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Oregon Appellate Cases

Multiple Adjustments, Single Jurisdiction

Land can be configured in several ways in Oregon. ORS Chapter 92 allows land to be subdivided (that is, creating four or more units of land within a calendar year), partitioned (dividing a unit of land into three or fewer smaller units), or split anew through property line adjustments. A property line adjustment is "relocation or elimination of all or a portion of the common property line between abutting properties that does not create an additional lot or parcel." The legislature has given responsibility for determining the approval of property line adjustments to the appropriate local counties or cities.

Lane County's property line adjustment code has two distinct approval processes: a ministerial process; and a process requiring planning director review, which involves the planning director's legal interpretation and policy judgment. There are three types of applications subject to the ministerial approval process: LC 13.450(4)(a), which is for F-1 zoned parcels smaller than 200 acres each; LC 13.450(4)(b), which adjusts shared boundary lines between vacant properties; and LC 13.450(4)(c), which permits adjustment between properties where "a surveyor certifies that any property reduced in size by the adjustment is not reduced below the minimum lot or personal size for the applicable zone, and where the setbacks from existing structures or improvements do not become non-conforming or more non-conforming with the setback requirements." To qualify under this third ministerial approval process requires two verbatim statements from a surveyor regarding those setback requirements and minimum lot or parcel size. Any other proposals for property line adjustments are subject to planning director review.

A recent case from the Oregon Court of Appeals tackles both LUBA's jurisdiction over property line adjustments and whether multiple property line adjustments can be

reviewed under the ministerial approval process or must be subject to planning director review in Lane County. Verne Egge had a large piece of property that he wished to subdivide into nine property lines in a particular sequence, but under only one application. This proposal requested that the county approve adjustments to property lines that did not yet exist – and would not exist unless Egge's sequence were followed. The single application was submitted under the LC 13.450(4)(c) ministerial approval method and included the surveyor certification that the property reductions would not reduce any of the eight parcels below the minimum lot size and that the setbacks would not become non-conforming. Two months later the county ministerially approved Egge's application. Egge then recorded the property line adjustment deeds conforming to each approved property line adjustment.

Bowerman and Bowerman Family LLC appealed the county's approval to LUBA and argued first that the application was not eligible for ministerial approval and second that the county erred by allowing Egge to approve all of the nine property line adjustments at the same time rather than individually. Egge responded that LUBA lacked jurisdiction because the approval was merely a ministerial decision that did not involve the exercise of legal interpretation or policy judgment. LUBA rejected the jurisdictional challenge and agreed with Bowerman that the county had erred in approving the applications through the ministerial approval process. LUBA interpreted LC 13.450(4)(c) to require the county planning director to make an *independent* determination of whether the proposed property line adjustments would result in non-conforming setbacks, which would require a legal interpretation and the exercise of a policy judgment, and which would make the approval subject to LUBA review. LUBA also concluded that the county erred by approving the application in a *single* decision rather than sequentially, since some of the adjustments were to property lines that were not yet reflected in recorded deeds.

The court of appeals held LUBA erred in interpreting LC 13.450(4)(c) to require only the planning director to determine whether a proposed property line adjustment would result in non-conforming setbacks. Instead, the court found that the provision authorizes the planning director in advance to ministerialy approve property line adjustments based on the surveyor certifications. As such, the county code is "truly ministerial" and does not require legal interpretation or the exercise of policy judgment. However, the court nonetheless found that LUBA had jurisdiction because another section of the county code said that applications for multiple property lines had to be approved through the planning director process. That is, because Egge had filed a *single* application with multiple property line adjustments, the planning office had to make a legal interpretation as to whether the application was subject to approval through the ministerial process and could be approved in the context of a single application.

Next, the court addressed whether LUBA erred when it concluded that LC 13.450(4)(c) required the county to use the planning director review process to evaluate the application or whether it could permissibly work through the ministerial approval process. Again, the court concluded that LUBA's conclusion was correct, but not its analysis. The court found that LC 13.450(4)(c) is ambiguous as to whether a surveyor certification is enough, or whether the planning director must determine independently whether setbacks become non-conforming. Because the code uses the definite article "the" before the words "property line adjustment," the text indicates that the ministerial approval process applies only to applications for *single* property line adjustments. Therefore, the court held that the county code authorizes the planning office to ministerially approve a single property line adjustment based on the surveyor certification. Thus, the planning office did err by accepting the application through the ministerial approval process rather than the planning director review process.

