of capacity. MT further contended that requiring compliance with the city's comprehensive plan imposes zoning regulations beyond the city's borders and out of reach of its police power. The city denied that it was an exclusive provider, and denied any duty to provide service to MT's land where septic systems “might be available.” The court dismissed the city's argument with little effort by pointing out that King County only authorizes septic systems in its urban growth area on a limited, temporary basis.

Although the court agreed the city was statutorily authorized to subject the provision of sewer service outside its borders to conditions, including those not directly related to capacity, it rejected the city's argument that its condition merely plans for urban growth as mandated by the Growth Management Act (GMA). *See* chapter 36.70A Revised Code of Washington (RCW). Cautioning that any conditions must not be “unreasonable or otherwise unlawful,” the court found that the city's sewer availability requirements overreached the GMA's mandate by imposing “immediate use, density, and structure requirements” upon property outside of the city's borders, effectively zoning outside the limits of the city's authority.

Although not discussed by the court, this case illustrates the tension created by overlapping county and city planning in urban growth areas. However, the more looming issue might be the Washington Court of Appeal's uncertainty about how to treat comprehensive planning, either as a mere blueprint, or something more regulatory such as zoning. Until a more definite distinction develops, the line between mandatory compliance and unlawful zoning remains blurry at best.

Dean Micknal

MT Dev., LLC v. City of Renton, 140 Wn.App. 422, 165 P.3d 427 (2007).

■ *CALIFORNIA SUPREME COURT UPHOLDS USE DISTINCTIONS IN COMMERCIAL ZONES*

Hernandez v. City of Hanford, 149 Ca.4th 279, 159 P.3d 33 (2007) involved plaintiffs' challenge to the constitutionality of defendant's zoning ordinance which – in an effort to preserve the vitality of its downtown area (which had a number of well-regarded furniture stores) – prohibited the retail sale of furniture in other commercial zones. However, the ordinance created an exception to that general prohibition for the Planned Commercial (“PC”) zoning district, which covered the city's one shopping mall, to allow for limited retail furniture sales of not more than 2,500 square feet in stores that had over 50,000 square feet of

retail floor space. Plaintiffs are the owners of a home furnishing and mattress store who wish to add retail sale of furniture to their inventory. The trial court rejected plaintiffs' constitutional challenge but the California Court of Appeals reversed, finding a legitimate basis for the ordinance but concluding the exception for large stores draws an unwarranted distinction between large department stores and other retailers within the PC district.

The regulations arose out of a 1989 retail strategy development committee created by the defendant's city council to advise it on retail commercial policy. The committee included members from both the downtown area and larger stores. The 1989 regulations which resulted were amended in 2003 to clarify the prohibition – and exception – in keeping with past understandings of commercial development policies. Plaintiffs alleged the ordinance was enacted for the primary purpose of regulating economic competition and violated the equal protection clause of the federal and California constitutions.

The trial court dismissed the case, finding the primary purpose of the regulation was to preserve the downtown area and that there was a rational basis for the ordinance's exception, which it found was made to keep large retail stores in the city. The California Court of Appeals upheld the downtown economic preservation basis of the ordinance but found the 50,000 square foot threshold and 2,500 square foot retail sales limit was arbitrary and invalidated it under the equal protection clauses of the federal and California constitutions.

On review, the Supreme Court clarified an issue that was, in its view, correctly decided by the lower courts in this case, *i.e.*, the legitimacy of regulating economic competition. The reviewed and elaborated upon previous decisions that acknowledge that zoning, by its very nature, regulates and limits economic competition. However, *dicta* in earlier cases to the effect that the regulation of economic competition is legitimate only if it is not the primary purpose of the regulation is "ambiguous and potentially misleading." It suggests that each regulation is valid only when it has an incidental effect on competition and never when it has a direct effect on competition. Additionally, this language seems to distinguish between public and private purposes for regulations. The court cited *Wal-Mart Stores, Inc. v. City of Turlock*, 138 Cal. App.4th 273 (Cal.App. 2006) with approval, where the court said that regulation of competition can be used to provide for the general welfare, even if it has a direct and intended effect on competition, so long as it furthers the public interest (as opposed to a private interest). Preserving the downtown area, then, is a lawful and legitimate use of the regulatory power. Language and previous opinions to the contrary were thus overruled.

