Oregon State Bar

OREGON REAL ESTATE AND LAND USE DIGEST

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Oregon Appellate Cases

Exaction – or Correction?

Hill applied to the City of Portland to divide a 1.06-acre property into three separate parcels. He wanted to keep an existing house on one parcel and build two new houses on each of the newly created parcels. That property abutted two streets. Neither street met city width requirements, nor contained improvements meeting current city standards, nor was wide enough to accommodate those improvements. The city approved the application subject to 1) dedication of additional public right of way to allow the street to be developed to the city's width and improvement standards and 2) waivers of remonstrance for future improvements. A hearings officer rejected Hill's challenges to those conditions.

The hearings officer decided, and LUBA affirmed, that the right-of-way dedication was not an unconstitutional exaction of property in violation of the Fifth and Fourteenth Amendments of the United States Constitution under N*ollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In addition, the hearings officer determined, and LUBA affirmed, that the city permissibly conditioned its approval on the requirement that petitioner execute waivers of remonstrance for future storm sewer and street improvements. Hill sought judicial review.

The court of appeals concluded that the hearings officer's and LUBA's rejection of Hill's unconstitutional exaction claim was based on an erroneous understanding of *Nollan* and *Dolan*. Under *Nollan* and *Dolan*, the Fifth and Fourteenth Amendments permit the government to exact a dedication of private property as a condition of approval of a land use permit if the government demonstrates, first, that there is a nexus between a governmental interest that would furnish a valid ground for the denial of the permit and the exaction of property,

and second, that the nature and extent of the exaction are roughly proportional to the effect of the proposed development.

Regarding the first element, a governmental interest is one that allows the denial of a permit if the impacts of the project, alone or with other construction, would substantially impede that interest. The purpose of the *Nollan/Dolan* framework is to allow permitting authorities to force applicants to bear the full costs of their proposals while balancing the property owner's right to just compensation under the Fifth Amendment.

Here, Portland required dedication of additional right of way so that streets could be brought into compliance with city standards for width and street improvements. The city required this dedication even though it made findings that the transportation system was capable, without mitigation, of safely supporting the proposed development in addition to the existing uses in the area for all travel modes. The city argued that the code's right-of-way standards entitled the city to deny Hill's application if it did not demonstrate compliance. The city also included evidence that the dedication required as a condition would amount to at the most 4 percent of the total property, making that dedication proportionate to the development's impact on traffic.

Hill argued that the condition was unconstitutional because it was not supported by findings sufficient under *Nollan* and *Dolan* – especially in view of the city's findings that the transportation impacts of the project were insufficient to require mitigation.

The court of appeals found the hearings officer's analysis lacking under the *Nollan/Dolan* framework. The city must show that a project's impacts "substantially impede" a legitimate governmental interest, permitting denial of the application. The city may not evade this requirement "simply by defining approval criteria that do not take into account a proposal's impacts."

Regarding the waivers of remonstrance, the court concluded that LUBA erred in affirming the hearings officer's decision because the hearings officer did not make the findings required under *Clark v. City of Albany*, 144 Or. App. 192 (1996). Specifically, the hearings officer did not find a need for a local improvement district and did not find that Hill's project would "both contribute to the need for a local improvement district and be benefitted by one."

The court reversed and remanded to LUBA.

Hill v. City of Portland, 293 Or. App. 283 (2018).
Rebekah Dohrman

Keeping Up With the Joneses

Marshall and Neale each own parcels adjacent to Cannaday's property. These parties, including their respective predecessors in interest, have used a private road as the primary access to their properties for decades. Initially, Jones Road ran entirely over property owned by Neale's predecessors in interest, then ran along the property line dividing his property from Cannaday's, then crossed Marshall's property, then followed the property line dividing Marshall's and Cannaday's properties. From 1990 through 2006, Cannaday acquired all the land on the east and south sides of the property lines that Jones Road follows.

Around 2006, Cannaday began locking a gate to restrict his neighbors' and public access to Jones Road. Three years later, Cannaday built a fence down a section of Jones Road and removed a cattle guard south of the fence, making the road impassable. Marshall and Neale sued Cannaday for an easement over the portions of Jones Road that cross the Cannaday property. Specifically, Marshall sought 1) a prescriptive easement over the portions of Jones Road on the Cannaday property that cross property Marshall has never owned and 2) an easement by implication over parts of the road that cross portions of the Cannaday property previously owned by Marshall. Neale in turn sought an easement by implication over the portions of the road on the Cannaday property which were previously owned by Neale's predecessor.

The trial court issued a series of letter opinions granting Marshall's prescriptive easement claim and both Marshall's and Neale's claims for easements by implication. Although Cannaday responded to the opinions, raising

various objections, the responses failed to raise the issue of whether the evidence was sufficient as a matter of law to rule in favor of the plaintiffs.