Bowerman v. Lane County, 287 Or. App. 383 (2017).
Max Forer

Cases from Other Jurisdictions

Seventh Circuit Affirms Denial of Attorney Fees in Religious Use and Fair Housing Case

From Chicago and the pen of the soon-to-retire Judge Posner comes a discussion of attorney fees recovery. The case included claims under a state religious freedom law and the federal Fair Housing Act, both of which allow for attorney fees for successful claimants. A faith-based addiction treatment center in Blue Island, Illinois, entered into an agreement with an order of Catholic Sisters over the use of a property with several buildings. The buildings would be used for support services, meals, lodging, religious outreach, and medical and dental referrals. The agreement allowed the nuns to live in a residential area and collect rent for the remaining buildings that were converted to allow residential use, meals, and support services for men fighting drug and alcohol addiction. The City of Blue Island initially allowed the use and the facility staff (roughly a dozen adults) moved in. The following year, the Blue Island fire chief asserted that the use could not continue unless an expensive fire sprinkler system were installed. Although it had not yet secured the land use permits or installed the sprinkler system, the treatment facility nonetheless moved in 73 residents. The city council upheld the fire chief's interpretation and Affordable Recovery Housing brought suit, alleging the sprinkler system was not required under the city's safety code. The district court denied a preliminary injunction and the residents moved out. Four of the evicted residents died of overdoses before the State of Illinois stepped in and designated the site as a recovery facility, which in these circumstances meant that the facility did not need a sprinkler system. The district judge then granted Affordable's Motion for Partial Summary Judgment, but denied its motion to recover attorney fees because Affordable had not prevailed on its claims under the Illinois Religious Freedom Restoration Act.

On appeal, Judge Posner affirmed. The court found no evidence that the city's actions had "substantially burdened" Affordable's religious exercise. The expulsion of residents was instead attributable to the city's "honest concern with possible fire hazards." The same result would obtain under the Federal Religious Land Use and Institutionalized Persons Act, assuming that a safety standard were covered under that legislation. Under the circumstances, each party was obliged to bear its own attorney fees and costs under the "American Rule," rather than shifting those fees and costs to the city to pay.

Oregon Real Estate and Land Use Digest

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This case illustrates a judicial disinclination to allow discretionary attorney fees even if the plaintiff is correct on the law. Plaintiffs must still show a correlation with the underlying legislation and establish that they acted diligently as well as correctly.

Affordable Recovery Housing v. City of Blue Island, 468 F.3d 975 (7th Cir. 2017).
Edward J. Sullivan

Arizona District Court Refuses to Dismiss Cell Tower Lessor's Telecommunications Act Complaint on Standing Grounds

Sun State Towers, LLC v. County of Coconino was a suit brought under the Federal Telecommunications Act over the denial of a conditional use permit to build a tower and associated telecommunications facility. The county moved to dismiss the TCA claim, alleging the cell tower lessor did not have standing to bring the action. The county argued that because the lessor was not a provider of wireless services, but rather leased towers to wireless service providers, it did not suffer an invasion of a legally protected interest under the TCA's "effective prohibition of service" provisions. Finally, it alleged that the court lacked subject matter jurisdiction because there was no "case or controversy" to adjudicate.

There are three elements of standing: an injury in fact, or in other words an invasion of a legally protected interest that is concrete and actual or imminent rather than conjectural or hypothetical; a causal connection between that injury and the conduct complained of; and the court's ability to redress the injury if it reaches a favorable decision. A plaintiff must also show standing under the relevant statute. While a plaintiff has the burden of demonstrating standing, in a motion to dismiss, a court must accept all the allegations in the complaint as true and may allow a plaintiff to supply amendments or affidavits to supplement the complaint to establish standing.

After distinguishing standing from the viability of a cause of action, the Arizona District Court turned first to the statutory basis for the claim. The TCA provides a broad right of action to "any person adversely affected by any final action or failure to act by a state or local government" restricting wireless service and allows "any person adversely affected" to bring an action within 30 days. That language does not limit standing to wireless service providers, nor distinguish between wireless service providers and those who supply the infrastructure to such providers. The court found additional authority for that position in case law and in the history of the TCA, which demonstrated an effort to limit impediments to placement and construction of personal wireless service facilities and sought a rapid increase in the availability of wireless services. Thus, a plaintiff seeking to construct and lease a personal wireless service facility to wireless service providers is a fit plaintiff for TCA litigation.

Moreover, this plaintiff provided evidence of an "injury in fact" – in the form of a lease agreement with Verizon – to show it would suffer actual or concrete economic injuries arising out of the county's denial of the conditional use permit. These facts were sufficient to demonstrate that the lessor had standing to bring this action.