The court then turned to the exception in the ordinance, considering whether it violated the equal protection clauses, and noting that the tests California courts use in evaluating economic distinctions require that the burden be on the plaintiff as in the usual "rational basis" case. In those cases, the presumption favors validity and constitutionality and only requires a rational relationship to a conceivable legitimate state purpose, a view which respects the actions of a co-equal branch of government. When suspect classifications or fundamental interests are involved, the state bears the burden of showing that there is a compelling state interest whereby that classification is necessary to achieve that purpose. The parties and the lower courts all agreed that this is a "rational basis" case. The Supreme Court disagreed with the Court of Appeals' determination that the 50,000 square foot general rule and 2,500 square foot exception were arbitrary, as it related to the premise that there was only one basis for the regulation, *i.e.*, protection of the downtown area. However, the Supreme Court found multiple purposes – including retention of larger stores – to support the exception, as well as the zoning ordinance scheme:

> [a]ccordingly, contrary to the Court of Appeal's determination, we conclude that the ordinance's differential treatment of large department stores and other retail stores is rationally related to one of the legitimate legislative purposes of the ordinance – the purpose of attracting and retaining large department stores within the PC district. The Court of Appeal's resolution of this issue, which would have required the city to extend the ordinance's 2,500-square-foot exception for furniture sales to all retail stores within the PC district, would have undermined the ordinance's overall objective of permitting the sale of furniture in the PC district only to the extent such activity is necessary to serve the city's interest in attracting and retaining large department stores in that district. [Footnote omitted]. 159 P.3d at 48.

This case focuses our attention on the role of zoning ordinances in regulating economic competition. It overturns previous decisions that have upheld such regulation on condition that regulation of competition was not the primary purpose of the regulatory exercise, thus avoiding judicial inquiry into legislative motives.

Edward J. Sullivan

Hernandez v. City of Hanford, 149 Cal.4th 279, 159 P.3d 33 (2007).

■ *UTAH COUNTY ZONING ENFORCEMENT NOT SUBJECT TO RICO SAYS TENTH CIRCUIT*

Gillmor v. Thomas, 490 F.3d 791 (10th Cir. 2007) involved the latest battle in a legal war between plaintiff landowners and Summit County, Utah in which plaintiffs alleged violations of the Racketeer-Influenced and Corrupt Organizations Act ("RICO") under 18 USC § 1962. The defendants are county commissioners and other county officials. The controversy was about the adoption and administration of zoning and development regulations for the Snyderville Basin district in Summit County. The regulations established low base densities based on environmental factors, and allowed for increased density in some areas in exchange for specified community benefits, such as providing public facilities on open space.

Plaintiffs alleged forty-one separate acts of extortion and other unlawful activities by defendants. Defendants suggested that at least some of these acts involved voluntary development agreements under which increased density was exchanged for some contribution to a community benefit. Most of the acts cited as RICO violations involved statements about and bargaining sessions over density allowances in exchange for such benefits. Defendants filed a motion for summary judgment alleging that

plaintiffs could not prove the "predicate acts" necessary for a RICO basis of liability, that plaintiffs lacked RICO standing, that county defendants were absolutely immune from liability and that county officials had qualified immunity as well. At the summary judgment hearing, defendants said that they were not asking the court to rule on the validity of the zoning ordinance, which was the subject of a separate lawsuit. The trial court granted summary judgment to defendants and plaintiffs appealed.

The Tenth Circuit said that RICO requires the conduct of an enterprise through a pattern of racketeering activity, which includes at least two "predicate acts" that involve the plaintiffs. Plaintiffs alleged a "county enterprise" engaged in extortion that injured them, so the court found these allegations sufficient to establish RICO standing. In this case, plaintiffs alleged such extortion was made under color of state law. The court ruled the absence of any challenge to the zoning ordinance in this lawsuit to be a waiver of that set of issues and applied a presumption that the ordinances are constitutional and valid. Thus, plaintiffs waived challenges to any conditions of development approval under *Nollan* and *Dolan*, as well as Utah legislation and case law. The Tenth Circuit rejected what it termed plaintiffs' efforts to "revivify" these claims on appeal.

Similarly, the court found no RICO liability here, rejecting the plaintiffs' reliance on *Robbins v. Wilkie*, 433 F.3d 755 (10th Cir., 2006), in which Bureau of Land Management officials were held to have used their authority to harass and extort private landowners. In this case, defendant officials were performing their "normal administrative duties" to explain and apply zoning ordinances and plaintiffs had not shown that they were treated any differently than other land owners. The court affirmed the grant of summary judgment to defendants.

This case is unusual because of the RICO claim targeting the administration of a land use system.

