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Contents

The Digest at Thirty

Every five years I get to comment on the passage of time and the state of the *Oregon Real Estate and Land Use Digest*. I am happy to report that the *Digest* is a mature thirty years old and going well. Not only has the method of publication changed, largely migrating to an on-line format, but our coverage of our topics has broadened and deepened.

The Section was founded in 1979, the same year as the legislative experiment in finding an alternative method of review of land use cases through LUBA. For land use practitioners, it would be difficult to think about life without either. For real estate practitioners, the Section's list serve and the *Digest* are two necessary elements for practice.

During its life, the *Digest* has had but three editors, not that many more associate editors, and a host of student (or recently admitted practitioner) editors. Our current editor, Kathryn Beaumont has led the digest for nearly 14 years, nearing the record of our second editor, Larry Kressel, who led the digest for 16 years. Together with founding editor, Patrick Randolph, they have brought the Section a quality publication which has strengthened both the Section and its members. The work of the editors is below the radar for most Section members, who are accustomed to the regular receipt of an excellent publication.

This will likely be my last quinquennial observation on the life of the *Digest*, as I expect to be retired before 2014. As the last of the original editorial staff, however, I thank the Section for allowing me to participate in the work of this fine publication and am sure it is left in good hands for the future good of the Section.

Edward J. Sullivan

Appellate Cases – Land Use

■ *STEWART V. CITY OF SALEM*—REVERSAL OF PERMIT DENIAL

Stewart v. City of Salem, 231 Or App 356, P.3d (2009), involved an appeal of a three-lot partition. The partition created two smaller lots and a third larger lot that arguably could have been further divided in the future. However, topographical issues would have made such division difficult.

The planning department had issued an administrative decision approving the partition. The applicant appealed, challenging some of the conditions. The Salem city council exercised its right under local code to initiate its own review, thus putting the entire application at issue during the public hearing before the city council. The council reversed the planning department and denied the application on the grounds that the partition application should have been processed as a subdivision pursuant to Salem Revised Code (SRC) 63.065, which provides: "When it appears to the planning administrator, commission, or council that the area of a proposed partition is to be ultimately divided into four or more lots or parcels, the provisions of this chapter pertaining to subdivisions shall apply."

The applicant appealed to LUBA, which reversed the city's denial. The city then appealed, arguing that LUBA erred (1) in concluding that the applicant had adequately preserved his objections to the denial of the application based on SRC 63.065 at the local hearing; and (2) in reversing rather than remanding the city's denial of the application.

The Court of Appeals affirmed LUBA, although on a slightly different analysis. LUBA had relied on ORS 197.835(4), which allows a petitioner to raise "new issues" at LUBA if they were omitted from the notice required by ORS 197.195 or 197.763. The court disagreed that the applicability of SRC 63.065 was a "new issue." The court concluded

that the relevance and scope of SRC 63.065 was raised by a participant before the local hearings body under ORS 197.835(3) and was therefore not a "new issue" under ORS 197.835(4). 2009 WL 3273835, *6.

The court, noting that the statute does not define "participant," did not decide whether city councilors who raised concerns about SRC 63.065 during the public hearing were "participants." However, the court held that, under the facts of this case, where a code provision was raised during the public hearing by governing body members and then discussed in general by staff members and the applicant, the issue was raised by a "participant" before the local hearings body within the meaning of ORS 197.835(3). *Id.* at *8. The court therefore did not require the applicant to raise any specific issues concerning the applicability of SRC 63.065 under ORS 197.835(4).

The court was careful to point out that there may be more particular obligations of an applicant to respond to an opponent's contentions that affect the meaning of "issue" under ORS 197.835(3). But in this case, the materiality of the SRC 63.065 provision was not the focus of testimony by a party opposed to the application.

On the merits, LUBA had reversed under ORS 197.835(10)(a), which requires reversal and precludes remand of a denial decision when LUBA determines on the basis of the record that the local government lacks discretion to deny the development application. The city argued that, at most, it had committed a procedural error, which would be the subject of a remand. However, the court found that the city's denial decision based on SRC 63.065 was not a procedural error (such as failure to give petitioner adequate notice and opportunity to respond to the application of a newly announced and relevant standard for the decision). Rather, the court held that "[t]he city's decision was not incomplete or uncertain of meaning, it was simply wrong." *Id.* at *10. The record appeared to show that the petitioner's application complied with both the partition and subdivision standards with the conditions the city staff originally approved. Since the sole basis for the city's denial decision was the failure to process the application as a subdivision, the court held that LUBA did not err in reversing the denial of petitioner's tentative partition plan application under ORS 197.835(10)(a). *Id.* at *11.

Steve C. Morasch

Stewart v. City of Salem, 231 Or App 356, P.3d (2009)

■ COLUMBIA RIVER GORGE COMMISSION PREVAILS IN ITS EFFORTS TO PRESERVE HISTORIC SITES THROUGH COMMERCIALIZATION

Two recent Oregon Supreme Court cases have validated the Columbia River Gorge Commission's efforts to allow commercial uses as a way to preserve historic sites in the Scenic Area of the Columbia Gorge. The Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544-544p (1986), required the Commission to adopt a management plan for the Scenic Area, which the Commission did in 1991. The Act requires the Commission to review its plan at least every ten years and determine if it should be revised.

The Act also permits the Commission to amend the management plan at any time in response to changes in the Scenic Area. The Commission must find that certain criteria are met before approving a plan amendment. Those criteria include the following: (1) Conditions in the Scenic Area must have "significantly changed," meaning "new information or inventory data regarding land uses or resources that could result in a change of a plan designation, classification, or other plan provision;" (2) any amendment is consistent with the Act's purposes and standards; and (3) no practicable alternative to the amendment exists that is more consistent with the Act's purposes and standards. OAR 350-050-0030.

In *Friends of the Columbia Gorge, Inc., et al. v. Columbia River Gorge Commission*, 346 Or. 433, 213 P.3d 1191 (2009) *[Friends I]*, the owner of the View Point Inn, a building on the National Register of Historic Places, submitted an application to the Commission to amend the management plan. The application sought to allow properties listed on the Register before November 17, 1986 to be used as a restaurant and hotel if that is how they had been used historically. The applicant stated that the amendment would allow the Inn to generate sufficient income to support its restoration.

The Commission subsequently broadened the proposed amendment to address more generally the protection of historic buildings. Ultimately, the Commission adopted an amendment allowing certain new commercial uses for various historic properties in the Scenic Area. The Commission sought to encourage the adaptive reuse of such properties in ways likely to generate enough money to support the historic restoration of those properties. Friends of the Gorge appealed the plan amendment, and the Court of Appeals affirmed. In its appeal to the Supreme Court, Friends argued that the Commission failed to show that "no practicable alternatives" to the proposed amendment existed and asserted that the plan amendment was inconsistent with the Act's purposes and standards.

The Supreme Court disagreed and affirmed the Court of Appeals decision. The Supreme Court rejected Friends' expansive read of the Commission's duty under OAR 350-050-0030(3) to find that no practicable alternative exists short of the amendment. Friends argued that pursuant to that rule, the Commission had to "show . . . through *some* evaluation of specific alternatives presented to . . ." the Commission that no practicable alternative exists. *Friends I*, 346 Or. at 445 (emphasis in original) (internal quotation marks omitted).

Essentially, Friends argued that the Commission had to consider particularly each alternative presented to it and find why each was not a practicable alternative in order to satisfy its responsibility under the rule. The Supreme Court swiftly rejected this argument, noting it was "fallacious" to conclude that because the Commission's order lacked the level of detail preferred by Friends, the Commission therefore didn't evaluate proposed alternatives. *Id.* at 446. Moreover, the Supreme Court held that all the rule required of the Commission was that it "must find" that no practicable alter-

native exists—the rule's plain language did not compel it to evaluate specific alternatives in order to make that finding. *Id.*

Additionally, the court rejected Friends' argument that the adopted amendment was inconsistent with the Act's stated purpose of encouraging growth in existing urban areas. Allowing the commercial use of historic properties outside of urban areas "is not inherently inconsistent with the Act's second purpose to encourage *commercial development* in urban areas," according to the court. *Id.* at 449.

In the companion case, *Friends of the Columbia Gorge, Inc., et al. v. Columbia River Gorge Commission*, 346 Or. 415, 212 P.3d 1243 (2009) [*Friends II*], the Commission rejected Multnomah County's attempt to implement the plan amendments. One of the plan amendments intended to encourage the adaptive reuse of certain historic Gorge properties required additional local review for certain types of commercial uses. Specifically, it stated that "[certain commercial uses] *may be allowed* in all GMA land use designations except Open Space and Agriculture-Special *on a property with a building either on or eligible for the National Register [of] Historic Places* and that was 50 years old or older as of January 1, 2006 . . . ." *Friends II*, 346 Or. at 421 (emphasis in original).

Recognizing that the amendment vested implementing jurisdictions with some discretion as to whether or not to permit certain commercial uses, Multnomah County drafted an implementing ordinance *requiring* a property to be listed on the Historic Register in order to be qualified for certain commercial uses. A property's mere *eligibility* to be placed on the Register did not entitle such a property to be considered for one of the new commercial uses under Multnomah County's ordinance. The county reasoned that its ordinance would encourage property owners to seek listing on the Register.

The Commission rejected that reasoning and consequently rejected the county's ordinance as being "inconsistent with the management plan" under 16 U.S.C § 544e(b)(3)(A). *Id.* at 423. The Commission believed that requiring a property to be listed as a prerequisite to permitting one of the enumerated commercial uses would result in fewer owners engaging in those uses. In turn, fewer historic buildings would be preserved with money generated by those uses, and therefore the county's ordinance would be less protective of cultural resources in the Scenic Area. *Id.* at 424. The Commission also rejected the ordinance because it didn't believe the county had the discretion to require properties to be listed on the Register.

The Court of Appeals agreed with the Commission. On appeal to the Supreme Court, Friends assigned error to the Court of Appeals determination that the management plan did not confer discretion on implementing jurisdictions to approve certain uses of property.

The Supreme Court agreed that the Court of Appeals erred in finding that the plan did not confer discretion on the county. Nonetheless, it affirmed the Court of Appeals ultimate holding that the Commission was entitled to reject the county's ordinance as inconsistent with the management plan. Writing for a unanimous Supreme Court, Justice Gillette stated that the management plan provision at issue

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Kathryn S. Beaumont

Assistant Editor
Eric Shaffner

Associate Editors
Alan K. Brickley
Edward J. Sullivan

Contributors

Nathan Baker
Richard S. Bailey
Gretchen S. Barnes
Jennifer M. Bragar
Alan K. Brickley
Robert A. Browning
Craig M. Chisholm
H. Andrew Clark
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gives the counties discretion whether to allow various uses, but it requires the counties to give that discretionary consideration on an individualized basis to properties with buildings both on and eligible for listing on the National Register. It does not give the counties the discretion to exclude "eligible" properties from any discretionary consideration, as the county's preferred version of its ordinance would do.

Id. at 430-31.

David F. Doughman

Friends of the Columbia Gorge, Inc., et al. v. Columbia River Gorge Comm'n, 346 Or. 433, 213 P.3d 1191 (2009)

Friends of the Columbia Gorge, Inc., et al. v. Columbia River Gorge Comm'n, 346 Or. 415, 212 P.3d 1243 (2009)

■ *OREGON SUPREME COURT UPHOLDS COLUMBIA RIVER GORGE COMMISSION'S INTERPRETIVE AUTHORITY BUT SENDS REVISED MANAGEMENT PLAN BACK FOR ADDITIONAL WORK*

In *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Commission*, 346 Or. 366, 213 P.3d 1164 (2009), petitioners (collectively, Friends) appealed an Oregon Court of Appeals decision on a petition for review of the Columbia River Gorge Commission's (Commission) 2004 revision of its Management Plan for the Columbia River Gorge National Scenic Area (the Plan). Friends challenged the various standards of review employed by the court in addition to its holdings that the Plan complied with the Columbia River Gorge National Scenic Area Act (Scenic Act). The Oregon Supreme Court affirmed in part, reversed in part, and remanded one question to the Commission for further proceedings.