This case shows a fairly liberal view of standing under the TCA's strong policy to allow availability of personal wireless facilities across the country, so long as a plaintiff challenging a permit denial alleges the necessary facts.

Sun State Towers, LLC v. County of Coconino, 2017 WL 2984297 (D. Az. 2017).
Edward J. Sullivan

Short LUBA Summaries

Urban Growth Boundary Expansion for Third Bridge in Salem

In this appeal, petitioners and intervenor-petitioner challenge the city's approval of a third vehicular bridge over the Willamette River. The challenged decision 1) amends the Salem-Keizer regional urban growth boundary to add approximately 35 acres of land, some of which is located in Polk County and zoned exclusive farm use; 2) adopts an

exception to Goal 15 to site portions of the bridge within the Willamette Greenway; and 3) amends the Salem Area Comprehensive Policies Plan and the city's Transportation System Plan.

Petitioners volleyed a number of assignments of error at the city. Three of the assignments stuck and LUBA remanded the decision to the city to correct the population forecast number that it used and relied on and to adopt additional findings explaining 1) why the existing plan and zoning designations for the land subject to the Goal 15 exception satisfy OAR 660-004-0018(4)(a), and 2) whether it is lawful to defer determination of compliance with certain Willamette Greenway policies until the permitting stage.

Although not successful, petitioners also argued that the proposed bridge and the TSP amendments that result from the location of the bridge are not designed to meet the city's adopted benchmarks as required by OAR 660-012-0035(4). That rule provides that regional and local TSPs must be designed to achieve adopted standards for increasing transportation choices and reducing reliance on the automobile.

The city made findings that "OAR 660-012-0035(4) does not apply to specific transportation projects or to targeted amendments to a TSP." However, the city's findings identify adopted standards in the city's TSP, the SACP, and the Salem Revised Code that include measures to reduce reliance on cars, including zoning to locate more new dwelling units in close proximity to transit stops, locating more jobs in activity nodes, growth in ridesharing, and increases in non-motorized and transit improvements. The city also made findings that the proposed bridge will help achieve those adopted standards and reduce reliance on cars by including pedestrian and bicycle facilities on the new bridge with connections to off-bridge pedestrian facilities around the bridgeheads. Additionally, the city's findings identify improvements for bicycles, pedestrians, and vehicles that are planned for the new bridge, and transportation demand management and transportation system management assumptions. The city concluded that these findings demonstrate that the amendments comply with OAR 660-012-0035(4).

LUBA determined that the city's position – that OAR 660-012-0035(4) did not apply at all to the proposed TSP amendments – was incorrect. However, because the city went on to make findings to demonstrate that the project satisfies all of the applicable standards, and the decision is consistent with OAR 660-012-0035(4), petitioners' argument provided no basis for reversal or remand.

Deumling v. City of Salem, LUBA No. 2016-126 (Aug. 9, 2017).

Expansion of Destination Resorts & Goal 8 (Recreational Needs)

Intervenor-respondent Pine Forest proposes to expand the Caldera Springs Resort, a destination resort located on a 390-acre tract which includes 320 single-family residence home sites and recreational facilities. On remand from the Oregon Court of Appeals, the issue in this decision is whether lock-off rooms qualify as overnight lodging units, as defined by ORS 197.435(5)(b), and whether they can be counted in the ratio to satisfy ORS 197.445(4).

ORS 197.445(4) requires that a destination resort provide 150 separate rentable units for overnight lodging and that residences offered for sale may not exceed 2.5 residences for each such overnight lodging unit. To satisfy this requirement, the existing Caldera Springs Resort relied on 38 privately owned cabins containing a total of 150 lock-off bedrooms. The original proposal counted the 150 bedrooms as separate rentable OLUs. In reality, the privately-owned cabins are 5-bedroom houses wherein each of the 5 bedrooms has its own bathroom and a door that locks from the inside and outside. In the history of Caldera Springs Resort, a single lock-off bedroom has never been rented separately from the other bedrooms in the cabin.

The expansion proposal also relies on the existing 150 OLUs and proposes approximately 10 more to expand the resort onto 490 more acres. The expansion would consist of up to 395 new single-family homes to be offered for sale, and an additional 95 OLUs to satisfy ORS 197.445(4). The proposed 95 OLUs would be similar lock-off bedrooms as used in the first phase of the destination resort.

In its initial decision, LUBA held that the cabin lock-off rooms did not qualify individually as OLUs and could not be relied upon to comply with ORS 197.445. The court of appeals held that LUBA misconstrued parts of the statute but did not hold that LUBA's decision was incorrect. Rather, the court directed LUBA to revisit the issue of whether

the lock-off rooms could be considered *separate* OLUs, under a correct interpretation of the relevant statues. LUBA remanded the decision to the county to make additional findings to address the factors provided in the court of appeals decision and to support the determination that the lock-off bedrooms should be counted as separate OLUs.