Edward J. Sullivan

Gillmor v. Thomas, 490 F.3d 791 (10th Cir. 2007).

■ *NEBRASKA FEDERAL COURT FINDS ADA/ FHAA/REHABILITATION ACT VIOLATIONS BY CITY IN FAILING TO ACCOMMODATE THE DISABLED*

The opening paragraph of this fair housing case, *Developmental Services of Nebraska v. City of Lincoln*, 504 F. Supp. 2d. 714 (2007), says it all:

> Evidence showing heaps of red tape, garnished with bureaucratic indifference and inconsistent and irrelevant posturing by city officials, elected and otherwise, does not make the City of Lincoln guilty of consciously intending to discriminate against people with developmental disabilities. But that evidence, and more, does prove that Lincoln denied a group home provider and its developmentally disabled clients reasonable accommodations to land-use requirements. As a result, taxpayers will have to pay the provider a lot of money for the City's violation of federal law. Sadly, by merely acting reasonably, Lincoln could have easily avoided that expensive outcome. 504 F. Supp. 2d at 717.

Plaintiff, a non-profit human services provider, was awarded $331,928 in damages, fees, costs and other relief. Plaintiff taught skills to mentally ill and behaviorally challenged developmentally disabled persons so as to allow them to participate better in society. During this controversy, plaintiff was the only provider of these services on a high level. The State Department of Health and Human Service Systems ("HHSS") has a policy of using the least restrictive environment for its clients, who are frequently Social Security ("SSI") recipients as well. Defendant city has a zoning requirement providing for separation of group homes of one-quarter or one-half mile, depending upon the zone. It defined group homes as those having four or more clients, so that the use qualified as a "family" in residential zones.

Plaintiff applied for three group homes through the only available city process, but did not receive a final decision for over two years. The separation requirements were the principal cause of the delay. Plaintiff asked defendant for a "reasonable accommodation" from the separation requirement as well as the definition of "family" and the city responded that such requests could not be granted administratively but only through a zone change. Later, the city advised plaintiff it would have to amend the code to allow these uses, whereupon plaintiff filed the instant federal action.

The city then adopted a process for responding to reasonable accommodation requests and plaintiff filed requests under this process, which the city rejected. During these proceedings, the city council did not seek any advice on the therapeutic needs of plaintiff's residents and asked no questions on the matter. The parties agreed that granting the accommodations would not place an undue financial or administrative burden on the city, nor fundamentally alter the city's zoning ordinance or its administration and enforcement.

At trial, plaintiff established it was limited financially to the number of homes it could operate, given the city's separation requirements. Defendant did not contest plaintiff's evidence that providing services to three or less developmentally disabled persons was not financially viable, that plaintiff has been required to turn away referrals because of these requirements, and that allowing a fourth resident would allow for more flexible staff hours and treatment services. Ultimately, plaintiff received Certificates of Occupancy for the three residences because the city attorney personally inspected the sites and determined they met plan review comments. Plaintiff presented testimony that it had lost $331,928 in revenue because of these delays and costs.

The Federal Housing Act Amendments of 1998 ("FHAA") prohibit discrimination of the sale or rental of dwellings because of a handicap, and also make unlawful the failure to make a reasonable accommodation in rules, policies, practices or services when an accommodation is necessary to afford an equal opportunity to use and enjoy a dwelling. The Rehabilitation Act prohibits an otherwise qualified person with a disability from being excluded from participation in, or deriving benefits of, or subject to discrimination in the administration of any program or activity involving federal assistance. Similarly, the Americans with Disabilities Act ("ADA") also prohibits an otherwise qualified person with a disability from being excluded from participation

in, or being denied the benefits of, the services, programs, or activities of a public entity or being subject to discrimination by such entity because of a handicap. The court said all of these acts amount to a requirement to accommodate the needs of the disabled and considered all the claims as one.

Under a reasonable accommodations analysis, the motives of the city and its officers are immaterial – all that matters is whether plaintiff was entitled to a reasonable accommodation under the law. If the plaintiff shows the accommodation is reasonable, defendant must respond with case-specific evidence that the accommodation creates an undue hardship. In this case, reasonable accommodation is an equal opportunity to use and enjoy a dwelling. That accommodation is necessary if it affirmatively enhances the circumstances of a disabled person and his or her quality of life by ameliorating the effects of the disability. In other words, plaintiff must show that, without the required accommodation, the disabled person would be denied an equal opportunity to live in the residential neighborhood.