The court of appeals held that the party who contends it is entitled to prevail on a claim or issue as a matter of law must make an ORCP 54B(2) motion or "timely equivalent assertion" that it seeks a ruling as a matter of law at trial. Accordingly, the defendants did not preserve two of their three assignments of error because none of their arguments or motions were ORCP 54B(2) motions or timely equivalent assertions. As to the portions of the third assignment of error that the court concluded had been preserved, the court found defendants' arguments "unavailing."

Marshall v. Cannady, 291 Or. App. 802 (May 16, 2018).
Mercedes W. Rhoden-Feely

The Sun: An Industrial Development?

In 2015, Or Solar 7, LLC, entered into a lease with the owner of a parcel of EFU-zoned, high-value irrigated farmland, in order to site an 80-acre photovoltaic solar power generation facility on the property. The proposed facility could generate roughly 10 megawatts of electricity, which would then be transmitted to PacifiCorp's Sage Substation, located within Medford's city limits and urban growth boundary, on land zoned for industrial use. Under its power purchase agreement with PacifiCorp, Or Solar would deliver electricity to the substation at a price set by the Oregon Public Utility Commission. ORS 215.283(2)(g) authorizes counties to approve "commercial utility facilities for the purpose of generating power for public use by sale" in EFU zones as conditional uses, and the LCDC has promulgated rules that limit such facilities to 12 acres, absent an exception under Statewide Planning Goal 3 (Agricultural Land).

In 2016, Or Solar applied to Jackson County for a reasons exception to Goal 3, a minor zone change, and a comprehensive plan amendment, subject to a limited use overlay. Advancing the reasons exception under two alternative theories, Or Solar contended that there was a "demonstrated need" for the facility under OAR 660-004-0022(1)(a), asserting that Goal 13 (Energy Conservation) requires counties to promote renewable energy sources. Alternatively, Or Solar argued that the facility constituted conditionally-permissible "industrial development" for the purposes of OAR 660-004-0022(3)(c). The county approved the application in June 2017, justifying its decision on both of Or Solar's alternative bases, and 1000 Friends of Oregon appealed that decision to LUBA.

Oregon Real Estate and Land Use Digest

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On review, LUBA reversed the county, holding, in part, that the county misconstrued OAR 660-004-0022 with respect to the two alternative bases advanced to justify the proposed Goal 3 exception. With regard to Or Solar's "industrial development" basis, LUBA held that a Goal 3 reasons exception under OAR 660-004-0022(3)(c) to site a solar facility on resource land would be permissible only if the predicate energy facility (a substation, transmission line, or similar facility that could allow the connection) was also on resource land. Or Solar appealed LUBA's reversal, and 1000 Friends cross-appealed LUBA's interpretation of "industrial development" under OAR 660-004-0022(3)(c).

The Oregon Court of Appeals affirmed on Or Solar's challenges to LUBA's determination under OAR 660-004-0022 and its disposition of reversal rather than remand, but reversed on 1000 Friends' cross-petition. While the court disagreed with LUBA's construction of OAR 660-004-0022(3)(c), it agreed that the county had improperly justified the exception for the solar facility under OAR 660-004-0022(3)(c), albeit on different grounds. In so holding, the court explained that the facility was not "industrial development" for the purposes of OAR 660-004-0022(3)(c) for three reasons. First, the text of the rule distinguishes between "industrial activity" and an "energy facility," and therefore, when the county determined that an "energy facility" employing construction, maintenance, and operations personnel is "industrial activity," it equated an "energy facility" with "industrial activity" and thereby failed to give effect to all provisions of the rule. Second, there is no need for a Goal 3 exception where the use is otherwise allowed under Goal 3 and its implementing rules. Because the establishment of the "nonfarm use" of "[c]ommercial utility facilities for the purpose of generating power for public use" is conditionally permissible under ORS 215.283(2)(g), the proposed solar facility did not require an "industrial development" exception under OAR 660-004-0022(3)(c). Lastly, the court of appeals observed that OAR 660-004-0022(3) provides for the "siting of industrial development on resource land outside an urban growth boundary[,]" and that Or Solar sought to "site" a "commercial utility facility for the purpose of generating power for public use" as a conditional nonfarm use under ORS 215.283(2)(g). Consequently, because the county exception proceeding under OAR 660-004-0022(3)(c) was not to site the proposed facility, but rather to vary a site characteristic (allowing a facility on 80 acres, rather than on 12 acres), OAR 660-004-0022(3)(c) did not apply. Thus, the court affirmed, in part, but reversed with regard to LUBA's conclusion that the proposed facility use was "industrial development" under OAR 660-004-0022(3)(c).