Central Oregon Landwatch v. Deschutes County, LUBA No. 2016-065 (July 12, 2017).
Rebekah Dohrman

Legislative Highlights

New Land Use Laws

City Powers Laws

Affordable Housing Omnibus Bill

SB 1051 streamlines the application process and restricts denials of applications for affordable and market rate housing to encourage residential development within urban growth boundaries. Expedited review of affordable housing applies to cities (5,000 people or more) and counties (25,000 people or more) that are reviewing applications for development of a multifamily residential building containing five or more residential units. If the qualifying applications contain at least 50 percent affordable housing units and are subject to a covenant to maintain affordable housing, the city must complete its review, including local appeals, within 100 days. Affordable housing is defined as housing that is affordable to households with incomes equal to or less than 60 percent of the median family income in that area.

The bill restricts the city or county's ability to deny applications for housing developments if they comply with clear and objective standards, including design standards. The restriction does not apply if the applicant elects discretionary review under ORS 197.307(6) or is within a qualifying area within Metro pursuant to ORS 197.307(5). The bill also prohibits the city or county from reducing the density (and height as it affects density) on applications if it is at or below the authorized density level and at least 75 percent of the floor area applied for is reserved for housing, unless a reduction is necessary to resolve health, safety, or habitability issues. "Authorized density level" means the maximum number of lots or dwelling units or the maximum floor area ratio that is permitted under local land use regulations. In addition, cities of 2,500 people or more and counties of 15,000 people or more must permit at least one accessory dwelling per each detached single-family dwelling "in areas zoned for detached single-family residential dwellings." The bill expands religious institutions' ability to use real property to include housing so long as it 1) is detached from the place of worship, 2) contains at least 50 percent affordable housing subject to a covenant maintaining such housing, and 3) is zoned for residential use within an urban growth boundary.

City Amendments to Comprehensive Plan Map

HB 3245 allows a city to authorize a planning commission or hearings officer to make amendments to the city's comprehensive plan map. Anyone who participates or appears in the proceedings of the planning commission or the hearings officer may appeal to the city's governing body to review final decisions. HB 3245 does not apply to plan map amendments that require a goal exception, relate to forest and agriculture designated land, and propose expansions of an urban growth boundary.

Designation of Vertical Housing Zones

SB 310 provides expanded local control for the designation of and tax exemptions within vertical housing zones. It permits local city and county governments to designate vertical housing development zones within their own

jurisdictions. The bill removes the Oregon Housing and Community Services Department from the designation and certification process and creates requirements for certification of vertical housing development projects.

Periodic Review of Housing Needs for Small Cities

In response to *GMK Devs., LLC v. City of Madras*, 225 Or. App. 1 (2008), HB 2316 requires cities with a population of fewer than 25,000 people to estimate housing needs for the next 20 years, create an inventory of the supply of buildable lands, and adopt measures in order to accommodate the housing needs. These cities must establish a periodic or legislative review of a comprehensive plan that requires application of the statewide planning goal for increased housing.

Property Value Calculation

HB 2088 provides for a city to use the area of that city's boundaries to calculate the maximum assessed value of specified properties under ORS 308.149, as long as the majority of the population lives in a county with a population greater than 700,000 (that is, Multnomah County). The bill requires a public hearing and three-fifths majority approval by members of the city's governing body. Such changes may only occur once per five-year period.

Exclusive Farm Use Lands

Cider Business Permissions

SB 677 permits cider business use on EFU and mixed farm and forest use lands. This measure is closely modeled to the winery statute (ORS 471.223). It specifies what related uses are allowed at a cider business and authorizes up to 18 agri-tourism or other commercial events per year.

Increased Non-Farm Uses Permitted on EFU Lands

HB 2179 adds to the list of "nonfarm" uses permitted on EFU lands the treatment of reclaimed water, agricultural or industrial process water, or biosolids prior to land-based application. Eligible treatment systems must be portable, temporary, and transportable by a truck trailer.

Limit on Property Adjustments for Measure 49 Lots

HB 3055 establishes that, on a unit of land that was a result of a Measure 49 waiver, a property line adjustment cannot be used to increase the unit of land above two acres on high-value farmland or forestland or five acres on non-high-value farmland and forestland.