The court found that disabled people will go without community-based treatment unless defendant grants an accommodation, and that finances of the industry and city restrictions limit the availability of plaintiff, the only provider, to provide these services. Additionally, allowing a fourth resident to be in a home setting would increase staffing and State oversight, as well as services. Each SSI recipient would receive more funding which would benefit them in their surroundings. Finally, without the accommodation, plaintiff would not be able to provide high-quality services.

Based on these findings, the court found that the proposed accommodation was reasonable. The city conceded that there were no financial or administrative burdens created as a result of granting the accommodation or that granting it would fundamentally alter the city's zoning regulations or their enforcement. The court rejected the city's principal defense, *i.e.*, that plaintiff could supply more houses with three disabled persons instead of adding a fourth through the group home process, by saying that even if that were true, that does not make the accommodation unnecessary. The three federal acts allow disabled persons to live in the housing of their choice, rather than some alternative property in their community.

The court concluded that the proposed accommodation was both necessary and reasonable to ameliorate the disabilities of plaintiff's clients and will neither fundamentally alter the city's zoning programs nor cause it too incur financial or administrative burdens. As a result of denying the proposed accommodation, the city violated the acts. Judgment was then entered for plaintiffs who were found to be entitled to attorney fees and costs.

Edward J. Sullivan

Developmental Serv. of Neb. v. City of Lincoln, 504 F. Supp. 2d 714 (2007).

■ *THIRD CIRCUIT REVERSES DENIAL OF PENNSYLVANIA METHADONE CLINIC*

New Directions Treatment Services v. City of Reading, 490 F.3d 293 (3rd Cir. 2007) involved the defendant city's denial of plaintiff's application for land use approval of a methadone clinic to treat heroin addicts. The State of Pennsylvania enacted a statute purporting to allow local governments to restrict the siting of such clinics under their zoning regulations, if the clinics were within 500 feet of a school, park, child-care facility or church, unless a majority of a local governing body votes in favor of issuing an occupancy permit. When the application in this case was denied by the city council and the federal government failed to act, the clinic and individual patients brought this action in federal court, alleging the Pennsylvania statute under which the city acted violated the Fourteenth Amendment's Due Process and Equal Protection Clauses, violated the Americans with Disabilities Act ("ADA") and the Rehabilitation Act, both facially and as applied, and was preempted by the federal regulatory scheme for methadone clinics. Plaintiff sought declaratory and injunctive relief but defendant successfully moved against the complaint to dismiss city officials from liability and struck plaintiff's preemption claims. After refusing to certify a class action, the trial court granted the city's motion for summary judgment on all remaining claims and Plaintiff appealed.

The Third Circuit first considered whether the Pennsylvania statute violated the ADA and Rehabilitation Acts, distinguishing the burden of proof from that of an equal protection claim in which the plaintiff bears the burden of showing that all conceivable bases for the regulation are invalid, whereas the two federal acts require a "but for" test. An equal protection claim involving a non-protected class will fail unless it is based upon a decision involving a politically unpopular group or the relationship to the asserted legislative goals are so attenuated as to make the distinction arbitrary or irrational. Reviewing precedent, the court said that both the Sixth and Ninth Circuits found similar restrictions to violate the ADA and Rehabilitation Acts. *See MX Group v. City of Covington*, 293 F.3d 326, 342 (6th Cir. 2002); *Bay Area Addiction Research & Treatment v. City of Antioch*, 179 F.3d 725, 730-31 (9th Cir. 1999). The Ninth Circuit observed that the "reasonable accommodation" standard of the ADA did not apply where a state or local government regulation is facially discriminatory toward the disabled. However, the court noted that the statutes excepted claims by individuals who present a significant risk to the community. Although the Sixth and Ninth Circuit cases dealt with outright bans, rather than the 500 foot prohibition here, the court found persuasive the reasoning of those two cases. It was the Pennsylvania statute that allowed differential zoning treatment of methadone clinics and was the basis for the challenged decision. The court found the statute to be constitutionally infirm as facially discriminatory against the handicapped.

The court then turned to whether the clinic's clients posed a significant risk, which would allow the ban to stand. Having a communicable disease that is easily transmitted to the public in a public setting might allow an otherwise discriminatory law to be held valid. However, for other alleged dangerous activity, the court used a four-part test to analyze the significant risk: the nature, duration and severity of the risk, and the probability that a potential harm would occur to the detriment of the health and safety of others, all measured objectively. The court concluded that, in this case, methadone clients did not present a significant risk as a class and there was no evidence to the contrary with respect to drug use or crime. The point of using the "significant risk" standard was to obviate the unfounded stereotypes and prejudices against methadone clients, stereotypes and prejudices which appear in both the legislative history of the Pennsylvania statute and in the denial of the permit in this case. Because the statute facially violates the

restrictions of the ADA and the Rehabilitation Act, the local land use decision based on it was reversed.