As a final matter, the court addressed Or Solar's assertion that LUBA improperly interpreted its own rule, OAR 661-010-0071, in reversing rather than remanding the county's land use decision. Pursuant to ORS 197.835(1), LUBA adopted OAR 661-010-0071(1)(c), which requires reversal when a decision "violates a provision of applicable law and is prohibited as a matter of law[,]" as well as OAR 661-010-0071(2)(d), which requires remand for further proceedings when a decision "improperly construes the applicable law, but is not prohibited as a matter of law." Or Solar argued that LUBA improperly interpreted "prohibited as a matter of law" to mean prohibited under the exception sought by Or Solar, and that the possibility of obtaining a different exception, or that a demonstrated need for a reasons exception could be shown by various statutes relating to energy needs, did not prohibit the county's decision as a matter of law. The court rejected that contention, explaining that Or Solar focused on the wrong part of the rule, and that the issue was not whether a different decision or application would allow a different result, but whether the actual land use decision under review was prohibited as a matter of law. The court of appeals made clear that LUBA reasonably construed "land use decision" to mean the decision that was requested by Or Solar and issued by the county, and that such a construction was both plausible and consistent with the text of the rule, the context of the rule, and with other sources of applicable law, and that Or Solar offered no textual or contextual analysis to suggest a different meaning.

1000 Friends of Oregon v. DLCD and Jackson County, 292 Or. App. 173 (2018).

Christopher Tackett-Nelson

The Construction of Permission

The Oregon Court of Appeals recently took a deep dive into two areas close to this writer's passion: linguistic construction and legislative intent. In a twist for a *Digest* devoted to real estate analysis, this case begins at sea. Cole Ortega was a fourteen-year old surfer who lost his arm in a dory boat accident. Although the arm was reattached, his medical bills nonetheless extended beyond the statutory cap of $1.5 million, which applies to awards against the state. Ortega and his guardians sued the State of Oregon, which holds the public land along the ocean shore and in the ocean in trust, alleging that it was negligent for failing to provide adequate warnings of the risk posed by dory boats to surfers. The trial court rejected the state's defense that it was entitled to recreational immunity under ORS 105.682. This appeal followed.

ORS 105.682 affords a defense of recreational immunity to "an owner of land" when that owner "either directly or indirectly permits any person to use the land for recreational purposes." The fight in this case is over construction of the word "permit." Ortega argued that in order for someone to permit another to take action, the grantor of permission must *equally* have the *power to prohibit*. That is, the equal sides of the coin for me to loan you my favorite orange sweater is my ability to restrict your sister from wearing it too. But once I donate it to charity, I cannot forbid your sister from putting it on. The state, on the other hand, argued that permission is merely the ability to *make possible* – restriction is not an element of such permission. The court acknowledged that both constructions are possible under a plain meaning of the word permit. It then turned to the legislative history of ORS 105.862 to discern what the Legislative Assembly contemplated in passing this law.

According to the 1995 policy objective of the bill in question, the recreational immunity defense was a quid pro quo arrangement to provide an incentive for landowners to "make their land available to the public." Furthermore, in the recent *Landis v. Limbaugh* case, the court held that a county was not entitled to recreational immunity from liability for harm that a jogger suffered while on a county sidewalk because the county took no affirmative action to open the land to the public to begin with. That is, the choice of whether I share my orange sweater does not become a choice if I donate the sweater to Goodwill – at that point, my choice with whom to share the sweater becomes moot. Thus, the court sided with Ortega's binary argument that if a land owner is required to permit access – as the state is, by virtue of the public land laws – it cannot prohibit access and thus cannot enjoy recreational immunity. The court held, as it did in *Landis* with the county sidewalk, that "to be entitled to recreational immunity, an owner of an interest in land must have made a volitional decision to open the land to the public for recreational use."

Ortega v. Martin, 293 Or. App. 180 (2018).
Judy Parker

Selling the Elliott (or Not)

The Elliott State Forest covers more than 93,000 acres of land near the Umpqua River in the Coast Range. The forest consists primarily of land owned by the Oregon Common School Fund. The State Land Board, which oversees the Department of State Lands, is required to manage the forest for the benefit of Oregon's public schools. For many years, the forest was a moneymaker for the state. But beginning in 2013, a series of lawsuits related to the presence of protected species in the forest stalled timber sales. Anticipating losses, the State Land Board began to investigate options for transferring ownership of the forest. This investigation led the State Land Board to approve the sale of a 788-acre parcel of the forest, known as East Hakki Ridge, to a private company. The threshold issue in *Cascadia Wildlands v. Oregon Department of State Lands* was petitioners' standing to challenge the sale. The circuit court concluded that petitioners did not have standing, but the court of appeals reversed.

In Oregon, standing is conferred by statute. Petitioners in *Cascadia* challenged DSL's order approving the sale under the Oregon Administrative Procedures Act, which grants standing to a person "adversely affected or aggrieved" by an agency order in an other than contested case. A person is "adversely affected or aggrieved" if any of three factors are met: "(1) the person has suffered an injury to a substantial interest resulting directly from the challenged governmental action; (2) the person seeks to further an interest that the legislature expressly wished to

have considered; or (3) the person has such a personal stake in the outcome of the controversy as to assure concrete adverseness to the proceeding."