Congress passed the Scenic Act in 1986 "to protect the scenic, cultural, recreational, and natural resources of the Columbia River Gorge," and to protect the economy of the area "by encouraging growth to occur in urban areas and by allowing future economic development . . . consistent with" resource protection. *See generally* Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544-544p (1986). As part of the Scenic Act, Congress authorized Oregon and Washington to "[e]stablish by way of an interstate agreement a regional agency known as the Columbia River Gorge Commission . . . ." *Id.* § 544c(a)(1)(A). The Commission is to carry out its functions in accordance with the interstate agreement and Scenic Act but is not considered an agency of the United States for the purpose of any federal law. *Id.* The Scenic Act further instructs the Commission to conduct studies, develop land use designations, and adopt a management plan. *Id.* § 544d(a)-(c).

The Plan is subject to periodic review and revision by the Commission. *Id.* § 544d(g). The Commission revised the original Plan in 2004 to address a limited group of issues after several years of public hearings and consultation with federal, state, and local governments. Friends petitioned for judicial review, arguing that various aspects of the revised Plan violated the Scenic Act and that the Commission's review process was incomplete because the act required it to review the entire Plan. The Court of Appeals remanded the Plan to the Commission for reconsideration of one minor issue but otherwise affirmed. Friends appealed.

I. Standard of Review: Facial Challenges

Friends argued that the court applied the wrong standard of review by holding that, in order to prevail on any of its challenges to the Plan, Friends had to show that "the plan could not be applied consistently with the law under any circumstance," a standard most frequently applied to claims that a statute violates a constitutional provision. *Friends of Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 215 Or. App. 557, 568, 171 P.3d 942 (2007) [*Friends v. CRGC I*]. Friends argued that the court should have followed the methodology set out in *Planned Parenthood Association v. Department of Human Resources*, 297 Or. 562, 565, 687 P.2d 785 (1984), for reviewing facial challenges to the validity of an administrative rule: (1) Whether the officials exceeded their authority; (2) whether proper procedures were followed; and (3) "whether the substance of the action, though within the scope of the agency's or official's general authority, departed from a legal standard expressed or implied in the particular law being administered, or contravened some other applicable statute."

The Supreme Court agreed, holding that this standard was consistent with the statutory standard for judicial review of Commission actions in Oregon courts. That standard provides for remand to the agency if a court finds the challenged action to be "[o]utside the range of discretion delegated to the agency by law . . ." or "[o]therwise in violation of a constitutional or statutory provision." *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 346 Or. 366, 377, 213 P.3d 1164 (2009) [*Friends v. CRGC II*] (quoting ORS 196.115(3)(d)(A) & (C) (2009)). Thus, the *Planned Parenthood* methodology (which applies only to Oregon courts) was the appropriate standard for reviewing petitioners' facial challenges to the lawfulness of the Plan. *Id.*

II. Standard of Review: Agency Interpretation

Friends further challenged the Court of Appeals holding that Oregon courts reviewing actions by the Commission must apply the federal "deferential standard of review" set out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). That case and its progeny hold that courts should defer to a federal agency's interpretation of a statute it is charged with implementing as long as that interpretation is reasonable. *Friends v. CRGC II*, 346 Or. at 378 (citing *Chevron*, supra).

Friends argued that the Commission is a product of an interstate compact that Congress authorized but did not require Oregon and Washington to adopt. The Commission's authority, according to Friends, thus derives not from Congress but from state law. Friends also noted that the Scenic Act specifically states that the Commission "shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law . . . ." 16 U.S.C. § 544c(a)(1)(A).

The Supreme Court nevertheless held that the Commission's interpretations of the Scenic Act are entitled to *Chevron* deference because Congress's delegation of authority implied an expectation that the Commission, when addressing ambiguities and gaps in the statutory scheme, will "speak with the force of law," as required by *United States v. Mead Corporation*, 533 U.S. 218, 229, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001). *Friends v. CRGC II*, 346 Or. at 384.

Friends argued alternatively that even if the Commission's interpretations are subject to *Chevron* deference, that standard should not extend to every interpretation, such as arguments raised by the Commission's lawyers during the judicial review process. The court agreed, holding that only interpretations articulated by the agency itself are entitled to deference. *Id.* at 385. However, the court did not find that the Court of Appeals had crossed that line.

III. Application to Substantive Claims at Issue

The court then applied the *Chevron* standard to several substantive challenges. First, Friends argued that the Plan violated the Scenic Act by failing to confine "commercial events" (weddings, receptions, and parties) to urban areas and areas designated by the Commission as Commercial land. The Commission responded that the Scenic Act did not specifically limit all commercial activity to those areas. The court found that, because the act was ambiguous on this point, the Commission's interpretation was entitled to deference.

The court reached a similar decision with respect to small-scale fish processing operations. The revised Plan permits such operations in conjunction with a family-based commercial fishing business on parcels designated GMA Residential, Small Woodland, or Small-Scale Agriculture, subject to certain conditions. Friends argued that the approved fish processing activities under the guidelines violated the Scenic Act's prohibition on industrial development outside of urban areas. 16 U.S.C. § 544d(d)(6).

Friends relied on the definition of "industrial uses" in the Plan, arguing that fish processing activities are industrial uses because they involve processing, handling, and distribution of raw material. The Commission responded that those activities are too limited to qualify as industrial uses. The court, finding that interpretation plausible, deferred to the Commission. *Friends v. CRGC II*, 346 Or. at 411.

The final interpretation question involved Friends' argument that the revised Plan's failure to inventory and protect geological resources violated the Scenic Act. Friends contended that geological resources are natural resources within the meaning of the Scenic Act. The Court of Appeals had rejected this claim but did not directly decide the question. The Supreme Court, however, found that the Scenic Act does not specifically define the term "natural resources" and that it conveys the kind of ambiguity that warrants deference. Friends argued that, since the Commission had construed the term in the Plan's glossary to include geological resources, the Commission was required to review and inventory such resources and establish rules for their protection. However, a second, narrower definition appears in the chapter addressing natural resources. The court found that, under that definition, "natural resources" did not appear to encompass geological features.

The court remanded for the Commission to specify which of the two conflicting definitions it had used.

IV. Livestock Grazing

Friends argued that the Plan violated the Scenic Act by allowing livestock grazing in almost all land use designations. However, the court found that, while the Scenic Act requires protection from adverse effects caused by commercial, residential, and mineral resource uses, the same is not true of agricultural activities such as grazing. 16 U.S.C. § 544d(d)(7)-(9). Friends argued alternatively that the Scenic Act's focus on natural resources requires such protection, but the court noted that the act seeks also to support the local economy; it does not require the Commission to protect "*all* natural resources in *all* circumstances and in *every* part of the Scenic Area." *Friends v. CRGC II*, 346 Or. at 400.

V. Adverse Cumulative Effects

Friends raised three separate arguments related to potential cumulative adverse effects of development within the Scenic Area. The arguments addressed the Scenic Act's requirement that the Plan prohibit non-urban development that adversely affects scenic, cultural, recreation, or natural resources. 16 U.S.C. §§ 544(d)(7)-(9). Each of these challenges was based on the definition of "adversely affecting" under the Scenic Act, with particular emphasis on "the relationship between a proposed action and other similar actions which are individually insignificant but which may have cumulatively significant impacts . . . ." *Id.* § 544(a)(3).

A. Scenic Resources

First, Friends argued that the revised Plan violates the Scenic Act because it contains "no standards, guidelines, criteria, or methodology for determining what causes cumulative adverse impacts to scenic resources . . . ." *Friends v. CRGC II*, 346 Or. at 386. The Court of Appeals disagreed, concluding that there was no provision requiring the Commission to spell out such standards. *Friends v. CRGC I*, 215 Or. App at 586. The Supreme Court, by contrast, agreed with Friends that the Scenic Act requires management plans to contain provisions minimizing adverse cumulative effects to scenic resources by development.

The Commission responded that the Plan does contain such provisions, such as the "key viewing areas" policy which requires new development to be visually subordinate to the applicable landscape setting. The court agreed that that policy and its related guideline, when read together, require implementing agencies to make a cumulative-effects determination for each development application and to prohibit those that would adversely affect scenic resources. The court concluded that such provisions in the Plan are consistent with the Scenic Act.

B. Natural Resources

Friends next argued that the revised Plan violated the Scenic Act by failing to minimize adverse effects to natural resources in the Scenic Area. The court noted that the chapter of the Plan devoted to natural resources contains no policies or guidelines equivalent to those for key viewing areas and visual subordinance determinations. The Commission countered that the Scenic Act

does not require it to prevent adverse cumulative effects in any particular way and that it has chosen to do so with a landscape setting approach rather than a case-by-case examination. This approach assigns land use designations and minimum parcel sizes, thus pre-defining the types and amount of development appropriate to avoid adverse effects.

The court found that, while some of the Plan's provisions were designed to ensure that development would not adversely affect natural resources, most contain no reference to adverse cumulative effects and no requirement that decision makers select a minimum parcel size, for instance, to eliminate such potential. The court thus agreed with Friends and concluded that the revised Plan violated the Scenic Act in this respect.

C. Cultural Resources

Finally, Friends argued that the revised Plan does not provide any standards for assessing the cumulative effects of development on cultural resources. The Commission argued that its provisions pertaining to land use designations and minimum parcel sizes were designed to eliminate the possibility that such effects would occur. The court, however, finding no provisions actually forbidding adverse cumulative effects to cultural resources, held that the Plan violated the Scenic Act. *Friends v. CRGC II*, 346 Or. at 408.

Lisa Knight Davies and Johnson Dunn

Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n, 346 Or. 366, 213 P.3d 1164 (2009)

Appellate Cases – Washington

■ *DEVELOPMENT FEES BY ORDINANCE MAY STILL BE ADDED POST-CONTRACT*

In an appeal under the Land Use Petition Act, Chapter 36.70C Revised Code of Washington (RCW), the Washington Court of Appeals affirmed the principle that impact fees accrue even against an approved project, especially against the sleepy developer who neglects to act in a timely fashion. In *Belleau Woods II, LLC v. City of Bellingham*, 150 Wash. App. 228, 208 P.3d 5 (2009), the developer Belleau Woods II, LLC (Belleau Woods) planned to develop 7.39 acres of apartments in northern Bellingham. The applicable Bellingham development regulations stated that the area was intended for residential units, subject to a prerequisite consideration of "contribution of land or fees for neighborhood park and trail system." BELLINGHAM, WA., MUN. CODE § 20.00.080 (2009) [hereinafter BMC]. In lieu of payment for capital improvements of the area, the development contract between Belleau Woods and the city allowed the Parks and Recreation Department (Parks Department) to accept "construction of improvements or land dedication . . . ." 150 Wash. App. at 232. Hoping to meet this and a city requirement for a wetland/buffer mitigation plan, in 2004 Belleau Woods offered, and the Parks Department accepted, an agreement to dedicate a conservation easement for a public trail and protection of wetlands.

Two years later, Belleau Woods still had not begun construction. In the meantime, Bellingham adopted a new impact fee ordinance under RCW 82.02.050 "as a means of mitigating residential development's impacts upon the parks and recreation facilities in the City." BMC § 19.04.010(E). This fee was adopted as a way to assure that new developments share in the costs of providing for recreational improvements. BMC § 19.04.030(B). Importantly, the ordinance provided an exemption for developments conditioned upon an agreement to mitigate park impacts, provided that any such agreement predated the fee imposition. 150 Wash. App. at 234 (citing BMC § 19.04.130(A)(6)(b) (deleted by ordinance in 2009)). It also provided a credit against park impact fees for the fair market value of dedications of land made pursuant to the capital facilities plan and accepted by the Parks Department. BMC § 19.04.140.

Under this new ordinance, Belleau Woods was not assessed the park impact fee—amounting to $111,215.13—until it applied for building permits. Surprised, Belleau Woods objected to the Parks Department on the ground that a previous dedication of land, valued at $8,912.34, was intended to satisfy all regulatory conditions relating to the provision of open space. The Parks Department denied the claim, arguing that the dedication was made to satisfy a prerequisite condition under previous rezoning, *not* a park impact fee. The Parks Department also noted that if Belleau Woods had acted in 2004, before the adoption of the 2006 ordinance, the dedication would have been sufficient. In the absence of such timeliness, "there is no prior vesting for the fee based on development approvals," and Belleau Woods was limited to claiming a credit towards the park impact fee for the value of its prior dedication. 150 Wash. App. at 236. After the superior court found that Belleau Woods should be exempt from park impact fees, the court of appeals reversed, finding that "the city intended that a developer is entitled to a full exemption only if the previous contribution of land or money was equivalent to the park impact fees assessed . . . ." 150 Wash. App. at 243.