The court then turned to the standing of individual clients to seek damages for violations of the two federal acts at issue. Recovering addicts could qualify but the defendant suggested that return to drug use by such clients was a real possibility and sought to deny them standing to gain monetary relief. The court determined that the plaintiffs' standing qualification would be measured as of the time of the alleged discrimination and that damages is a fact-based inquiry. One individual plaintiff was drug-free for some time, and was entitled to damages, while three others were drug-free for only about three months prior to the filing of the complaint. The Third Circuit remanded the matter for a factual determination as to whether these three plaintiffs could recover damages.

The court then turned to plaintiff's equal protection challenge in the event individual plaintiffs lacked standing under the two federal acts. The parties agreed that a rational basis test was applicable in this case. Plaintiffs used statements made during city council proceedings to show motivation based on stereotypes and prejudices by legislators. The court noted the lack of evidence to support the concerns stated by individuals opposing the methadone clinic and directed the trial court to determine whether these issues were legitimate or pretextual, particularly whether they applied to other permitted uses in the area.

This case is a textbook example of how land use legislation can discriminate against the disabled – and what may be done about it.

Edward J. Sullivan

New Directions Treatment Serv. v. City of Reading, 490 F.3d 293 (3rd Cir. 2007).

■ NEW JERSEY APPELLATE COURT DECIDES FAIR SHARE HOUSING ALLOCATION APPEAL

In the Matter of the Borough of High Bridge Challenging Denial of Amendment to Substantive Certification, (N.J. App. 2007) involved the application of New Jersey's Fair Housing Act ("FHA") under which all municipalities are obliged to plan and zone lands within their boundaries for the purpose of providing their fair share of low and moderate income housing needs. In this case, the Borough of High Bridge sought to remove a site from its fair share affordable housing plan, notwithstanding the willingness of the developer-landowner to undertake development of the site. The Borough attempted to remove the site twice previously but was rebuffed by the courts. The developer filed a "builders remedy" suit in 1984, but upon passage of the FHA, the matter was transferred to the Council of Affordable Housing ("COAH"), the state agency provided by that legislation to decide housing allocations in lieu of the courts. The developer-landowner and the Borough reached settlement in 1988 whereby the site was mapped as part of the Borough's affirmative housing plan and would provide for both affordable and market-rate housing. This settlement effectively insulated the Borough from "builders remedy" litigation.

The developer built the market housing first and encountered multiple obstacles from the Borough in developing the affordable housing portion. In 2004, the court rejected the Borough's objection to building affordable housing on steep slopes, noting that there was no similar objection when the market-rate housing on the same site was developed. The court also rejected the Borough's attempt to eliminate the site from its Housing Element and Fair Share Plan because it was not located in a designated center, noting that sewer and water was available. In 2004, the courts also upheld COAH's refusal to amend the Borough's substantive certification (something akin to acknowledgement) under the state Fair Housing Act. And in 2006, the court upheld the developer's action to require the Borough to grant preliminary subdivision and site plan approval, with rather strong language.

In this case, the court reviewed COAH's denial of the Borough's application to amend its Fair Share Plan to delete the subject site. The Borough contended the site "no longer presented a realistic opportunity for low and moderate income housing" since there was insufficient sewer capacity and the development was to be located on steep slopes. The Borough also alleged there were other sites on which its housing obligations could be met and it was prepared to use eminent domain to acquire the site. COAH noted that these arguments were previously rejected or were raised for the first time on appeal.

On review, the court said that its scope of review of the COAH decision was limited to whether there was substantial evidence to support the decision and whether it was consistent with applicable law. The court noted that COAH had broad discretion under the FHA to address housing allocations and found nothing legally wrong with its action. The court characterized the Borough's arguments as "largely recycled" having been raised and rejected in the two previous appeals and before COAH. While the court said it may be possible for the Borough to meet its housing obligations on other sites, it had not done so as of 2005 when the instant litigation began. It also suggested that the Borough had attempted to undercut the settlement agreement that had been reached and affirmed the COAH decision.

This case shows how another state deals both with affordable housing obligations and a state planning policy of assuring provision of such housing through local plans.