The *Cascadia* petitioners included three conservationist groups and one individual. The individual petitioner attested that he had visited the East Hakki Ridge parcel before the sale and planned to return to the parcel in the future but was prevented from doing so because the timber company had posted "no trespassing" signs after purchasing the land. The court held that the individual petitioner had standing under the first of the three "adversely affected or aggrieved" factors because his "use and enjoyment of the East Hakki Ridge parcel" was a substantial interest injured by DSL's sale of the parcel.

The court's standing analysis included three parts. First, the court rejected DSL's argument that the alleged injury did not result directly from the sale. DSL contended that the timber company's "independent action . . . to exclude petitioners from the East Hakki Ridge parcel after the sale" was the cause of cause of petitioners' harm – in other words, petitioners' exclusion from the parcel was not a direct result of the sale, since nothing in the purchase and sale agreement directed the timber company to restrict public access. The court summarily rejected this argument because it "ignores . . . the general rule that property ownership includes the right to exclude others."

Second, the court adopted the federal law rule that injury to a person's use and enjoyment of public land is sufficient to establish standing under the "adversely affected or aggrieved" standard. Prior to *Cascadia*, Oregon courts had not expressly held that use and enjoyment of public land provides standing to challenge agency orders affecting that land.

Third, and finally, although the court adopted the federal rule for "injury in fact," the court *declined* to adopt the federal "zone of interests" test for standing under the Oregon APA. The United States Supreme Court has most recently described the "zone of interests" test as an inquiry into statutory intent – "whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 527 U.S. 118 (2014). The court of appeals explained that the "zone of interests" test is inconsistent with the three-factor "adversely affected or aggrieved" analysis because requiring petitioners to meet the "zone of interests" test to establish standing under the first factor (injury to a substantial interest) would essentially require petitioners to also meet the second factor (interest that the legislature expressly wished to have considered), and only one of the three factors must be satisfied to establish standing.

Having resolved that petitioners had standing to challenge the sale, the court decided the merits of the parties' arguments. Petitioners argued the sale was unlawful under ORS 530.450, which expressly "withdraw[s] from sale" the Elliott State Forest. DSL did not contest that its sale of the East Hakki Ridge parcel violated ORS 530.450. Instead, DSL contended that ORS 530.450 is unconstitutional because the statute violates both Article VIII, section 5 of the Oregon Constitution and the separation of powers doctrine.

Article VIII, section 5 created the State Land Board for the purpose of selling lands owned by the Common School Fund and investing the funds arising from such sales. Because ORS 530.450 restricts the State Land Board's power to sell land, DSL argued that the statute directly conflicts with the Oregon Constitution. The court disagreed with this point. Although Article VIII, section 5 gives the State Land Board authority to sell land, it also provides that the "powers and duties" of the State Land Board "shall be such as may be prescribed by law[.]" The court interpreted this provision as allowing the legislature to limit how the State Land Board's powers are exercised, including limiting the lands that may be sold – in this case, the Elliott State Forest. For the same reason, the court found that ORS 530.450 did not violate the separation of powers doctrine by "unduly burden[ing]" the State Land Board's core function.

The Elliott State Forest has become well known for the policy debates it has kindled. But the court's ultimate decision in this case did not turn on questions of policy. Rather, on the merits, the court simply concluded that the sale of the East Hakki Ridge parcel violated ORS 530.450, which has been in effect in its current form and unchallenged since 1957.

Cascadia Wildlands v. Dep't of State Lands, 293 Or. App. 127 (2018).

Kirk Maag and Hayley Siltanen

Time Cures All Scars

A recent Forcible Entry and Detainer action took a wrong turn for the tenant when his witness was impeached using a 25-year old conviction. Both defendant tenant and plaintiff landlord proceeded pro se at trial, and the court conducted examinations of all witnesses. The tenant called a witness who provided character evidence that the tenant did not have character in conformity with the allegations of the complaint. The judge, on her own initiative, searched Odyssey for the witness's name and discovered criminal convictions. The judge then impeached the witness by asking a leading question to confirm that the witness had been convicted of a felony. The witness answered affirmatively and qualified the answer informing the judge that the conviction was 25 years old. The judge then excused the witness and relied on the credibility of the witnesses in finding in favor of the landlord.

The tenant, on appeal, assigned error to the trial court's decision to admit evidence of a criminal conviction for purposes of impeachment of a witness where more than 15 years had elapsed since the date of the conviction, in violation of OEC 609. The court of appeals, citing *State v. Loving*, 290 Or. App. 805 (2018), found that though the error was not preserved below, where the error is one of law, the error is apparent, and the error appears on the face of the record, it is nevertheless reviewable under the plain error doctrine. Accordingly, the court held that the trial court committed plain error by admitting evidence in violation of OEC 609 because the conviction used for impeachment was 25 years old.