The Urban Growth Boundary Process

Changes to UGB Expansion Processes

SB 418 requires the Department of Land Conservation and Development to make decisions on sequential phases of work during certain UGB processes, when requested to do so by a city. This change applies to cities with a population of 2,500 or more that intend to add more than 50 acres to the UGB, or to requests related to needed housing specified under ORS 197.295 to 197.314. This bill establishes a 90-day timeline for DLCD's response and authorizes an appeal process.

Metro's Urban Growth Boundary

HB 2095 allows Metro to bring as much as 1000 acres of land into the UGB, without complying with boundary location requirements of the statewide planning goals, under the following conditions: 1) expansion is initiated at least three years after Metro's most recent review, 2) the expansion proposes needed housing, 3) each county has acknowledged urban and rural reserve designations, 4) the proposal is for expansion into urban reserves adjacent the city, and 5) Metro has entered into an IGA.

Miscellaneous Land Use Laws

Additional Meeting Location for Governing Bodies

SB 317 adds Indian Country to the list of locations where governing bodies of cities, counties, and the state may hold meetings, regardless of whether the body is meeting with a tribe.

LUBA Budget

SB 5528 appropriates a General Fund budget of $1,926,784 and an Other Funds expenditure limitation of $33,700 for LUBA. This was an increase of 6.1 percent in comparison to the 2015-2017 budget. SB 5528 was deemed necessary for the immediate preservation of "public peace, health, and safety" and therefore the Act took effect July 1, 2017.

Notification to Water Districts

SB 865 requires local bodies to give notice to affected irrigation, drainage, water control, and water improvement districts of proposed land divisions. Within 15 days of notice, the district may supply a report that identifies the facilities and resources available and potential impacts of the proposed division, as well as recommended conditions of approval. The local jurisdiction may include such conditions in the final approval.

Oregon Industrial Site Readiness Program Changes

SB 333 changes the income tax revenue waiting period to one year for sponsors who participate in the Oregon Industrial Site Readiness Program. The Oregon Business Development Department must obtain employment and wage information from eligible employers to determine the annual amount of estimated income tax revenues generated by the eligible employer and to obtain certification of these amounts. OBDD will consult with the Oregon Department of Revenue to administer the program.

Pilot Program for the City of Madras

HB 2743 establishes an Economic Development Pilot Program Fund. Madras owns 1,200 acres of land adjacent to its airport outside of its UGB. Business interest in utilizing the airport-adjacent land prompted the Oregon Legislature to create the Fund to implement a master plan for economic development on land near a rural airport. The pilot program will be reviewed and presented to the Legislative Assembly in 2022.

Publicly Supported Housing

HB 2002 requires publicly supported housing owners to provide notice to the local government and the Housing and Community Service Department two years before the property loses its status as publicly supported housing. If the property owner fails to provide notice as required, the property owner must extend the affordability restriction on the property for the number of months the property is in noncompliance with the notice provision. The bill also requires property owners to provide notice to the local government and the Housing and Community Services Department of the opportunity to offer to purchase a participating property at least 13 months prior to certain

actions that will result in withdrawal of the housing from publicly supported housing. These actions include but are not limited to refinancing the primary mortgage, entering into an agreement to sell the property, or withdrawing the property from public housing. This notice provision is intended to allow qualified purchasers an opportunity to purchase the property but the property owner is under no obligation to accept a qualified purchaser's offer.

Reclassification of Historic Homes into ADUs

HB 3012 permits counties to allow owners of property zoned for rural residential use to build a new single-family unit on the land and then convert an existing historic (pre-1945) home into an ADU. Among other restrictions, HB 3012 forbids subdividing the land and then constructing a new single-family unit apart from the ADU. Counties are authorized to require that both units use the same water supply.

Southwest Corridor MAX Light Rail Project

HB 3202 provides procedures and requirements for establishing criteria for siting of the Southwest Corridor MAX Light Rail Project. The initial decision would be made by the Metro Council, which would be appealable to LUBA and then directly to the Supreme Court.

The Land Use Legislative Committee (Will Rasmussen and Steven G. Liday)

New Real Estate Laws

Appraisers

Appraiser Licensing

HB 2279 establishes that the Department of Revenue has sole responsibility for setting education and experience requirements for applicants seeking to take the appraisal exam, administering the exam, registering (licensing) appraisers, and establishing continuing education requirements. It also allows the DOR to revoke an appraiser's registration for cause.

Limitations Period

HB 2189 provides that an action arising out of real estate appraisal activity must be commenced before the earlier of the applicable period of limitation otherwise established by law or six years after the date of the act or omission. The six-year limitation period does not apply to actions based on fraud or misrepresentation, which continue to be subject to the two-year discovery rule set forth in ORS 112.110(1).