Key to the opinion is the court's construction of the controversy as a simple question of vested rights under RCW 58.17.033 rather than a contract enforcement case. The court clarified that impact fees do not affect physical aspects of development. Instead, they simply add to the cost of a project and therefore are not "land use control ordinances" (which vest at the time an application is perfected). *Id.* at 238-39. However, the court did recognize that a "development agreement," as described by RCW 36.70B.170(1), could vest rights and foreclose park impact fees. *Id.* at 239. Such agreements, though, could only be made by ordinance or resolution after a public hearing as required by RCW 36.70B.200, and the record did not suggest that the contract in this case was approved through such a process.

Finding no vested rights, the court looked to the ambiguous language of the ordinance's exemption for any "development activity for which park impacts *have been mitigated* pursuant to an agreement." *Id.* at 241 (quoting BMC § 19.04.130(A)(6)(b) (deleted by ordinance in 2009)) (emphasis added). Belleau Woods contended that the exemption applies if any of the park impacts

have been mitigated, with the word "mitigate" meaning merely to "make less severe or intense." *Id.* However, the court turned to principles of statutory interpretation and examined the context. The next section allowed for credit for dedications of land and would not have existed if full exemptions were granted whenever a developer contributed *any* land. 150 Wash. App. at 242. The court gleaned legislative intent from a subsequent amendment, even though it was not enacted until after the dispute arose, and found that partial mitigation was intended to receive partial credit and not a full exemption. *Id.*

Although interpreting the language of the statute in a "harmonious" fashion should have been sufficient, the court sought to resolve any remaining ambiguities by recognizing the agency's interpretation. Recognizing that "[w]here an agency is charged with the administration and enforcement of a statute, the agency's interpretation of an ambiguous statute is accorded great weight in determining legislative intent," the court ultimately found persuasive the testimony of the director of the Parks Department. *Id.* at 243 (citing *Waste Management of Seattle, Inc. v. Utilities & Transp. Comm'n*, 123 Wash.2d 621, 628, 869 P.2d 1034 (1994)).

By clarifying the authority of local governments to assess impact fees subsequent to the effective date of a development contract, this opinion adds further incentive for developers to proceed upon preliminary approval. Property owners do not vest against impact fees imposed under RCW 82.02.050, as these are not construed to be land use control ordinances subject to vesting

Andrew Wilson

Belleau Woods II, LLC v. City of Bellingham, 150 Wash. App. 228, 208 P.3d 5 (2009)

Cases From Other Jurisdictions

FIFTH CIRCUIT FINDS CITY FAILURE TO MAKE ITS CURBS, SIDEWALKS, AND SOME PARKING LOTS COMPLIANT WITH ADA MAY BRING LIABILITY

Frame v. City of Arlington, 575 F.3d 432 (5th Cir. 2009), involved the claims of several plaintiffs over alleged violations of the Americans with Disabilities Act (ADA) by the city's failure to make its sidewalks, curbs, and certain parking lots accessible to those with motorized wheelchairs. Plaintiffs sought compliance with the ADA rather than damages. The trial court dismissed the case, finding plaintiffs had not shown the claims were filed within the applicable two-year statute of limitations. The court held the statute of limitations began to run when the city completed construction of any noncompliant facilities. Plaintiffs argued the statute of limitations began to run when they actually encountered the noncompliant facilities. In the alternative, plaintiffs contended the statute of limitations does not apply to injunctive actions, and the violations were continuing so that their claims were filed within the statute of limitations period. They also asserted the city had the burden of showing when the limitation period had expired.

In a case of first impression in the Fifth Circuit, the court first determined that the city's curbs, sidewalks, and parking lots were a "service, program or activity" subject to Title II of the ADA. The court pointed to similar decisions in other circuits and concluded these interpretations were consistent with the legislative history of the ADA.

The court then turned to the statute-of-limitations issue, finding the applicable two-year limitation not in federal law but in Texas statutory law. The court rejected plaintiffs' alternative arguments that the statue of limitations did not apply to injunctive actions and that the two-year period was calculated from the date plaintiffs encountered noncompliant construction.

First, the court held that the burden of proof of showing the statute of limitations barred the claims was on the city, as it is federal law that governs the accrual of claims even though a state two-year statute of limitations applied. 575 F.3d at 441. The ADA does not specifically govern such accruals in this case. The court noted that the United States Supreme Court has generally declined to adopt a "discovery" rule that holds a cause of action accrues upon the occurrence of an injury attributable to a faulty facility. The only exceptions the court has made are for cases involving fraud or medical malpractice where the harm is latent and often is discovered long after the injurious action occurs. In the court's view, the purpose of a statute of limitations is to protect defendants against stale claims and use of a discovery rule here would expose public entities to unlimited liability.

The court therefore held that the statute of limitations begins when the construction of the alleged noncompliant facility is completed. *Id.* Again, though, the burden of showing the statute of limitations had run was on the city, which was in the best position to prove accrual. Plaintiffs had no discovery opportunity prior to filing a complaint and the city had the burden of proving an affirmative defense like a statute of limitations. Thus, the trial court's decision was vacated and the case remanded. *Id.*

Judge Prado dissented from the majority's holding that the cause of action accrued when the noncompliant facility was constructed, preferring to find the accrual when a plaintiff encounters alleged noncompliant construction, thus avoiding the question of the use of the discovery rule. The ADA provides that no qualified individual with a disability shall be denied the benefits of a public entity's services, programs, or activities—in his view, there is no injury before that point. 42 U.S.C. § 12132 (2006). Thus, the cause of action accrues when that denial occurs—not when the facility is constructed. A plaintiff would not have standing to sue beforehand, he argued (noting that the statute of limitations did not run at the time of completion of the construction or alteration of an existing facility under the ADA). The ADA was meant to advance the elimination of discrimination against those with disabilities. The majority position, according to him, limits the vindication of such rights so that a person recently moving to the area must endure the ADA violation. Judge Prado concluded:

> We must choose between two options, neither of which is ideal. Either we must give stronger credence to the policies

behind statutes of limitations, thereby eschewing the broad goals of the ADA, or we must forego the City's desire to strictly cut off its liability to allow disabled people to vindicate their rights. The majority chooses the former; the text of the ADA, the analysis of when a plaintiff actually suffers an injury, and the purposes behind the Act compel me to choose the latter. . . .

This case presents us with a difficult choice. With immense respect for the majority's position, I think that the better, legally correct, and more pragmatic answer is to allow a plaintiff to bring suit for injunctive relief within two years of his or her injury, that is, within two years of when the plaintiff was unable to access or was deterred from attempting to access a noncompliant sidewalk or other facility. The contrary result countenances a public entity's decision to construct or alter a sidewalk without curb cuts, allowing this ADA violation to go uncorrected forever so long as no one brings suit within two years of the construction or alternation.

Id. at 450.

While both opinions could remand the case, the dissent's reasoning appears to be more consistent with the purposes and provisions of the ADA.

Edward J. Sullivan

Frame v. City of Arlington, 575 F.3d 432 (5th Cir. 2009)

Oregon Legislative Summaries

Editor's Note: *Below are summaries of real estate and land use legislation passed in 2009 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 these summaries, which are also published in 2009 Oregon Legislation Highlights (OSB CLE 2009). If you are interested in purchasing this book, which contains a review of important 2009 legislation covering a wide range of topics, please call the Bar at (503) 620-0222 or visit* ***www.osbar.org****.*

BILLS AFFECTING REAL ESTATE LAW

HB 2084 – Chapter 597 Oregon Laws 2009 – Effective January 1, 2010

Financing statement renewal

Modifies means by which Secretary of State sends renewal notice report concerning financing statements or effective financing statements for secured transactions or agricultural liens that are filed with secretary. Provides that the Secretary may send a renewal notice report to secured party by electronic means upon request.

HB 2085A – Chapter 338 Oregon Laws 2009 – Effective January 1, 2010

Notary ID

Modifies list of documents upon which notarial officer may rely in identifying person.. Allows current drivers license, passport, military ID card, or Indian tribe ID card. Requires only one document and eliminates bank signature cards.

Provides that fee for performing notarial act may not exceed $10. An additional fee for travel may be charged if agreed to in advance. Permits public body to collect fees for notarial acts. Specifically allows driver's license from any state, current passport of any country, US military ID card, current Indian tribe ID card, and requires only one document. Allows an employee of a public body to collect a notary fee to defray costs of the public body.

HB 2086A – Chapter 339 Oregon Laws 2009 – Effective June 18, 2009

Dissolution of nonprofits

6/18 Governor signed

Permits Secretary of State to waive requirement that administratively dissolved nonprofit corporation apply for reinstatement within five years from date of dissolution if corporation requests waiver and shows good cause for failure to apply for reinstatement.

Declares emergency, effective on passage.

HB 2134A – Chapter 757 Oregon Laws 2009 – Effective January 1, 2010

Lead Based Paint regulation, inspector certification, licensing

7/1 Governor signed

Directs Department of Human Services to adopt rules for regulation of lead-based paint activities, certification of individuals and firms to perform specified activities related to lead-based paint and accreditation of training providers to train those individuals and firms. Makes violation of rules or specified laws subject to civil penalty. Requires penalty moneys to be deposited in Public Health Account for purposes of lead poisoning prevention.

Directs Construction Contractors Board to establish system to license contractors as lead-based paint activities contractors and certified lead-based paint renovation contractors.

Establishes Construction Contractors Board Lead-Based Paint Activities Fund. Continuously appropriates moneys in fund to board for purposes of lead poisoning prevention.

Makes violation of board's rules or specified laws subject to civil penalty. Requires penalty moneys to be deposited in fund for purposes of lead poisoning prevention.

HB 2135A – Chapter 127 Oregon Laws 2009 – Effective January 1, 2010

Smoking policy disclosure in rental agreement

5/26 Governor signed

Requires that rental agreement for dwelling unit contain disclosure of smoking policy for premises on which dwelling unit is located. Exempts from requirement rental agreements in which owner of manufactured dwelling or floating home secures right to locate dwelling or home on real property of another.

HB 2188A – Chapter 603 Oregon Laws 2009 – Effective January 1, 2010

Loan originator regulation – language, good faith

6/26 Governor signed

Prohibits mortgage banker, mortgage broker or loan originator from making, negotiating or offering to make or negotiate negative amortization loan without evaluating and verifying borrower's ability to repay loan.

Requires mortgage banker, mortgage broker or loan originator that advertises or solicits business and conducts transaction substantially in language other than English to provide borrower with certain materials in language in which parties conduct transaction.

HB 2189 – Chapter 863 Oregon Laws 2009 – Effective July 30, 2009

7/30 Governor signed

Licensing of mortgage brokers and mortgage bankers

Prohibits individual from engaging in business as mortgage loan originator without obtaining license from Director of Department of Consumer and Business Services and obtaining unique identifier from Nationwide Mortgage Licensing System and Registry. Creates exception, including exception for certain employees of dealers of manufactured structures.

Requires applicant for license to submit certain information to director and to Nationwide Mortgage Licensing System and Registry. Specifies standards director must use to evaluate application.

Permits director to issue interim license under certain conditions.

Specifies requirements for applicant to obtain or renew license, including educational requirements.

Authorizes director to deny, suspend, place conditions upon, revoke or decline to renew license under specified conditions. Permits director to contract with Nationwide Mortgage Licensing System and Registry to collect and process records, application fees and perform other duties.

Requires person that employs mortgage loan originator to file corporate surety bond with director in amount director prescribes by rule.

Authorizes director to investigate violations of provisions of Act and require production of specified records.

Provides that mortgage loan originator may not take certain actions. Requires mortgage loan originator to display license and unique identifier on specified documents and in certain locations.

Provides that person that violates provisions of Act is subject to civil penalty in amount of $5,000 per violation. Provides that person that knowingly violates provisions of Act is subject to maximum criminal penalty of five years' imprisonment, or $125,000 fine, or both.

Declares emergency, effective on passage.