Citing to *Ailes v. Portland Meadows Inc.*, 312 Or. 376 (1991), which set forth the factors a court is to consider in deciding whether to exercise its discretion in correcting plain error, the court of appeals found that when considering the totality of circumstances in the case, the ends of justice and the policies underlying the preservation requirement were better served by correcting the plain error below. Accordingly, the case was reversed and remanded.

Integrity Properties of Oregon, LLC v. Elkins, 293 Or. App. 152 (2018).
Nicholas C. Smith

LUBA Cases

Goal 3 Agricultural Land

In *Friends of Douglas County v. Douglas County*, petitioners appealed the county's approval of an application for a comprehensive plan designation amendment from Agricultural to Rural Residential with a corresponding zone change from Farm Grazing to Rural Residential. The subject property – 47 acres – includes oak savanna stands, a Goal 5 inventoried creek that drains to the North Umpqua River, and a Goal 5 inventoried, but not protected, wetlands. The property was used for rotational grazing through a lease agreement with a nearby ranch.

The county declared that the presence of oak savanna stands and wetlands on 43 acres of the property left the property "environmentally constrained" and the unconstrained four-acre portion was not "suitable for grazing." Based on these findings, the county determined that the property was not "agricultural land" as defined by OAR 660-033-0020(1).

Petitioners argued that nothing in OAR 660-033-0020(1)(a)(B) allows the county to exclude, due to the presence of oak savanna stands or wetlands, "land in other soil classes" from consideration regarding whether it is "suitable for farm use." Petitioners further argued that identifying those lands as "environmentally constrained" had no basis in OAR 660-033-0020(1)(a)(B), and that the county's conclusion that those portions of the property are "environmentally constrained" for farm use was not supported by substantial evidence in the record where the property was used for grazing.

Intervenors argued that the "environmental constraints" identified are relevant to the consideration of whether a property is "suitable for farm use" under OAR 660-033-0020(1)(a)(B) and that the county was correct in only considering the four acres that are free of oak savanna or wetlands in determining whether the property is "suitable for grazing."

LUBA agreed with petitioners that the county improperly construed OAR 660-033-0020(1)(a)(B) when it failed to consider whether the 43 acres of the property that included oak savanna stands and wetlands are "suitable for farm use." In this case, the oak savanna stands were not included on the county's Goal 5 inventory. The wetlands were on the Goal 5 inventory but were not identified as protected wetlands. Further, neither the county nor intervenors pointed to any regulations that prohibit use of the property for grazing as it has been used.

LUBA remanded the decision to the county to determine, consistent with OAR 660-033-0020, whether the property is agricultural land that is "suitable for farm use."

Friends of Douglas County v. Douglas County, LUBA No. 2018-052 (Sep. 12, 2018).

Streambank and Floodway

In *Meyer v. Jackson County*, LUBA affirmed a hearings officer's decision approving a project intended to prevent further erosion of a streambank located along the subject 1.5 acre parcel.

In 2005, a significant amount of streambank along Bear Creek washed away. Several homes within intervenor's mobile home park, including intervenor's own home, were threatened by this change in the streambank. Intervenor filed a joint application with the United States Army Corps of Engineers and the Oregon Department of State Lands to install streambank protection measures on the property to stabilize the eroding streambank. Instead of sending the requisite land use compatibility statement to the county, DSL sent the form to the City of Talent to process. The city issued a LUCS for the proposal and then all necessary state and federal permits were obtained.

In 2017, it was discovered that county review and approval was necessary for the streambank project. County staff denied the application under standards applicable to "alteration of a watercourse."

The hearings officer agreed with county staff that the project involved "alteration of a watercourse" but found that intervenor complied with the applicable standards. The hearings officer rejected petitioners' argument that the project was subject to floodway development standards. Petitioners appealed the hearings officer's decision to LUBA.

On appeal to LUBA, petitioners argued that the hearings officer erred in finding that the application was not subject to the development-within-a-floodway standards. Petitioners argued that because the project involved development in the channel of Bear Creek and, hence, the floodway, floodway development standards should apply. The hearings officer found that the riprap, instream barbs, and fill that were part of the streambank protection project were placed entirely outside the floodway of Bear Creek as depicted on the flood insurance rate maps and therefore the floodway development standards did not apply to the project.

LUBA held that where the FIRM designates the location of the floodway, county regulations governing the floodway apply only to those designated locations, unless and until the county applies the regulations more expansively. In this case, the county had not expanded application of the floodway development standards and LUBA affirmed the county's decision.

Meyer v. Jackson County, LUBA No. 2018-056 (Aug. 31, 2018).