Foreclosures

Foreclosure of Residential Trust Deeds by the Department of Veterans' Affairs

SB 79 modifies the prerequisites for judicial and non-judicial foreclosures of residential trust deeds with respect to loans in which the Director of Veterans' Affairs is a beneficiary under ORS 407.125. Instead of having to record or attach to a complaint a certificate of compliance with the resolution conference requirements, or an exemption from such requirements, the Director of Veterans' Affairs may record or attach to a complaint the Director's signed affidavit stating that the DVA, in the department's capacity as a beneficiary of loans made under ORS 407.125, is exempt from the requirement under ORS 86.726 to request or participate in a resolution conference.

Non-Judicial Foreclosure

HB 2359 deletes the requirement that a beneficiary send to the Attorney General a copy of the notice sent to a homeowner informing that the homeowner is not eligible for a foreclosure avoidance measure or that the homeowner has not complied with terms of the foreclosure avoidance measure.

Satisfactions of Money Awards in Foreclosure

If a judgment of foreclosure results in an execution sale of real property, HB 2920 imposes a requirement that the judgment creditor file a full or partial satisfaction upon receipt of the execution sale proceeds. If, after notice, the judgment creditor fails to file the satisfaction, the debtor may file a motion to compel satisfaction under ORS 18.235. If the judgment creditor does not show that failure to file the satisfaction was not the fault of the creditor, the court may enter a supplemental judgment for attorney fees in favor of the judgment debtor.

Lenders and Mortgage Loan Servicers

Mailing Notices of Real Estate Loans

Many documents related to real estate loans are required to be mailed to borrowers in hard copy, including payoff statements, requests for resolution conferences, notices of noncompliance with, or ineligibility for, foreclosure avoidance measures, notices of default, and notices of trustee sales. Existing law specifies the documents are to be mailed to the address on file. SB 381 specifies that the documents must be mailed to a post office box if that is the address on file for the borrower, and requires that certain notices relating to real estate loans be mailed to all addresses on file for the recipient, including post office boxes.

Residential Mortgage Loan Servicers

SB 98 creates a new Mortgage Loan Servicer Practices Act comprised of comprehensive statutes authorizing the Department of Consumer and Business Services to license and regulate residential mortgage loan servicing. The new law prohibits any individual or business entity from directly or indirectly servicing a residential mortgage loan without first obtaining a license under the Act. It also requires that individuals or entities holding a different license from DCBS obtain a separate license as a residential mortgage loan servicer.

The Act applies to servicing of a "residential mortgage loan," which means a loan secured by a mortgage, a deed of trust, or an equivalent consensual security interest in one-to-four family real property. "Servicing" activities include 1) receiving a scheduled periodic payment from a borrower under the terms of a residential mortgage loan, including escrow payments in accordance with the RESPA; 2) paying principal, interest, or other amounts to a lender or other person in accordance with a servicing agreement; and 3) paying an amount to a borrower, if the residential mortgage loan is a reverse mortgage.

With certain exceptions, the new licensing requirement will not apply to the following:

a. A person, or an affiliate of the person, that in all operations within the United States during the calendar year services fewer than 5,000 residential mortgage loans, excluding loans that the person or the person's affiliate originates or owns.

b. A financial institution, as defined in ORS 706.008.

c. A person who has obtained a license under ORS 725.140 (consumer finance).

d. A financial holding company or bank holding company, if the financial holding company or bank holding company does not do more than control an affiliate or a subsidiary, as defined in 12 U.S.C. § 1841(d), and does not engage in business as a residential mortgage loan servicer.

e. An attorney who is licensed or otherwise authorized to practice law in this state if the attorney services the loan as an ancillary matter while representing a client and does not receive compensation from a residential mortgage loan servicer.
f. An agency or instrumentality of Oregon or the United States.
g. A housing finance agency, as defined in 24 C.F.R. § 266.5.
h. An institution that the Farm Credit Administration regulates.
i. A person that the DCBS designates by rule or order as exempt, including but not limited to a nonprofit organization that promotes affordable housing or financing.

Licenses must be renewed annually. A licensee may not service a residential mortgage loan during a period in which the licensee has applied to reinstate a license unless DCBS has given conditional approval to the licensee.

A licensee must maintain sufficient liquidity, operating reserves, and tangible net worth. DCBS may specify by rule the financial adequacy requirements. Approval of a licensee by Fannie Mae, Freddie Mac, or Ginnie Mae, and compliance with liquidity, operating reserve, and tangible net worth requirements of Freddie, Fannie, or Ginnie constitutes compliance with Oregon financial adequacy requirements. DCBS may take possession of a licensee's property, business, and assets located in Oregon if the licensee fails to meet the financial adequacy requirements, until the licensee returns to compliance with those standards. DCBS may apply to the court for an order appointing a receiver to take possession of, operate, or liquidate the licensee's assets. The court may appoint the director of DCBS as the receiver.