HB 2235A – Chapter 130 Oregon Laws 2009 – Effective January 1, 2010

Permits Department of Transportation to go upon private property without notice and cut down or remove trees that are creating substantial risk of damage or injury by obstructing, hanging over or otherwise encroaching or threatening to encroach in any manner on state highway. Directs department to notify property owner after cutting down or removing trees.

HB 2255B – Chapter 609 Oregon Laws 2009 – Effective January 1, 2010

Manufactured dwelling park nonprofit cooperatives, mandatory membership

6/26 Governor signed

Prohibits manufactured dwelling park nonprofit cooperative from issuing stock.

Prohibits member of manufactured dwelling park nonprofit cooperative from selling or redeeming membership at profit. Limits number of manufactured dwelling park nonprofit cooperative memberships to number of sites in manufactured dwelling park of cooperative.

Specifies rights of lienholder acquiring manufactured dwelling located in manufactured dwelling park of cooperative. (Requires written request from lienholder for notice of termination of membership.) Establishes deadlines for buyer of, or person who acquires from lienholder title to, manufactured dwelling in park of cooperative to join cooperative or move manufactured dwelling.

Makes membership in manufactured dwelling park nonprofit cooperative mandatory for residents if newly created park originates as cooperative.

Allows manufactured dwelling park nonprofit cooperative to be sponsoring entity for purposes of tax credit for loans used to finance construction, development, acquisition or acquisition and rehabilitation of manufactured dwelling park. Limits types of sponsoring entity that may be qualified borrower on loans for manufactured dwelling parks.

HB 2256 – Chapter 61 Oregon Laws 2009 – Effective January 1, 2010

Housing grant approvals

4/9 Governor Signed

Requires Housing and Community Services Department to adopt rules establishing threshold amount above which housing grant or other housing funding award proposal requires review and approval by State Housing Council.

HB 2257 – Chapter 62 Oregon Laws 2009 – Effective January 1, 2010

Housing grants/loans

4/9 Governor Signed

Allows Housing and Community Services Department to make loans or grants from Community Development Incentive Project

Fund without review or recommendation by Community Development Incentive Advisory Board for purpose of preserving affordable housing.

HB 2278A– Chapter 354 Oregon Laws 2009 – Effective January 1, 2010

Child support judgments – retroactive

6/18 Governor signed

Provides that judgment remedies for child support award portion of judgment expires **35** years after entry of judgment that first established support obligation, instead of 25 years after entry of judgment that first established support obligation.

Applies to all judgments, whether entered before, on or after effective date of Act unless expired prior to the effective date.

HB 2306A – Chapter 612 Oregon Laws 2009 – Effective June 26, 2009

Bankruptcy homestead exemptions

6/26 Governor signed

Increases amount of value of vehicles and homesteads exempt from sale on execution of bankruptcy proceedings. Provides that homestead exemption applies to floating homes and manufactured dwellings. Vehicle amount increased from $2,150 to $3,000. Homestead amount increased for single from $30,000 to **$40,000** and for multiple homesteads in the same property from $39,600 to **$50,000**.

Declares emergency, effective on passage.

HB 2308A – Chapter 358 Oregon Laws 2009 – Effective September 28, 2009

Early application for estate tax determination

Allows executor or trustee of estate to apply to Department of Revenue for determination of inheritance tax due and discharge from tax liability.

Specifies period of time during which department may allow or make any refund of inheritance tax.

Applies to applications for determination of and discharge from inheritance tax liability filed with Department of Revenue on or after January 1, 2010.

Takes effect on 91st day following adjournment sine die.

HB 2312 – Chapter 14 Oregon Laws 2009 – Effective 3/12/09

Recognizes business entities formed by tribal governments

Adds business entities formed by Native American or American Indian tribes to definitions of certain entities in Oregon law of corporations and partnerships. Declares emergency, effective on passage.

HB 2313A – Chapter 294 Oregon Laws 2009 – Effective January 1, 2010

Clarifies language in definition of person

Deletes references to trusts and estates from certain statutory definitions of "person" and "entity." Actually eliminates redundant terms. Does not change law.

HB 2339C – Chapter 769 Oregon Laws 2009 – Effective January 1, 2010

7/22 Governor signed

Nondisclosure of certain information regarding certain public safety officers.

Expands exemption from disclosure of certain personal information to include personal information sought by district attorney, deputy district attorney, Attorney General or assistant attorney general, United States Attorney for District of Oregon or assistant United States attorney for District of Oregon, city attorney who engages in prosecution of criminal matters or deputy city attorney who engages in prosecution of criminal matters. Specifies procedure by which information may be disclosed. Creates exceptions. Exemption must be requested by the safety officer and other co-owners.

HB 2349 – Chapter 513 Oregon Laws 2009 – Effective January 1, 2010

Investment earnings/loss on construction lien cash bond

6/24 Governor signed

Directs county treasurer to pay investment income to person who deposits money with county to release perfected lien against improvement or land when treasurer distributes money to owner and lien claimant. Specifies that person who makes deposit bears risk of loss that results from investment of money.

Creates procedures for release of lien and distribution or return of deposited money.

HB 2357 – Chapter 17 Oregon Laws 2009 – Effective January 1, 2010

Disclaimer in estate – provides that if spouse of transferor is living but has remarried at the time of distribution it is treated as if disclaimant was not married.

Modifies Uniform Disclaimer of Property Interests Act. Specifies distribution of property to be made after disclaimer of right to inherit property by intestate succession.

(Eliminates remarried spouse of deceased as default distributee)

HB 2360 – Chapter 363 Oregon Laws 2009 – Effective January 1, 2010

Provides that only last four digits of settlor's Social Security number need be provided in certain trust related proceedings.

HB 2383A – Chapter 295 Oregon Laws 2009 – Effective January 1, 2012

Right of first refusal to tenants' association in manufactured dwelling park or marina

Gives tenants' association, facility purchase association or tenants'

association supported nonprofit organization 14-day right of first refusal for offer or agreement by owner to sell manufactured dwelling park or marina. Takes effect January 1, 2012.

HB 2418A – Chapter 136 Oregon Laws 2009 – Effective January 1, 2010

Adds LLCs to exemption from real estate licensing, clarifies corporations and partnerships

Adds certain legal entities and persons affiliated with certain legal entities to list of parties exempt from real estate licensing law.

Exempts an individual who is a sole member or managing member of a domestic or foreign limited liability company registered in Oregon, an individual who is a partner in a partnership, and an individual who is an officer or director of a domestic or foreign corporation registered in Oregon when dealing with property of that LLC, partnership or corporation.

HB 2418A – Chapter 136 Oregon Laws 2009 – Effective January 1, 2010

Adds LLCs to exemption from real estate licensing, clarifies corporations and partnerships

Adds certain legal entities and persons affiliated with certain legal entities to list of parties exempt from real estate licensing law.

Exempts an individual who is a sole member or managing member of a domestic or foreign limited liability company registered in Oregon, an individual who is a partner in a partnership, and an individual who is an officer or director of a domestic or foreign corporation registered in Oregon when dealing with property of that LLC, partnership or corporation.

HB 2436A – Chapter 18 Oregon Laws 2009 – Effective September 28, 2009

Adds $15 recording charge

Establishes fee for recording of documents in deed and mortgage records of county. Directs county clerk to transfer amounts collected to Housing and Community Services Department to fund housing programs of department. Exempts satisfactions of judgments and documents not subject to other recording charges.

Modifies affordable housing programs and requires rulemaking.

Establishes General Housing Account in Oregon Housing Fund. Promotes minority home ownership.

Takes effect on 91st day following adjournment sine die. Adds a $15 charge payable to the Housing and Community Services Department.

HB 2481A – Chapter 298, Oregon Laws 2009 – Effective June 17, 2009

Prohibits reservation of a future profit from subsequent resales of property Makes declaration or covenant that requires payment to specified person upon future transfer of fee simple interest in real property void. Prohibits inclusion of such declaration or covenant in instrument that transfers fee simple right.

Creates exceptions.

Declares emergency, effective on passage.

HB 2560 – Chapter 302 Oregon Laws 2009 – Effective January 1, 2010

Requires cover sheet and no alteration to certified copy of document

Prohibits alteration of certified copy of recorded instrument when rerecording corrected document.

Allows rerecording of certified copy if attached to cover sheet.

The rerecording certificate shall contain the words "RERECORDED AT THE REQUEST OF _____TO CORRECT_____ . PREVIOUSLY RECORDED IN BOOK AND PAGE _____, OR AS FEE NUMBER _____."

HB 2585A – Chapter 552 Oregon Laws 2009 – Effective June 25, 2009

Class action suits under Unlawful Trade Practices Act, Truth in Lending Act, etc.

Repeals Oregon Rule of Civil Procedure prohibiting class action for recovery of statutory minimum penalties for violations of Unlawful Trade Practices Act, federal Truth in Lending Act and similar statutes.

Imposes requirements for recovery of statutory damages for class action lawsuits under Unlawful Trade Practices Act.

Declares emergency, effective on passage.

HB 2626C – Chapter 753 Oregon Laws 2009 – Effective July 22, 2009

Governor signed 7/22/2009

Directs Director of State Department of Energy to administer energy efficiency and sustainable technology loan program for purpose of encouraging investments in energy efficiency, renewable energy and energy conservation.

Directs director to establish sustainable energy project manager certification program for purpose of certifying project managers. Specifies that project managers shall administer program in sustainable energy territories established by director.

Specifies conditions for disbursement of loan moneys. Directs director to establish pilot programs to initiate program. Sunsets pilot programs on January 2, 2016.

Establishes various funds in State Treasury. Continuously appropriates moneys in funds to State Department of Energy for purposes relating to energy efficiency, sustainable technology, small scale local energy projects and higher cost of energy for energy efficiency projects. Authorizes State Treasurer to issue and sell revenue bonds in amount that director considers necessary for purposes related to administering program.

Authorizes department to impose special assessment on certain energy resource suppliers.

Directs moneys received from special assessment to be deposited in Energy Project Supplemental Fund for purposes related to loan

programs for small scale local energy projects.

Limits biennial expenditures for payment of expenses from fees, moneys or other revenues, including Miscellaneous Receipts, but excluding lottery funds and federal funds, collected or received by department for purposes related to activities conducted by department pursuant to Act.

Allows local governments to establish program to make loans to owners of qualifying real property for purpose of paying for cost-effective energy improvements.

Declares emergency, effective on passage.

HB 2655 – Chapter 307 Oregon Laws 2009 – Effective January 1, 2010

Adverse possession against mass transit district/transportation district

Prohibits adverse possession of land owned by mass transit district or transportation district.

HB 2700A – Chapter 626 Oregon Laws 2009 – Effective September 28, 2009

Tax exemption for public and other exempt entities

6/26 Governor signed

Extends deadline for claiming property tax exemption by certain public and other exempt entities.

Applies to claims for exemption for tax years beginning on or after July 1, 2009.

Takes effect on 91st day following adjournment sine die.

HB 2759A – Chapter 628 Oregon Laws 2009 – Effective January 1, 2010

Provides for correction of erroneous Reconveyance or erroneous recording of trust deed.

6/26 Governor signed

Creates form for correction of errors concerning status or effect of recorded trust deed.

Requires recording officer of county to file specified records in statutory lien record. Allows for reinstatement of original trust deed where reconveyed in error and for setting aside of a trustees deed where erroneously recorded.

HB 2822 – Chapter 318 Oregon Laws 2009 – Effective January 1, 2010

Way of necessity for private sewer line

Establishes way of necessity for private sewer lines. Sets conditions for use. Continuation of a pre-existing sewer line to service land with access to a public road.

HB 2839A – Chapter 561 Oregon Laws 2009 – Effective September 28, 2009

Domestic partners – surname, tax deductions

6/25 Governor signed

Allows either party entering into domestic partnership to retain surname or to change surname to surname of other party or hyphenated combination of surnames of both parties. The correct legal name must be entered on the declaration of domestic partnership.

Allows taxpayer to adjust taxable income to account for health insurance benefit paid by taxpayer's employer for health insurance coverage of taxpayer's domestic partner for the tax year 2008.

Limits applicability to taxpayer eligible for income tax subtraction under state law as in effect prior to passage of domestic partnership legislation.

Takes effect on 91st day following adjournment sine die.

HB 2883A – Chapter 321 Oregon Laws 2009 – Effective June 17, 2009

Guardian and Conservator Task Force

Creates Public Guardian and Conservator Task Force.