Edward J. Sullivan

In the Matter of the Borough of High Bridge, Not Reported in A.2d, 2007 WL 1468602 (N.J.Super.A.D.).

■ FLORIDA COURT INTERPRETS PLAN

Payne v. City of Miami, ___ Fla. App. ___ (2007) involved a 4.3-acre parcel for which defendant city granted a Future Land Use Amendment ("FLUM") from industrial to restricted to commercial and an implementing zone change and major special use permit to allow a multi-family development for two 12-story structures containing 633 dwelling units. Plaintiffs unsuccessfully challenged the plan amendment through an administrative process before the state Department of Community Affairs. They appealed to the Florida Court of Appeals in a proceeding similar to a review of a contested case proceeding under the Oregon APA.

The court treated the plan amendment as legislative and subject to the "fairly debatable" standard. However, because it was

a map amendment, the court found Florida case law required any review to include a re-examination of consistency with plan policies. In particular, the court noted a statutory obligation to take land use actions in conformance with comprehensive plans which, in turn, must conform to state enabling legislation. The court also pointed out that cities were limited to two comprehensive plan amendments per year, with some exceptions, one of which was for urban infill. The city took the position that the entire city was an urban infill area. The court found the city's position "hard to justify," but since plaintiffs did not raise it below, the court did not consider that argument.

Defendant city established a Waterfront Industrial District into which the subject property fell. That District, and the plan, designated the area as industrial and nonresidential in nature. The amendment was for a residential use and was affirmed by a state Administrative Law Judge ("ALJ") as consistent with the city's comprehensive plan. However, the court noted that the ALJ appeared to be confused as to the location of the site and did not consider two pertinent plan policies.

One of the policies related to the Port of Miami River. The court in a previous case involving some of the same parties noted there were two different views of what comprised the Port area. At one point in the plan, the city limited its discussion to fourteen properties and ownerships. In other portions of the city's plan, it took a much broader view of this area. In fact, the city specifically adopted as part of its comprehensive plan the Miami River Master Plan, which broadened the area and the scope of the marine industrial areas under consideration. The findings supporting the grant of the proposal under review limited the Miami River port only to the original fourteen sites, which the court found inconsistent with the plan read as a whole, as well as with a previous appellate court opinion addressing that definition. Under its plan, the city is required to protect water-dependent or water-related industrial uses in the area. The residential use proposed was inconsistent with the plan as it is neither industrial nor water-dependent or water-related. The ALJ's refusal to include the subject site in the Port of Miami River and to carry out related plan policies to protect water-related or water-dependent industrial uses led to the reversal of the decision.

Another issue raised involved the Coastal Management section of the city's plan which had a goal of no net loss of land dedicated to water-dependent uses and had a policy of providing sufficient land for those uses. The zone change requested was from a zone that precluded residential uses to one that allowed them and the ALJ did not consider the Coastal Management sections in the challenged order. These portions of the plan dealt extensively with the role of marine industrial uses in the local economy and the policy reasons for the goals and policies of protecting these uses and assuring adequate land for their continuation.

A further issue is found in the FLUM policies of maintaining a land use pattern that protects and enhances the quality of life in the city's residential neighborhoods, reduces land use conflicts, and protects and conserves the significant waterfront and coastal resources in the city. The ALJ spoke to the residential neighborhood enhancement issue and said that these policies were advanced by elimination of industrial externalities. Under the plan, the subject property is zoned industrial and is in the midst of other industrial uses in a large block along the Miami River with more than 3,000 linear feet of industrial shoreline. The adjacent residential neighborhood also objected to the addition of 1,600 new residents and the resulting impacts on a local bridge. The court held the ALJ's findings that the project improved quality of life were unsupported by the evidence.

Another issue the court addressed was the Miami River Master Plan, which set out long- and short-range issues for this area along the river and established a policy of reserving the waterfront area for water-dependent or water-related uses to support the marine economy. The plan specifically addressed the zoning in place on the subject site as "intended for application in areas appropriately located for marine activities, to limit principal and accessory uses to those reasonably requiring waterfront location, and to exclude residential uses . . . not primarily related to waterfront activities." That zone excludes residential uses and the plan limits housing opportunities to lands not reserved for water-dependent uses, recognizing that the market might favor residential uses in this area so as to price out marine industrial uses. The plan identified this problem and provided a policy to prevent it from occurring, a policy the ALJ also declined to consider. Given this catalog of errors, the ALJ's decision was reversed.

This case illustrates how the city's actions in granting a plan and zoning map amendment were inconsistent with the overarching policies for the area and thus reversed.

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