The Act gives DCBS broad authority and powers over licensed individuals and entities. DCBS also has power to issue cease and desist orders or request a court order enjoining non-licensed servicing activities. DCBS is authorized to examine a licensee at any time and may charge and collect costs incurred in conducting the exam. Books, accounts, papers, records, files, correspondence, contracts and agreements, disclosures, documentation, and other information, material, or evidence DCBS obtains in an examination are confidential and subject to the provisions of ORS 705.137, except that a borrower may request to inspect material related to the borrower's residential mortgage loan that DCBS by rule specifies is available for inspection. DCBS is authorized to investigate complaints against servicers at the servicer's cost, to issue cease and desist orders, and to order reimbursement or payment of damages to the borrower. DCBS may impose a civil penalty under ORS 183.745 in an amount of not more than $5,000 for each violation, but may not impose a penalty that exceeds $20,000 for a continuous violation.

Reverse Mortgage Notices

HB 2563 requires the lender under a reverse mortgage to send annual notices to borrowers or to any servicer paying property taxes from escrow. This notice must be sent at least 60 days before property taxes are due to inform the borrower that the borrower retains title to the property and the borrower is responsible for paying property taxes, insurance, maintenance, and related taxes, and that failure to pay the taxes and fees may cause the reverse mortgage to become due immediately (unless the reverse mortgage includes a reserve account for taxes). Under existing law, financial institutions as defined in ORS 706.008, and consumer finance brokers/facilitators, and licensed mortgage bankers and mortgage brokers are exempt from the notice requirement.

Manufactured Homes

Manufactured Home Parks

HB 2008, which amends ORS 62.809, 62.813, 90.643, and 90.645, increases the termination fees landlords of manufactured home parks must pay tenants upon closure of a park or conversion to another use. It also requires the Office of Manufactured Dwelling Park Community Relations to recalculate these amounts annually, requires the owner of a manufactured home park to notify the CRC of certain information upon sale, transfer, or exchange of

a manufactured home park, and specifies requirements for transferring manufactured homes from a member of a manufactured dwelling park nonprofit cooperative.

Rental Spaces

SB 277 increases the notice period from 30 to 60 days for landlords wishing to terminate month-to-month or fixed-term rental agreements, and requires removal of a deteriorating manufactured dwelling or floating home. Deterioration includes collapsing or failing staircases or railings; one or more holes in walls or roof; inadequately supported window air conditioning units; falling gutters, siding, or skirting; peeling or fading paint; and other conditions that indicate disrepair or that create a safety hazard. SB 277 allows a landlord to terminate a rental agreement with 30 days' written notice to the tenant if a manufactured dwelling or floating home creates a risk of serious or imminent harm. Finally, SB 277 allows a landlord to terminate a rental agreement within 6 months of new tenant occupation (after proper notice) if the tenant fails to complete repairs.

Planned Communities/Condominiums

Solar Access for Residential Real Property

HB 2111 prohibits a planned community from banning installation and use of solar panels in its declaration or bylaws. It also allows an owner to petition for removal of such provisions from existing documents, as provided in ORS 93.272, and authorizes homeowners' associations to adopt and enforce provisions that impose reasonable size, placement, and aesthetic requirements for installation or use of solar panels.

Child Care Use

HB 3447 prohibits real estate conveyance instruments and governing documents of planned communities and condominiums from including provisions that restrict use as a certified or registered child care home or as an exempt family child care provider receiving certain subsidies. Homeowners' associations may restrict a registered or certified family care home from sharing a common surface with another unit, but an exempt family care provider is permitted even when it shares a wall, floor, or ceiling with another unit. The prohibition does not apply to condominiums or planned communities that provide "housing to older persons" as defined by ORS 659A.421(7)(b).

Homeowners' association may adopt reasonable rules that govern parking, noise, odors, nuisance, or use of common spaces, so long as the rules do not have the effect of restricting the use of properties as exempt child care providers or as certified or registered family child care homes. These restrictions apply to instruments conveying fee title executed on or after January 1, 2018, and to association governing documents and guidelines adopted on or after January 1, 2018.

Homeowners' Association Finances

HB 3057 requires homeowners and condominium association boards to consider specified information when conducting annual review of reserve accounts, including current balances, estimated expenses, rate of inflation, and actual returns on investments. It extends the time within which an association must deliver its financial statement for review by an accountant from 180 days to 300 days after the end of the fiscal year for large associations and, for smaller associations, 300 days after receipt of a petition signed by a majority of the homeowners.