Sunsets task force on date of convening of next regular biennial legislative session.

Declares emergency, effective on passage.

HB 2910A – Chapter 324 Oregon Laws 2009 – Effective January 1, 2010

Eliminates sole practitioner as of January 1, 2010, provides for temporary supervision and repeals regulation of personal assistants.

Excludes sole practitioners from conducting professional real estate activity that is licensed by Real Estate Agency unless practicing prior to January 1, 2010. Permits individuals who engaged in professional real estate activity as of January 1, 2010 to continue to engage in professional real estate activity as professional real estate broker. Prohibits agency from charging individuals licensing fee to change license.

Authorizes real estate broker with three years of active experience to temporarily supervise professional real estate activity of another real estate licensee under certain circumstances for period of up to 90 days.

Repeals provision of law that authorizes Real Estate Commissioner to prescribe terms and conditions for licensed personal assistant agreements.

HB 2962B – Chapter 569 Oregon Laws 2009 – Effective January 1, 2010

Allows landlord/employer to evict terminated employee.

Provides that employee of resident who occupies dwelling unit along with resident and whose occupancy is conditional upon employment in and about dwelling's premises may only be evicted after at least 24 hours' written notice of termination of employment.

Makes holding of dwelling unit after 24-hour period grounds for cause of unlawful holding by force.

HB 3004B – Chapter 883 Oregon Laws 2009 – Effective August 4, 2009

Prohibits deficiency against grantor unless other security given.

8/4 Governor signed

Provides that sale by trustee of foreclosed property or sale of residential property after judicial foreclosure precludes further action against mortgagor, grantor or other specified obligor for deficiencies in amount secured by mortgage or trust deed. Includes additional loans to same lender at same time. Prohibits suit on the note. Creates exceptions (When trust deed covers more property or additional security in other property) (Allows action for deficiency against guarantor if judicial foreclosure) Prohibits guarantor from taking action against grantor for recovery.

Provides for notice to tenants no sooner than 30 days prior to original sale date; 60 days if a fixed term provided at least 60 days before termination date and at least 30 days before original sale date. Has further provisions but Federal law would prevail on residential property.

Declares emergency, effective on passage. Provides for notice to all parties upon release of stay in bankruptcy plus notice to any Oregon attorney who requests notice and provides a self-addressed stamped envelope. Allows notice by posting a true copy or a link to a true copy of the amended notice of sale on the Trustee's Internet website.

HB 3077B – Chapter 574 Oregon Laws 2009 – Effective January 1, 2010

Adjusts spouse's elective share based upon length of marriage

Establishes new elective share for surviving spouses. Provides that elective share is percentage of augmented estate based on number of years of marriage.

Describes assets to be considered by court in establishing augmented estate. Establishes priorities for sources of payment of elective share. Creates procedure for filing motion or petition seeking payment of elective share.

HB 3085A – Chapter 575 Oregon Laws 2009 – Effective June 25, 2009

Allows local ordinance regulating manufactured dwelling park closure/partial closure

Allows amendment of local ordinance regulating manufactured dwelling park closures or partial closures until January 1, 2010, if amendment does not reduce statutory rights of manufactured dwelling park tenants.

Declares emergency, effective on passage.

HB 3111A – Chapter 327 Oregon Laws 2009 – Effective January 1, 2010

Attorneys fees to defendant prohibited in civil action for unlawful trade practice unless plaintiff had no reasonable basis.

Prohibits award of attorney fees and court costs to prevailing defendant in civil action based upon unlawful trade practice brought by private party unless court finds that plaintiff had no objectively reasonable basis for bringing action or asserting ground for appeal.

(3) The court may award reasonable attorney fees and costs at trial and on appeal to a prevailing plaintiff in an action under this section. The court may award reasonable attorney fees and costs at trial and on appeal to a prevailing defendant only if the court finds there was no objectively reasonable basis for bringing the action or asserting the ground for appeal.

HB 3450A – Chapter 591 Oregon Laws 2009 – Effective June 25, 2009

Carbon Monoxide detector in residential dwelling

Prohibits transferring title to one and two family dwelling or multifamily housing that has carbon monoxide source (coal, kerosene, petroleum products, wood or other carbon monoxide producing fuels) unless dwelling or housing is equipped with carbon monoxide alarm. Requires alarms in certain structures according to rules set by the State Fire Marshall.

Prohibits landlord from renting out dwelling unit that has carbon monoxide source or is located within structure that has carbon monoxide source, unless dwelling unit is equipped with carbon monoxide alarm. Imposes duty on landlord to repair and maintain alarm.

Prohibits removing or tampering with alarm.

Requires tenant of rental dwelling unit to periodically test carbon monoxide alarm.

Requires seller's property disclosure statement to include information relating to carbon monoxide alarms.

Declares emergency, effective on passage.

Although the law did contain an emergency clause, it also contains sections that delay the implementation of it. For landlords renting dwellings with carbon monoxide sources they must be in compliance on or after July 1, 2010. For owners selling homes with carbon monoxide sources they must be in compliance on or after April 1, 2011.

A person may not convey fee title to a one and two family dwelling or multifamily housing that contains a carbon monoxide source, or transfer possession under a land sale contract of a one and two family dwelling or multifamily housing that contains a carbon monoxide source, unless one or more properly functioning carbon monoxide alarms are installed in the dwelling or housing at locations that provide carbon monoxide detection for all sleeping areas of the dwelling or housing.

HB 3484 – Chapter 858 Oregon Laws 2009 – Effective January 1, 2010

7/28 Governor signed

Exchange facilitator notices, bonding

Requires persons that facilitate like-kind exchanges to make certain notifications upon change of control and to provide bonds or other securities in specified amounts.

Prohibits exchange facilitator from taking certain actions.

Sunsets January 2, 2014.

HB 5046A Chapter 119 Oregon Laws 2009 – Effective July 1, 2009

Background search charges

Charge of $47 for criminal background checks through Real Estate Agency.

Applies to tax years beginning on or after January 1, 2010.

SB 50A – Chapter 160 Oregon Laws 2009 – Effective May 26, 2009

Deadline for filing claim on contractor's bond

Sets deadline of 180 days for notices of claim made on contractor's payment bond in connection with work performed on public contract. Sets deadline of 200 days for notices of claim for required contribution to fund of employee benefit plan.

Declares emergency, effective on passage.

SB 58 – Chapter 109 Oregon Laws 2009 – Effective May 21, 2009

Modification of rental property

Allows landlord to condition permission for modification to real property on renter's agreement to restore interior of premises to pre-modification condition. Declares emergency, effective on passage.

SB 79 – Chapter 750 Oregon Laws 2009 – Effective July 22, 2009

Energy efficient construction codes

Creates Task Force on Energy Performance Scores. Directs task force to submit report to interim committee of Legislative Assembly by October 1, 2010. Sunsets task force on convening of next regular biennial legislative session.

Directs Director of the Department of Consumer and Business Services to adopt Reach Code. Specifies that **Reach Code is alternative to state building code**. Requires Reach Code to provide more energy-efficient construction standards and methods than state building code.

Directs director to take certain actions to achieve increases in building energy efficiency.

Declares emergency, effective on passage.

SB 102 – Chapter 387 Oregon Laws 2009 – Effective January 1, 2010

Adds questions regarding woodstoves and fireplace inserts to seller's property disclosure statement.

SB 140 – Chapter 224 Oregon Laws 2009 – Effective January 1, 2010

Modification of real estate rules

Modifies provisions relating to registered business names and branch offices of real estate licensees.

Allows Real Estate Commissioner to issue limited real estate licenses to applicants.

Requires client trust funds placed in escrow to be placed in licensed neutral escrow depository. Removes requirement to publish addresses of real estate licensees subject to discipline. Allows imposition of civil penalty of up to $1000 per day for failure to make real estate property management records available for inspection.

SB 141A – Chapter 174 Oregon Laws 2009 – Effective January 1, 2010

Escrow licensing, bond

Requires Real Estate Commissioner to establish system for licensing escrow agents. Requires escrow agent to submit application, fingerprints and criminal records check prior to change in ownership interest in escrow agent, change in corporate officer in charge of escrow operations or change in other individuals in charge of escrow operations. Expands causes for disciplinary action and for imposition of civil penalties for violation of escrow licensing statutes. Modifies requirements related to deposits and disbursements of escrow money and property.

SB 189 – Chapter 69 Oregon Laws 2009 – Effective 1/1/2010

Classification of forestland

Clarifies obligation of owner of timberland regarding payment of assessments and taxes. Allows governing bodies of two or more counties to establish joint forestland classification committee.

Clarifies classification of forestland. Modifies circumstances under which State Forester may classify forestland. Allows State Board of Forestry to adopt rules to implement county forestland classification.

SB 192 – Chapter 892 Oregon Laws 2009 – Effective September 28, 2009

Historic property tax exemptions

Modifies criteria by which owner of historic property may participate in historic property special assessment program. Requires applicants to submit and implement preservation plan that demonstrates owner's compliance with criteria.

Modifies application, certification, notice and reporting procedures for program. Modifies criteria by which property is disqualified from program.

Specifies that certification expires after 10 years. Authorizes certification for additional 10 years if owner meets additional criteria and submits preservation plan that demonstrates owner's compliance with criteria.

Allows for condominiums, progress reports on improvements, requires minimum expenditure for preservation.

Extends program to July 1, 2020.

Takes effect on 91st day following adjournment sine die.

SB 202A – Chapter 271 Oregon Laws 2009 – Effective January 1, 2010

Repositions reference to cleaning and servicing of chimneys within definition of contractor.

SB 203A – Chapter 408 Oregon Laws 2009 – Effective January 1, 2010

General contractor

Makes construction contractor obligation to provide Construction Lien Law information notice to owner applicable only for construction that requires written contract.

Authorizes Construction Contractors Board to sanction contractor who hires employees while licensed as exempt independent contractor. Authorizes board to impose civil penalty of not more than $5,000.

Extends board's authority to renew lapsed license from one year after lapse occurs to two years after lapse occurs.

Changes information to be included in written construction contract from summary of required notices to list of required notices.

SB 204 – Chapter 225 Oregon Laws 2009 – Effective January 1, 2010

Contractor bond availability

Revises construction contractor bonding and construction claim statutes to clarify availability of residential and commercial contractor bonds for satisfaction of claims.

SB 205A – Chapter 409 Oregon Laws 2009 – Effective January 1, 2010

Contractor follow-up

Expands consumer notice requirement to include original purchaser of residential structure or zero-lot-line dwelling.

Makes standard contractual term requirement regarding notice summary applicable to zero-lot-line dwelling contracts.

Specifies time for contractor to provide recommended maintenance schedule to property owner or original purchaser. Eliminates requirement that provision of maintenance schedule be acknowledged in contract. Eliminates requirement that Construction Contractors Board make minimum information required for recommended maintenance schedule available to construction contractors without charge.

Makes warranty offer requirement applicable to newly constructed residential structure or zero-lot-line dwelling sold by contractor. Identifies types of work subject to requirement for written contract. Revises terminology.

SB 206 – Chapter 226 Oregon Laws 2009 – Effective January 1, 2010

Construction contractor privacy, information

Makes personal identifier information contained in license or certificate application to Construction Contractors Board confidential. Prohibits board from disclosing personal identifier information contained in application. Creates exceptions.

Exempts construction contractor from submitting certain information to board if contractor offers securities registered with United States Securities and Exchange Commission for sale to public.

Exempts contractor that is partnership or joint venture offering securities registered with commission for sale to public from obtaining new contractor license upon withdrawal of partner or joint venturer. Makes contractor submission of false information to commission grounds for sanctions by board.

SB 217A – Chapter 89 Oregon Laws 2009 – Effective May 14, 2009

Historic Preservation Revolving Loan Fund

Permits Historic Preservation Revolving Loan Fund to be used for enforcement of cultural resources protection laws and for promotion of public education regarding cultural resources. Requires funds recovered by Attorney General for cultural resources protection enforcement to be placed in Historic Preservation Revolving Loan Fund.

Declares emergency, effective on passage.

SB 235A – Chapter 413 Oregon Laws 2009 – Effective January 1, 2010

Small estate amount increase

Increases value of estate for which small estate affidavit may be filed. Provides that total value of estate may not be greater than $275,000, of which not more than $75,000 may be personal property and not more than $200,000 may be real property.