Rebekah Dohrman

2018 Legislative Updates

Real Estate Updates

Real Estate Legislative Subcommittee chaired by Pat Ihnat

HB 4007 (Ch. 109): First Time Homebuyers Savings Account

A first-time homebuyer may establish a savings account for the purchase of a single-family residence to be owned and occupied as the account holder's principal residence. Individuals who file joint income tax returns may establish a joint savings account. Funds contributed to the account may be used for "eligible costs" such as down payment and allowable closing costs listed as disbursements on the buyer's closing statement.

The account holder is entitled to subtract a portion of the account deposits from federal taxable income for the year in which the deposits are made. Interest earned on the deposited funds is exempt from tax. These favorable income subtraction and interest exemption benefits are capped by limitations set forth in the new statute, which vary based on adjusted gross income for the tax year during which the deposits are made. Income subtractions and interest exemptions may not be carried forward to subsequent years. Although other persons may deposit funds into the account, the account holder is not entitled to favorable tax benefits for deposits made by others.

Favorable tax treatment is available to an account holder for a period of 10 years.

During the 10-year period, the total of principal deposits and interest earned may not exceed $50,000. Funds must be expended for the purchase of a home by December 31 of the last year in the 10-year period or be subject to federal income tax if in a previous tax year, the account holder claimed the income subtraction or interest exemption benefits on an income tax return. Except for events such as death, bankruptcy, or disability, funds withdrawn from the account and not used for the purchase of a home are subject to a 5 percent penalty assessed by the Department of Revenue.

Financial institutions are not obligated to open first-time buyer accounts. Those who do must send the account holder an annual certificate by January 31 of each year showing, among other things, amounts contributed, interest earned, amounts withdrawn, and any other information required by Department of Revenue rule.

The new first-time homebuyer savings account provisions apply to tax years beginning on or after January 1, 2019, and before January 1, 2037, and to accounts opened before January 1, 2027.

Recording fees charged and collected by county clerks increased by $40 per document. Specifically, this increase tripled the portion of the recording fee allocated to the Housing and Community Services Department and dedicated to housing-related programs. The increased recording fee became effective on June 4, 2018.

HB 4048 (Ch. 92): Real Estate Licensee Education; Long-Term Care Providers and Licensed Property Manager

This bill established a new education requirement for principal real estate brokers. The new 27-hour Principal Broker Advanced Practices Course must be completed by a principal real estate broker renewing an active license for the first time on or after July 1, 2019. Any principal broker whose first renewal was inactive must also take the course in order to reactivate the license for the first time on or after July 1, 2019.

An amendment to the bill, unrelated to broker education, added provisions related to elderly housing. The new law specifies that the Oregon Housing and Community Services Department may not require an elderly housing project to hire a licensed real estate property manager, real estate broker, or principal real estate broker if the elderly housing project has repaid in full the financing received through a Housing and Community Services Department housing program and has retired any bond obligations related to the project. "Elderly housing project" means a residential care facility that does not provide continuous nursing care, including an assisted living facility or independent living community. These elderly housing–related provisions became effective April 10, 2018.

HB 4134 (Ch. 35): Procedure for Removal of Discriminatory Provisions From Title to Real Property

An additional legal procedure for removal of discriminatory restrictions from the title to real property was added to Oregon Revised Statutes Chapter 93. ORS 93.270 originally became law in 1973 and provides that certain discriminatory restrictions in instruments of conveyance are prohibited, void, and unenforceable. In 1991, ORS 93.272 became law, and provides a legal procedure for removal of discriminatory restrictions by the filing of a petition in circuit court, service of the petition on all owners of record as provided in ORCP 7, and entry of a judgment "removing the provision from title to the property."

HB 4134 added another legal procedure for removal of discriminatory restrictions, and applies only to restrictions based on race, color, religion, sex, sexual orientation, national origin, or disability. The new procedure applies to instruments of conveyance and declarations recorded under ORS 94.580.

Under the new procedure, the petition filed in circuit court is not required to be served pursuant to ORCP 7 and may be served on all owners of record by registered or certified mail. The petitioner must submit to the court an affidavit certifying that the petitioner made a good faith effort to provide notice of the petition to all owners of record. If no one requests a hearing within 20 days, and if the court finds that the restriction violates ORS 93.270, the court "shall enter a judgment removing the provision from the title to the property." Both the existing statute, ORS 93.272, and HB 4134 prohibit the courts from charging filing fees for petitions to remove discriminatory restrictions. It took effect March 16, 2018.

Land Use Updates

Land Use Legislative Subcommittee chaired by Will Rasmussen

HB 4006 (Ch. 47): Rent-Burdened House Supply Reporting for Cities

Cities must complete a survey developed by Oregon's Housing and Community Services Department if the city has a population over 10,000 and more than 25 percent of the city's renters are in households that are severely rent burdened. "Severely rent burdened" is defined as households that spend more than 50 percent of household income on gross rent for housing. The survey form will request information from the city related to:

- City actions taken to increase affordability of housing;
- Additional actions considered by the city to reduce rent burdens for severely burdened households; and
- Other information related to the affordability of housing in the city.