Current limits $200,000 of which $150,000 may be real property.

SB 237 – Chapter 46, Oregon Laws 2009 – Effective January 1, 2010

Future effective (springing) power of attorney

Provides that power of attorney may become effective at specified future time, or upon occurrence of specified future event or contingency. Allows principal to authorize person or persons to determine whether specified event or contingency has occurred, and manner in which determination must be made.

Provides that physician may make determination as to whether principal has become financially incapable if power of attorney does not designate person or persons to make determination or if designated person or persons are not willing or able to make determination.

SB 238A – Chapter 179 Oregon Laws 2009 – Effective January 1, 2010

Guardianship

Enacts Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.

SB 239A – Chapter 229 Oregon Laws 2009 – Effective June 4, 2009

Recording Chapter 19 notice, shortens time limit for grantor to object

Requires trustee foreclosing residential trust deed to record affidavits of mailing of notice required to be sent to grantor.

(There is an interesting twist to the Chapter 19 notice. Section 20 of the chapter requires that the loan involved be a "residential trust deed" as defined in ORS 86.740, which , under the definition in 86.705 defines a "residential trust deed" as one wherein the residence is occupied by the grantor, spouse, minor or dependent child at the time of foreclosure. Thus if the residence is unoccupied or occupied by someone other than the above Chapter 19 does not apply.)

Requires grantor to inform certain persons in writing (trustee, purchaser, beneficiary, loan servicer) that grantor did not receive notice and did not have actual notice of trustee's sale in order to obtain rights equivalent to those of omitted party defendant in judicial foreclosure proceeding. Notice to be given within 60 days after purchaser takes possession of the property.

Declares emergency, effective on passage.

SB 240 – Chapter 230 Oregon Laws 2009 – Effective June 4, 2009

Modifies identification information in judgment lien records to show only year of birth and taxpayer ID for companies or last four numbers of Social Security number or Driver's License.

SB 241A – Chapter 638 Oregon Laws 2009 – Effective June 30, 2009

Tenant surrender after foreclosure

Requires purchaser seeking possession of property after trustee's sale to provide certain notices to person holding possession of property by reason of interest created voluntarily by grantor of deed of trust. Provides that person in possession need not surrender possession until 30 days after effective date of notice or 10th day after trustee's sale, whichever date is later.

Applies fees and procedures set forth for actions under residential landlord and tenant laws to actions to recover possession of premises in certain circumstances.

Declares emergency, effective on passage.

NOTICE: Federal Public Law 111-22, Title VII (Protecting Tenants at Foreclosure Act of 2009) effective 5/20/09, provides for a 90-day notice to tenants of dwellings and residential property after foreclosure. If the purchasing party will not occupy the property or unit as a primary residence then existing bona fide leases must be honored. This does not override State or local laws that require a longer notice. Only applies to federally regulated loan foreclosure. Section 8 contracts are assumed by the purchaser.

SB 268 – Chapter 47 Oregon Laws 2009 – Effective January 1, 2010

Privacy in court records

Authorizes Chief Justice of Supreme Court to make rules relating to data that state courts may require to be submitted by parties and other persons for purpose of distinguishing particular persons from other persons with same or similar name.

SB 286 – Chapter 48 Oregon Laws 2009 – Effective January 1, 2010

Enacts Uniform Foreign-Country Money Judgments Recognition Act. Omits judgments for taxes, fines or penalties, or domestic relations. The foreign court must have an impartial tribunal, have personal jurisdiction and have jurisdiction over the subject matter among other qualifications.

SB 356A – Chapter 78, Oregon Laws 2009 – Effective April 28, 2009

Civil Forfeiture

Revises laws relating to civil forfeiture. Among other things re-enacts Oregon's civil forfeiture laws. This legislative action was needed to avoid claims that a law found unconstitutional by the court might not be automatically made constitutional due to a later court ruling.

Declares emergency, effective on passage.

SB 394A – Chapter 52, Oregon Laws 2009 – Effective September 28, 2009

Property tax minimum refunds, maximum deficiency

Changes mandatory minimum refund of overpaid property taxes to amounts more than $10. Increases to $10 maximum amount of deficient property taxes tax collector must cancel.

Applies to property tax years beginning on or after July 1, 2009.

SB 395 – Chapter 54 Oregon Laws 2009 – Effective September 28, 2009

Personal property tax liens

Allows counties to serve notice of required personal property tax delinquency warrants by means of one publication in newspaper and by first-class mail to persons named in notice. Increases fee for service of personal property tax delinquency warrant.

Takes effect on 91st day following adjournment sine die.

SB 558A – Chapter 181 Oregon Laws 2009 – Effective January 1, 2010

Uniform Commercial Code

Conforms Oregon law to changes in Articles 1 and 7 of Uniform Commercial Code. Amends other provisions of Oregon law to conform to changes in Uniform Commercial Code.

SB 589A – Chapter 453 Oregon Laws 2009 – Effective September 28, 2009

Taxes on Indian land

Repeals five-year time limit for exemption from taxation of Indian tribal land.

Repeals sunset of exemption for property tax years beginning on or after July 1, 2012.

Applies to property tax years beginning on or after July 1, 2008.

Takes effect on 91st day following adjournment sine die.

SB 618 – Chapter 500 Oregon Laws 2009 – Effective June 24, 2009

Military Discharge Records

Exempts military discharge records from public records disclosure. Creates exception for county clerks for producing discharge papers to certain individuals who make request in accordance with specified procedure. Allows clerk to impose additional procedures.

Declares emergency, effective on passage.

SB 628C – Chapter 864 Oregon Laws 2009 – Effective July 30, 2009

Notice of right to seek modification of loan in foreclosure

7/30 Governor signed

Changes contents of notice of default that lender must deliver to grantor before sale to foreclose residential trust deed. Requires lender to also deliver form by which grantor may request loan modification. Specifies procedures by which sale to foreclose residential trust deed may occur if owner uses form to request loan modification. Sunsets on January 2, 2012.

Declares emergency, effective on passage.

Changes Chapter 19 (2008) notice to grantor. In addition requires "modification request form" to be sent to Chapter 19 notice recipients. Provides 30 days to send in the form measured from signing notice. Beneficiary then has up to 45 days to notify grantor whether modification will be allowed. No sale is allowed until after a response has been made. If a meeting is requested the grantor cannot respond until after either a face to face meeting or a telephone meeting has occurred. If beneficiary attempts to contact grantor and no response after seven business days they may proceed with the foreclosure. (Section 3 expires January 2, 2012) The beneficiary is required to provide the trustee with an affidavit describing how he/she met the requirements and the trustee must record the affidavit. If the beneficiary notifies the grantor that he/she is not eligible for modification after request this process does not apply. Applies to all notices sent after September 29, 2009 (60th day following the effective day of the act). On January 2, 2012, Sections 4 and 6 become operative in place of Section 3. Basically there will then be yet another version of the Chapter 19 notice and the requirement for recording an affidavit regarding modification will no longer be required.

SB 640A – Chapter 502 Oregon Laws 2009 – Effective January 1, 2010

Realtor education, providers

Requires all real estate broker and real estate property manager applicants to have high school diploma or equivalent certification.

Establishes new continuing education requirements for real estate licensees. Establishes requirements for certifying real estate continuing education providers. Establishes requirements for persons teaching real estate continuing education courses.

Requires Real Estate Agency to develop learning objectives and course topics for real estate continuing education courses.

SB 739 – Chapter 284 Oregon Laws 2009 – Effective January 1, 2010

Arsenic in wells

Requires seller of real estate to test for arsenic in certain wells upon accepting offer to purchase real estate. Allows Department of Human Services to adopt rules requiring testing for other contaminants.

SB 771A – Chapter 431 Oregon Laws 2009 – Effective January 1, 2010

Tenancy termination and guest agreements

Creates 60-day no-cause notice for terminating tenancy. Allows 30-day notice if termination meets specified criteria. Specifies procedures for terminating various forms of tenancy. Allows including explanation for termination of tenancy with no-cause notice.

Allows landlords, tenants and guests of tenant to enter into agreement for guest to become temporary occupant of premises. Specifies agreement contents and rights of parties.

Specifies procedure for disposition of certain personal property landlord presumes is abandoned due to death of tenant.

Requires landlord to disclose deposits, fees and rent before entering into rental agreement or accepting payment. Regulates assessment of fees. Prohibits landlord use of liquidated damages provisions.

Regulates charging of security deposits and claims against security deposits.

SB 794B – Chapter 530 Oregon Laws 2009 – Effective January 1, 2010

Condemnation compromise offers

Provides that defendant in condemnation action may not recover attorney fees from condemner unless amount of just compensation assessed by verdict exceeds highest written settlement offer submitted by condemner before filing of action.

Allows condemner to serve offer of compromise to defendant in condemnation action not less than 10 days before trial. Requires court, if defendant accepts offer under specified circumstances, to give judgment to defendant for amount of specified litigation costs incurred before service of offer. Provides, if defendant rejects offer and fails to obtain judgment more favorable than offer, that defen-

dant may not recover specified litigation costs incurred on or after service of offer, that defendant will recover specified litigation costs incurred before service of offer and that condemner will recover specified litigation costs incurred on or after service of offer.

SB 874B – Chapter 508 Oregon Laws 2009 – Effective January 1, 2010

Disability discrimination

Updates and clarifies discrimination laws related to individuals who have disabilities. Changes person to individual, provides new definition for disabled.

SB 875 – Chapter 472 Oregon Laws 2009 – Effective June 23, 2009

Assistance animals in rented housing

Prohibits person from charging fee or deposit for assistance animal in rented housing.

Declares emergency, effective on passage.

SB 929B – Chapter 479 Oregon Laws 2009 – Effective January 1, 2010

Submetering utilities in manufactured dwelling parks

Requires landlord of manufactured dwelling park with 200 or more spaces in park to use billing method that determines charge through submetering when assessing tenant utility or service charge for water. Requires compliance by December 31, 2012.

SB 952A – Chapter 510 Oregon Laws 2009 – Effective August 23, 2009

Notice to tenants in foreclosures

Provides that purchaser is entitled to possession of property sold at trustee's sale subject to interests of person in possession of property under interest created voluntarily by grantor or successor to grantor. Requires purchaser of foreclosed property to give additional notice to tenants living on property when purchaser intends to take possession of property. Creates different notice procedures for different types of tenancy. Modifies information to be included in notice. Creates other procedures related to taking possession of property.

Allows tenant who receives actual notice of foreclosure to apply security deposit or prepaid rent to pay rent obligation.

Declares emergency, effective 60 days after passage.

Tenant at sufferance: 30 days notice given no sooner than 30 days before the first sale date set.

Fixed term tenancy: 60 days notice as above

Month-to-month or lesser tenancy: 30 days notice as above

Any tenancy where the purchaser intends to occupy the property: 30 days notice as above

No vacation can be required before the 10th day after the sale.

Notice must be by regular mail and is effective three days after mailing.

Effective 60 days after passage

NOTICE: Federal Public Law 111-22, Title VII (Protecting Tenants at Foreclosure Act of 2009) effective 5/20/09, provides for a 90-day notice to tenants of dwellings and residential property. If the purchasing party will not occupy the property or unit as a primary residence then existing bona fide leases must be honored. This does not override State or local laws that require a longer notice. Only applies to federally regulated loan foreclosure. Section 8 contracts are assumed by the purchaser.

SB 963A – Chapter 641 Oregon Laws 2009 – Effective January 1, 2010

Revises condo/planned community law regarding management

Revises various provisions governing condominiums and planned communities. Defines who can serve as a director. Provides for a dissolved association to continue and provides for reinstatement. Provides that unless the board determines that a reserve fund is adequately funded they cannot waive assessments to the fund. Requires recording of amendments to bylaws. Provides for granting of leases, easements, rights of way and licenses by the association on common property if not governed by bylaws. Allows for investment in certificates of deposit. Specifies the components of an amendment to a condominium plat.

SB 970 – Chapter 481 Oregon Laws 2009 – Effective January 1, 2010

Payment for purchase of property from State

Removes requirement that proposals for purchase of real property from state be accompanied by certified check or by sufficient bond furnished by surety company in sum not less than 10 percent of total amount of value of proposal.

SB 5535 – Chapter 906 Oregon Laws 2009 – Effective August 4, 2009

Establishes Housing and Community Services Department Housing Preservation Fund. Appropriates moneys from fund to provide financial assistance to aid in acquisition, renovation or maintenance of section 8 housing or other housing with federal rent subsidies.

Establishes Housing and Community Services Department Manufactured Dwelling Parks Preservation Fund. Appropriates moneys from fund to provide assistance to community organizations or tenant groups in acquiring manufactured dwelling parks.

Greg Nelson

■ BILLS AFFECTING LAND USE LAW

I. INTRODUCTION

The 2009 legislative session focused on several specific areas of land use law. First, Ballot Measure 49 was amended to allow certain claimants to pursue relief that they would not have otherwise been able to obtain. Second, the legislature continues to try to balance the rights of developers and the preservation of natural resources. The debate for this session centered on the Metolius River Basin and the result was some creative problem-solving. Third, the legislature provided more options for resolving land use issues by creating transferable development credit programs and streamlining some state and local permit approval procedures. Finally, there was the usual collection of miscellaneous measures.

All bills take effect on January 1, 2010 unless otherwise noted.

II. BALLOT MEASURE 49 CHANGES

A. HB 3225 (ch 855) Modifications to BM 49 to Allow Precluded Claimants to Pursue Relief

In 2004, Oregon voters passed Ballot Measure 37, allowing landowners whose property values were diminished by land use laws or regulations to file claims for compensation. In 2007, voters passed Ballot Measure 49, which modified the claims process for certain land owners who had already submitted claims for compensation. HB 3225, §2 permits a claimant who filed a timely election in pursuit of compensation for loss of property value due to land use regulation to pursue relief under §2 and §6, chapter 424, Oregon Laws 2007 on claims that would otherwise have been precluded under Measure 49. The legislature estimates that approximately 500 claimants who would otherwise have been precluded will be able to pursue relief through HB 3225. §3 provides that in order to be eligible to pursue relief, a claimant must have:

- Filed a valid claim for just compensation under ORS 195.305 with the appropriate county on or before December 4, 2006, and with the state on or after December 4, 2006, and before December 6, 2007; or
- Submitted a land use application before June 28, 2007, that was a prerequisite to filing a valid claim for just compensation on or before December 4, 2006, and filed the claim with the state before December 6, 2007.

A claimant who did not receive notice and an opportunity to file an election under §8(3), chapter 424, Oregon Laws 2007, or who filed timely but received a preliminary denial before the claimant could submit an appraisal, are also eligible to pursue relief. The deadline for claimants to pursue relief is December 31, 2009. However, claimants who have been determined to have common law vested rights in a final judgment or order are precluded from pursuing relief under §2. Claims under §2 are to be reviewed by DLCD pursuant to rules adopted by LCDC, with final orders issued by December 31, 2010.

A claimant is eligible to pursue relief even if a majority, but not all of the property described in the claim is outside an urban growth boundary and the claimant previously filed a valid claim with the state for just compensation under ORS 195.305. HB 3225, §4. A claimant is also permitted to pursue relief if the claimant's property is within the boundaries of a city, but entirely outside any urban growth boundary. HB 3225, §5.

HB 3225 prohibits any claimant from obtaining relief under the theory of common law vested right, and under §§ 5 through 11 of chapter 424, Oregon Laws 2007.

Final orders for claims reviewed under §§6 or 7, chapter 424, Oregon Laws 2007 must be issued on or before June 30, 2010.

Up to 100 claims may be advanced by the Director of DLCD for priority processing in cases of demonstrated hardship. HB 3225, §9. Hardship is defined as:

- threatened loss of ownership of the property,
- a contractual obligation to sell the property entered into before November 6, 2007,
- prolonged illness or medical expenses that threaten the financial status of the property owner,

- threatened expiration of permits granted to carry out development on the property, and
- situations in which a claimant cannot continue to occupy an existing dwelling on the property and wants to occupy a new dwelling on the property. HB 3225, §20.

Any new dwelling, lot, or parcel established on property that is bisected by an urban growth boundary must be located on the portion of the property outside the urban growth boundary. HB 3225, §14.

DLCD is required to investigate the numbers of claimants who only filed claims with a county, failed to file appraisals, or failed to make elections to seek relief, and the reasons behind these failures to pursue claims. HB 3225, §17.

The fee for each claim under HB 3225 is $175. HB 3225, §18.

DLCD is authorized to rely upon a decision of a county under Ballot Measure 37, or on one or more prior land use decisions by a county in determining whether to authorize a land division or dwelling. HB 3225, §21.

HB 3225 took effect on July 28, 2009.

B. SB 691 (ch 464) Forest Practice Modifications to BM 49

SB 691 modifies the provisions for claiming compensation under Ballot Measure 37/49 based on land use regulations that restrict forest practices on private real property by amending ORS 195.300, 195.310 and 105.312.

SB 691 expands the definition of "land use regulation" under Measure 49 (ORS 195.300(14)(e)) to include laws enacted or rules adopted solely for the purpose of regulating forest practices. However, the measure eliminates land use regulations regulating forest practices as a basis for a claim if enacted or adopted before January 1, 2010. SB 691, §1. Definitions are also added for "lawfully established unit of land", "lot", and "parcel" to have the meaning given those terms in ORS 92.010. SB 691, §1.

The bill also modifies ORS 195.310. For the purposes of law or rules regulating forest practices, ORS 195.310 provides that the reduction in the fair market value of the property is the reduction in fair market value of a lawfully established unit of land that is attributable to the land use regulation on the date the claim is filed. SB 691, §2. An alternative process is added for an owner to support the claim through appraisals showing the value of the land and harvestable timber with and without the application of the land use regulation. SB 691, §2. Also, an authorization based on laws or rules regulating forest practices under ORS 195.300(14)(e) granted to a claimant under ORS 195.310(5)(b) or (6)(b) may be used by a subsequent owner. SB 691, §2.

Finally, the bill modifies ORS 195.312 to allow separate claims based on the same laws or rules regulating forest practices under ORS 195.300(14)(e) for separate lawfully established units of land. SB 691, §3.

Practice Tip: Claims for relief under this legislation remain subject to all of the existing claims exceptions under M49, including health and safety regulations and regulations required by federal law.

III. METOLIUS

A. HB 3298 (ch 712) Metolius Area of Critical State Concern

In 2006, Jefferson County amended its comprehensive plan to map two sites in the Metolius River Basin as eligible for siting of destination resorts. HB 3298, §1(2) approves the recommendation of the Land Conservation and Development Commission (LCDC) to designate the Metolius River Basin the "Metolius Area of Critical State Concern" under ORS 197.405. LCDC had never before used ORS 197.405, enacted in 1973 as part of Senate Bill 100, to recommend the designation of an area of critical state concern. In the past, other areas considered appropriate for designation, such as the Columbia River Gorge, have been protected through statewide land use planning goals, federal laws, and other state and local designations.

The bill approves the LCDC management plan that was included in the recommendation with a few exceptions. HB 3298, §1(3). First, notice of proposed amendments to the management plan must be given to the governing bodies of Jefferson County and the Confederated Tribes of the Warms Springs Indian Reservation. If either governing body files a written objection, LCDC must find by clear and convincing evidence that the proposed development will not result in:

- Negative impact on the Metolius River, its springs or its tributaries;
- Negative impact on fish resources in the Metolius Area of Critical State Concern; or
- Negative impact on the wildlife resources in the Metolius area of Critical State Concern.

Second, the management plan must limit development of a small-scale recreation community within certain townships in Jefferson County so that all units must be sited within up to 25 clusters that may be connected only by a road system. Third, descriptions in the management plan of annual average water use must refer to an annual average consumptive water use.

Most significant, the county is prohibited from any approval siting a destination resort in the Metolius Area of Critical State Concern. HB 3298, §1(6).

HB 3298 took effect on July 15, 2009.

B. HB 2228 (ch 636) Small-Scale Recreational Communities, TDR Program and Skyline Forest Development

HB 2228 (the Rural Unemployment Reductions and Living-wage Job Opportunities Bring Stability Act, or the RURAL JOBS Act) is divided roughly into three parts. First, HB 2228 takes into account the Metolius River Basin management plan recommended to the Legislative Assembly on April 2, 2009 by the Land Conservation and Development Commission (LCDC). It also accounts for the two destination resorts currently approved by Jefferson County within the Metolius Basin. Second, the bill authorizes DLCD to establish a system of transferable development credits. Finally, the bill authorizes specific development in the "Skyline Forest" in Deschutes and Klamath Counties based on specific development standards and the transfer of property for conservation purposes.

1. Small-Scale Recreation Communities

HB 2228 §§2 to 5 approves one or two small-scale recreation communities to be developed on forestlands by the owners of the previously-approved Metolius resort sites. HB 2228, §3. The small-scale recreation communities may only be established in conjunction with a transfer of development interests from the previously-approved Metolius resort sites to the site of the proposed development. HB 2228, §3. The small-scale recreation community may not be sited in areas regulated by the management plan. HB 2228, §3. The owner of a Metolius resort site must submit an application to a county for a small-scale recreation community within two years of the effective date of this bill. HB 2228, §3.

The bill also includes development standards for the small-scale recreation community, including the area size (200 acres), number of units, primary purpose and types of facilities allowed including a restaurant, lodge or other non-residential buildings. HB 2228, §4. The community may not include a golf course or related facilities. HB 2228, §4. The community must include certain additional housing for employees of the destination resort. HB 2228, §4.

2. Oregon Transfer of Development Rights Pilot Program

HB 2228 §§6 to 8 establish the Oregon Transfer of Development Rights Pilot Program in the Department of Land Conservation and Development (DLCD). HB 2228, §6. The Land Conservation and Development Commission may select up to three pilot projects nominated by local governments. Each project must include a sending area and a receiving area for development rights. HB 2228, §6. The commission may allow additional development for a project that includes affordable housing. HB 2228, §6. Receiving areas may not be located within 10 miles of the Portland metropolitan area urban growth boundary. HB 2228, §6. Local governments implementing projects may amend their comprehensive plan and land use regulations to implement these pilot projects notwithstanding contrary provisions of certain statewide land use planning goals. HB 2228, §7.

3. Skyline Forest Development

HB 2228 §9 authorizes the development of certain forestlands in exchange for the transfer of other forestlands for conservation or management as public forests. The terms "Skyline Forest", the "Southern Conservation Tract" and the "Skyline Forest Sustainable Development Area" are defined to mean specific land identified by section, township and range. HB 2228, §9. The Skyline Forest Sustainable Development Area may include up to 282 residential units, a caretaker's residents, a restaurant, a small community store, a conference center, an equestrian facility, and other small-scale recreational commercial and basic service uses with utilities. HB 2228, §9. No golf or golf-related facilities are allowed. HB 2228, §9. Any development must be sited in particular locations within the Skyline Forest Sustainable Development Area. HB 2228, §9. To develop the Skyline Forest Sustainable Development Area, the owner of the Skyline Forest and the Southern Conservation Tract must transfer certain lands into land trusts or public ownership in exchange for development rights. HB 2228, §9

HB 2228 took effect on June 29, 2009.

C. HB 3313 (ch 888) Metolius Resort Sites, Skyline Forest Sustainable Development Area HB 3313 amends several provisions of HB 2228, the RURAL JOBS Act described above.

The bill extends the time limit from 90 days to one year for the owner of a Metolius resort site to notify DLCD of its election to seek approval for a small-scale recreation community, and extends the time period from two years to three years to submit an application to the county for approval. HB 3313, §1(2). A small-scale recreation community authorized under HB 2228 must be sited on land that is planned and zoned for forest use or land that is rural and not subject to forest or agricultural statewide land use planning goals. HB 3313, §1.

The allowable tract size for small-scale recreation communities is increased from 200 to 320 acres. HB 3313, §2.

If the development standards of the county are dependent upon the zoning of the site, the county shall apply the development standards for the county's most dense rural residential zone, rather than an urban zone with the highest population density. HB 3313, §3.

The areas included within the definition of the "Southern Conservation Tract", consisting of portions of Deschutes and Klamath Counties are expanded. HB 3313, §4. Access roads, utility lines, and maintenance and security facilities are allowed as development purposes in the Skyline Forest Sustainable Development Area. HB 3313, §4.