Cities with more than 25 percent of renters in severely rent burdened households must also hold a public meeting to discuss the causes and consequences of severe rent burdens within the city.

HB 4031 (Ch. 15): Land Use Omnibus Bill – Continued Guest Ranches, Metolius TDOs, and Rural ADUs

Guest ranches of a limited size have been allowed in parts of Oregon since 1997 as a way for ranchers to supplement their income. The most recent statute authorizing guest ranches sunsetted in January 2018. HB 4031 reauthorizes guest ranches. The guest ranch must be:

- Incidental to a continuing livestock operation for cattle, sheep, horses, or bison;
- On a legal lot of at least 160 acres;
- On farm use land not designated high-value farmland;
- In eastern Oregon;
- Subject to county siting standards;

- Limited to four to ten guest lodging units in a lodge, bunkhouse, cottage, or cabin; and
- Limited to 12,000 square feet in floor area, excluding areas used for kitchen, restrooms, storage, and other shared or common areas, unless the ranch is over 320 acres.

In addition to food services for guests, guest ranches may provide accessory passive recreational activities such as hunting, fishing, hiking, biking, horseback riding, and swimming. Golf courses are prohibited. The guest ranch provisions of HB 4031 sunset in April of 2020.

ORS 197.416 prohibits the siting of destination resorts in the Metolius River Basin. As part of the legislative tradeoff that led to the prohibition, certain Transfer Development Opportunities were authorized for persons who otherwise would have been able to develop a destination resort in the basin. The TDOs enable the establishment of small-scale recreational communities elsewhere in the state in lieu of Metolius Basin development. HB 4031 makes certain modifications to the TDOs' methodology to enable a developer to pursue a TDO recreational community in Bradwood Landing in Clatsop County. The amendments addressed the potential need for a Statewide Planning Goal exception and authorization to develop in non-conservation designated estuarine resource areas.

SB 1051 (2017) required cities and counties to allow the development of an accessory dwelling unit in areas zoned for single family residential use, such as in rural residential areas, subject to certain health and safety limitations. HB 4031 restricts the scope of application for the requirement to allow ADUs only in those areas "within the urban growth boundary." The requirement that ADUs be allowed on certain residential land no longer applies outside of urban growth boundaries.

HB 4124 (Ch. 117): Changes to Local Jurisdiction Hearing Requirements for Certain LUBA Remands

Prior to HB 4124, a county's governing body had to conduct the local land use hearing for decisions remanded from LUBA for lands designated under a statewide planning goal addressing agricultural lands or forestlands. HB 4124 allows county governing bodies to designate planning commissions or hearings officers to perform initial hearings on LUBA remands related to agricultural lands or forest lands. In such remands, the county governing body retains authority to review local hearings on remand and issue final decisions related to local decisions on remand.

HB 1533 (Ch. 109): Equine-Related Therapeutic Facilities on Agricultural Land

HB 1533 adds equine and equine-affiliated therapeutic and counselling activities to the list in ORS 215.213 of allowed uses in the exclusive farm use zones, subject to certain requirements. Buildings used in conjunction with such use must have been constructed prior to HB 1533's effective date or be a new building that is accessory, incidental, and subordinate to the farm use on the tract. Persons performing such therapeutic or counselling activities must do so within the scope of any licenses required by the state.

HRJ 201: Constitutional Referral Removing Prohibition on Certain Housing Bonds

Section 9, Article XI of the Oregon Constitution prohibits counties, cities, and other municipal corporations from raising money for, or loaning credit to, any company or corporation. This prohibition has been interpreted to bar cities and other municipal corporations from issuing bonds to build affordable housing if that housing is to be subsequently owned or managed by a non-public entity. This referendum to the voters of the state would authorize cities and other municipal corporations to issue bonds to construct affordable housing if:

- The bond is approved by the voters in that municipal jurisdiction;
- The measure approving the bond describes the affordable housing proposed;
- Annual audits and public reporting related to the bond are provided; and
- The principal expended for affordable housing bonds does not exceed one-half of one percent of the real market value of all property in the jurisdiction.

Cases From Other Jurisdictions

Recycling Plant Protected by "Right to Farm" Law

A Georgia appellate court recently reviewed a suit for nuisance and negligence against a paper recycling plant that mixed used paper with virgin fiber to make tissues, towels, and napkin products. The case was brought by a family, the Ratners, who moved into a subdivision near the plant, which had been operating for years. The plant removed printers' ink, talc, and other materials from recycled paper and placed them in a sludge that was treated with bacteria that gave off a "rotten eggs" odor. This process meets federal and state environmental standards – although, of course, there is no federal or state regulation for rotten egg odors. Despite the plant's steps to reduce the order, including replacing HVAC systems and periodic removal of the sludge for agricultural application, the Ratners were not satisfied and brought the instant suit. Both sides filed summary judgment motions. The trial court granted the plant's motion on trespass and granted the Ratners' motions on the nuisance claims. Both sides appealed.