HB 3313 took effect on August 4, 2009.

IV. LAND USE PLANNING SYSTEMS

A. HB 2229 (ch 873) County Resource Zones and Regional Problem-Solving

In 2005, the Oregon Legislature created the Oregon Task Force on Land Use Planning. HB 2229 is a result of the recommendations of that task force.

First, HB 2229 includes additional principles to guide the land use program for the state including providing a healthy environment, sustaining a prosperous economy, and ensuring a desirable quality of life. HB 2229, §1. However, the bill specifically provides that the principles "are not judicially enforceable." It also allows LCDC to consider the variations of conditions and needs of different regions in their state and local planning approaches to land use issues. HB 2229, §2.

Second, the bill authorizes counties to conduct a legislative review of county resource lands to determine whether the lands planned and zoned for farm use, for forest use or mixed farm and forest use are consistent with statewide planning goals 3 (farm lands) and 4 (forest lands). HB 2229, §5. If the county determines that land zoned for farm use or forest use does not meet the definitions in the goals, the county may rezone the land for non-resource use. County amendments to the comprehensive plan to reflect the non-resource designation are subject to a re-acknowledgment process through DLCD, including an approved work plan. HB 2229, §5. If the county amends its comprehensive plan or land use regulations then the county must assess and inventory the

environmental significance of lands designated as non-resource lands. HB 2229, §6.

This bill provides a process by which a county and at least one other local government in the region may request that DLCD participate in a collaborative regional problem-solving process to resolve regional land use planning issues. HB 2229, §8. Through this process, participants will create a proposal for regional land use planning issues which may be submitted to LCDC for acknowledgement.

LCDC is required to grant, deny or remand its approval of proposed changes to the comprehensive plan or land use regulations within 120 days after the date the local government submits the proposed changes. HB 2229, §13. LCDC must issue a report stating whether the proposed changes comply with applicable statutes, goals and commission rules. HB 2229, §13.

Practice note: Under relevant case law counties may already have authority to rezone resource land for non-resource use. However, the process and the standards are unclear. HB 2229 clarifies local authority and provides standards to perform the analysis and rezone land as appropriate, subject to review by LCDC.

In addition, state agencies, cities and counties in areas with rapid growth are encouraged to "[c]onsider directing major public infrastructure investments, including major transportation investments, to reinforce compact urban development" and to "consider giving priority to investments that promote infill or redevelopment of existing urban areas to encourage the density necessary to support alternative modes of transportation." HB 2229, §14.

Finally, if funds are available LCDC may appoint a work group to conduct a "policy neutral" review and audit of ORS chapters 195, 196, 197, 215 and 227, statewide land-use planning goals and the rules of the commission implementing the goals. HB 2229, §17.

HB 2229 took effect on August 4, 2009.

B. SB 763 (ch 504) Transferable Development Credit Systems

SB 763 authorizes governmental units, including cities, counties, metropolitan service districts and state agencies, to establish transferable development credit (TDC) systems. TDC systems allow development interests to be transferred from a sending area within the jurisdiction of one governmental unit to a receiving area within the jurisdiction of the same or another governmental unit. If a TDC system permits the transfer of development interests between the jurisdictions of different governmental units, the transfer process must be described as an intergovernmental agreement under ORS 190.003 to 190.130. SB 763, §3(2)

A TDC system must provide as follows:

- The record owner of a lot, parcel or tract in a sending area may voluntarily sever and sell development interests of the lot, parcel or tract for use in a receiving area;
- A potential developer of land in a receiving area may purchase TDCs that allow a higher intensity use or development of the land, including development bonuses or other incentives not otherwise allowed, through changes to the planning and zoning or waivers of density, height or bulk limitations in the receiving area;
- The governmental units administering the system are to determine the type, extent and intensity of uses or development allowed in the receiving area, based on the TDCs generated from severed and sold development interests; and
- The holder of a recorded instrument encumbering a lot, parcel or tract from which the record owner proposes to sever development interests for transfer must be given prior written notice of the proposed transaction and to approve or disapprove the transaction. SB 763, §3(3).

A TDC system must offer: incentives to resource land owners to limit or prohibit development and sell or transfer development credit to lands in receiving areas; benefits to land owners by providing monetary compensation for limiting development in sending areas; and benefits to developers by allowing increased development and incentives in receiving areas. SB 763, §3(4).

Governmental units that administer TDC systems must designate sending and receiving areas in conjunction with the objectives set forth in §1, which include complementing the statewide land use planning system, encouraging effective local implementation of the statewide land use planning goals, providing incentives for the protection of farm land and forest land, and providing methods to help improve the livability of urban areas and mitigate and adapt to global climate change. SB 763, §3(5). Under this section the governmental units must also maintain adequate records, provide periodic summaries, and require the owners of development interests that are transferred to record conservation easements. The holders of conservation easements are required under §3(9) to hold, monitor, and enforce the easements to ensure that lands in sending areas do not retain TDCs that are transferred.

The receiving area of a TDC system must be composed of land that is within an urban growth boundary, or land that is within an urban reserve area and is:

- appropriate and suitable for development,
- not subject to limitations designed to protect natural resources, scenic and historic areas, open spaces or other resources protected under the statewide land use planning goals,
- not within an area identified as a priority area for protection in the "Oregon Conservation Strategy" prepared in September 2006 by the State Department of Fish and Wildlife.

Land within an urban reserve area may be a receiving area only if the land is likely to be brought within the urban growth boundary at the next periodic review or legislative review, and development is only allowed after the receiving area is brought within an urban growth boundary. SB 763, §3(6).

Land that is selected as a receiving area may be designated for priority inclusion in the urban growth boundary if the land qualifies under the boundary location factors in a goal relating to urbanization.

A governing body of a governmental unit is allowed to establish a TDC bank to facilitate such activities such as buying and sell-

ing TDCs, accepting donations of TDCs, managing funds available for the purchase and sale of TDCs, authorizing and monitoring expenditures, maintaining records, providing summary reports, obtaining appraisals, serving as a clearinghouse and information source, and soliciting and receiving grant funds. SB 763, §3(8).

DLCD is required to evaluate and report to the Seventy-seventh Legislative Assembly on the TDC systems that are established under this bill, and recommend whether the program should be continued, modified, expanded or terminated. SB 763, §4.

SB 763 took effect on June 24, 2009.

V. OTHER LAND USE BILLS

A. HB 3099 (ch 850) Modifications of Exclusive Farm Use (EFU) Zone Exceptions

HB 3099 amends the list of permitted and conditional uses in EFU zones as applied to uses established on or after the effective date of the bill. HB 3099 removes schools, solid waste disposal sites and greyhound kennels from the list of permitted uses in ORS 215.213 (1) and 215.283 (1) and moves them to the list of conditional uses in ORS 215.213 (2) and 215.283 (2). HB 3099 also clarifies that owners of EFU lands used for model aircraft uses may charge rent to operators on the property. Operators on such properties may also charge users a fee that does not exceed the operator's cost to maintain the property, buildings and facilities.

HB 3099 modifies conditional uses under ORS 215.213 and 215.283 by prohibiting golf courses on high-value farmland and allowing schools for kindergarten through grade 12 that are primarily for residents of the rural area where the school is located.

Uses formerly allowed pursuant to ORS 215.213(1)(a) and 215.283(1)(a) in effect before the effective date of HB 3099 may be expanded if:

- Conditional approval of the county as provided in ORS 215.296 is obtained,
- The use was established on or before January 1, 2009, and
- The expansion occurs on the tax lot on which the use was established on or before January 1, 2009 or a contiguous tax lot that was under the same ownership on January 2, 2009. HB 3009, §18.

Counties are required to amend their land use regulations to conform to the amendments of ORS 215.213 or 215.283 on or before December 31, 2010. HB 3009, §16. A county may adopt the required amendments to its land use regulations without holding a public hearing or adopting findings if the county has given notice to the DLCD as provided by ORS 197.610 and DLCD has confirmed in writing that the only effect of the proposed amendments is to conform the county's land use regulations to the amendments of ORS 215.213 and 215.283.

B. SB 189 (ch 69) Modifies Definition of Forestland For Purposes of Fees and Assessments

ORS 477.281 requires owners of forestland to pay fees to maintain the Oregon Forestland Protection Fund and to pay assessments to forest protection districts. The term "forestland" is defined in ORS 526.005, and is amended by SB 189 to clarify that forestland includes a clearing, meaning "any grassland, improved area, lake, meadow, mechanically or manually cleared area, road, rocky area, stream or other similar opening that is surrounded by or contiguous to" forestland.

C. SB 234 (ch 25) Appeal of LUBA decisions to the Courts of Appeals

ORS 197.850 outlines the process for a party to appeal a Land Use Board of Appeals decision to the Court of Appeals.

SB 234 conforms the service method for appeals from the Land Use Board of Appeals to the service method for appeals from the circuit courts as described in ORS 19.260. SB 234 §1 amends ORS 197.850(4) to allow for service of the petition for appeal by first-class mail. SB 234 §2 defines an appeal as a petition for judicial review to the Court of Appeals of:

1) a Land Use Board of Appeals' final order; or

2) a local government referee's decision on an expedited land division.

D. HB2822 (ch318) Private Way of Necessity for Sewer Lines

SB 2822, §1 expands the definition of a "way of necessity" found in ORS 376.150 to include "a continuation of preexisting sewer service to land that has access to a public road" as established under ORS 376.150 to ORS 376.200. A landowner is allowed to file a petition with the local governing body to prove:

- A publicly owned sewer line does not exist in the portion of any public road adjacent to the land, and
- The land is located in a jurisdiction that has adopted and implemented a public sewer extension program designed to make public sewers available to land lacking access to a public sewer line in the portion of a public road adjacent to the land. SB 2822 §2

The sewer line way of necessity terminates six months after the local government issues a notice to the affected landowners that a sewer line with direct access to the land has been completed. SB 2822 §4. This section also prohibits a sewer line way of necessity where the new development or redevelopment will include abandonment of an existing private sewer line connection. SB 2822 §4. Landowners benefited by a sewer line way of necessity should compensate the burdened landowner. SB 2822 §4. The burdened landowner's compensation should reflect the temporary duration of the way of necessity. SB 2822 §4.

E. HB 2230 (ch 606) Streamlining State and Local Permitting

ORS 197.015 (10) defines a "land use decision." This definition determines the types of decisions that may be appealed to the Land Use Board of Appeals.

HB 2230 provides additional exclusions to what is considered a land use decision and therefore not appealable to LUBA. A local government decision that a state agency permit is consistent with statewide land use planning goals and compatible with the acknowledged comprehensive plan (often referred to as a "land use compatibility statement" or "LUCS") is excluded if:

- the local government has already approved the use;

Oregon State Bar
Section on Real Estate and Land Use
16037 SW Upper Boones Ferry Rd
PO Box 231935
Tigard, OR 97281-1935

- the use is allowed outright and not subject to review under the local code; or
- the use requires a future land use decision. HB 2230, §2.
- Also excluded is an action by a state agency, if:
- the local government has already approved the use or activity or
- the local government does not have the authority to regulate that use or activity. HB 2230, §2.

HB 2230 also gives LCDC the authority to adopt rules clarifying the sequence of approvals when a use requires multiple permits from state agencies and local governments.

F. HB 3043 (ch 216) Extension of Metropolitan Service Districts

HB 3043 combines two existing processes to automatically extend the jurisdiction of a metropolitan service district to an urban growth boundary when an urban growth boundary is expanded. Metropolitan service districts make public services available when they are not adequately available through other governmental agencies. Proceedings for annexation of territory not within the urban growth boundary and all other boundary changes to the metropolitan service district shall be conducted as provided in ORS chapter 198. HB 3043, §2.

G. HB 2003 (ch 532) Landowner Immunity to the Public

ORS 105.676 provides landowners immunity for allowing the public access to their land for recreational purposes.

HB 2003 includes gardening as a recreational purpose. A landowner's immunity for gardening uses applies only if the owner charges no more than $25 per year for the use of the land by the public for gardening. HB 2003, §2. The current definition of 'land' is expanded to include "all paths, trails, roads, watercourses and other rights-of-way while being used by a person to reach land for recreational purposes… that are on land adjacent to the land that the person intends to use for recreational purposes, etc.." HB 2003, §2.

Megan Roche and Jennifer Pike