The appellate court surveyed Georgia's "right to farm" statutes and various definitions of "forest products." The "right to farm" statute contained a purpose to protect the state's farm and forest industries from losses by limiting the circumstances in which nuisance suits may be brought. The law prohibited public or private nuisance suits based on changed circumstances relating to "agricultural support facilities" that had been used for a year or more. Those facilities specifically included forest products processing plants, together with related or ancillary facilities. The court found those statutes ambiguous, but combining the stated purpose of those statutes with the broad definition of "forest products processing plant," including the ancillary sludge facility, the court was convinced the state legislature intended to include this facility as protected from nuisance suits.

Turning next to the negligence claim, which would exempt from nuisance protection those facilities operated improperly or negligently, the court found no reason to withdraw that protection. The plant operated within environmental regulations and did not require a permit for the smell it emitted. The court concluded there was nothing the plant could do to reduce the harm. Moreover, the "unreasonable risk of harm" was not met in any event, given these circumstances, as well as Ratner's additional circumstance of moving to the nuisance, which, though not dispositive, is a factor in calculating such unreasonable risk. The court reversed the grant of summary judgment to the Ratners and denial to the plant on the nuisance, negligence, damages, and attorney fees portion of the case and affirmed summary judgment on the trespass ground.

This case illustrates the importance of statutory language in "right to farm" litigation, as well as the significance of the absence of regulation of odors. Oregon's Right to Farm Law (ORS 30.930 to .947) covers both farm and forest practices and is similarly broad. ORS 30.933(2)(b) provides that "Forest practices on lands zoned for the production of forest products must be protected" and Oregon's legislation generally prohibits local governments from declaring rural forest practices to be a nuisance, generally prohibits most nuisance suits against such practices, and does not require state agencies to consider complaints regarding nuisance or trespass if the forest practices (broadly defined in ORS 30.930(4)) are protected by the Right to Farm legislation. It is not clear whether the paper recycling operation would fall under this definition, but a timber operation could assert immunity under these statutes with a straight face.

Georgia Pacific Consumer Products LP v. Ratner, 812 S.E.2d 120 (Ga. App. 2018).

Edward J. Sullivan

QUINQUE

Quinque, Latin for five questions, is an occasional but regular series interviewing non-lawyers whose industries intersect those of *RELU Digest* readers. If you have suggestions for future *Quinque* profiles, please email the editors.

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1. *Tell the readers of the RELU Digest about your job.*

   I am outstanding in my field. Though I live on a 50-acre farm in Troutdale, my career is real estate brokerage. I've been flourishing by referrals since 1979. Two partners and I formed Realty Brokers and as they retired, several of my sons and daughters joined the company. We offer a wide range of real estate services, representing buyers, sellers, landlords, and tenants in the commercial and residential market in Oregon and Washington.

2. *What trends do you see in your industry with respect to real estate and land use?*

   I have served on business and government committees and participated in hours and hours of meetings regarding proposed changes to Portland's 2035 Comprehensive Plan. I've been very vocal trying to protect the interests of several of my clients and myself as a land-owner who will be affected by the new Comp Plan approved by the City Council in May. It is estimated that about 111 new residents join Portland each day so increasing density is critical for residential properties. Portland Maps has been valuable in helping us find Base and Overlay Zones, Ownership, land and building area, property valuations and sizes, permits, and more.

3. *Tell us your professional horror story.*

   Before Realty Brokers, Portland Maps, and Google, I worked for another real estate company. An associate there listed some acreage in Corbett and highlighted "the site." I found a cash buyer who wanted a home site and we walked the land as the listing broker had outlined. I wrote the sales agreement and escrowed the transaction. When the paperwork came back from the title company, an adjoining parcel of land was highlighted . . . about the same size, but STEEP and ROCKY with no flat land. I immediately confessed to the buyer and told him I would try to get the seller to release his purchase (NO WAY!) or I would buy it myself. The buyer was getting married that weekend and he had invited my wife and I to attend the wedding. Sheepishly we showed up. The groom introduced me to his guests, holding up the corrected plat map and a glass of champagne. He explained the problem and asked the crowd to toast the first land acquisition he and his wife would be buying together. They've bought and sold other properties since then through Realty Brokers, but still are hanging on to the cliff-hanger.

4. *Do you think the law helps or hinders your industry?*

   Though I complain about the massive paperwork all the laws and rules and regulations our Realty Brokers Team now is obliged to prepare for our buyers, sellers, tenants, and landlords, I'm grateful that our clients understand the disclosures, deadlines, and responsibilities.

5. *What one thing do you wish you could tell lawyers about interacting with you and your clients?*

   Lawyers: When you interact with Realtors and our clients, please advise us first if you uncover any mistakes or foresee any potential problems. We're not perfect and we hire you so we can get it right for our customers.