Housing Association Governing Documents

HB 2722 makes void and unenforceable any provision of condominium or planned community governing documents that impose irrigation requirements while any of the following is in effect: 1) a declaration by the Governor that drought exists or is likely or occur, 2) a finding by the Water Resources Commission that severe or continuing

drought exists or is likely to occur, 3) a requirement of the governing body that imposes conservation or curtailment of water use, or 4) adoption of an association rule to reduce or eliminate irrigation water use. It authorizes associations for planned communities or condominiums to adopt rules that require the reduction or elimination of irrigation on any portion of the planned community, and to permit or require the replacement of turf or other landscape vegetation with xeriscape.

Liens of Owners' Associations

Oregon law provides that when a homeowners' association in a planned community or a condominium levies an assessment, that assessment is a lien against the real property to which the assessment applies. Several remedies exist for the association, including an action to obtain a money judgment, foreclosure of its lien, or acceptance of a deed in lieu of foreclosure. HB 3056 amends ORS 94.709 of the Planned Community Act and ORS 100.450 of the Oregon Condominium Act to clarify that an association may obtain a money judgment for unpaid assessments without extinguishing its lien, that a partial satisfaction of the money judgment does not extinguish the lien, and that a full satisfaction of the money judgment does not extinguish any portion of the association's lien that is unrelated to the amounts awarded in the judgment. Payment of the judgment will extinguish the lien, or a portion of the lien, but only to the extent of the amount received.

Special Declarant Rights

A declarant of a condominium or planned community generally will create special declarant rights in addition to the rights normally held by homeowners. These rights include weighted voting, exemptions from architectural review, the ability to appoint interim directors, the ability to add or withdraw property, and the right to control the association before turnover to the homeowners. In many cases, the declarant will transfer its special declarant rights to a successor. HB 3059 clarifies that any rights held by the original declarant are extinguished when the special declarant rights are transferred; the rights cannot be revived automatically; and the rights may be recovered only by an instrument evidencing an intent to convey the special declarant rights back to the original declarant.

Property Tax Laws

Abatement of Additional Taxes upon Termination of Lease

HB 3171 modifies instances when additional taxes are not imposed upon leased public property disqualified from special assessment when the reason for disqualification is termination of the lease under which the land was assessed. It also clarifies that the time of disqualification means the date on which the lease was terminated.

Disqualification of Forestland Tax Assessments

HB 2281 changes the timing of forestland disqualification to occur as of the January 1 assessment date of the assessment year in which the discovery occurs. The disqualification process is not changed. The county assessor must mail notice of disqualification prior to August 15 of the tax year. This will apply to land disqualified as forestland on or after January 1, 2018.

Property Tax Refunds Crediting

HB 2277 requires a county governing body to credit property tax refunds first to the total tax liability account of the person to whom the refund is owed. Upon request of the owner, and with approval of the tax collector, a county governing body may authorize a credit of a refund to the total tax liability of the account of the requester and, in instances where a refund credit remains, would allow the remaining refund to be credited to the total tax liability of any other account.

Seismic Retrofitting Costs Property Tax Exemptions

SB 311 authorizes a city or county to adopt an ordinance or resolution providing for an exemption or partial exemption from ad valorem property taxation for eligible property that will be seismically retrofitted.

Miscellaneous Laws

Delivery of Deed of Conveyance

HB 2855 adds new sections to ORS Chapter 93 that provide for a non-judicial method of transferring a seller's or vendor's title in the limited instance where a land sale contract has been fully paid, but the seller has failed to provide a fulfillment deed. This new law requires service of the buyer's/vendee's notice of intent to enforce the contract on the seller and other interested parties pursuant to ORCP 7 D (2) and 7D(3), as well as by first class mail certified with return receipt. If no objection is received within 30 days, the seller's interest in the real property will be transferred by publishing the required notice and recording an affidavit of compliance.

Demolitions and Hazardous Materials

SB 871 authorizes a city to establish a program for the demolition of residences or residential buildings, requires the Oregon Health Authority to establish a lead containment certification program in cities with a demolition program, and mandates that the Environmental Quality Commission establish procedures for conducting asbestos surveys under ORS 468A.757.

Electric Vehicle Charging Stations

HB 2510 authorizes a commercial tenant to install electric vehicle charging stations for use by the tenant or the tenant's employees or customers. A landlord may impose conditions on the installation, but may prohibit installation or use of a charging station only if the premises do not have at least one parking space per rental unit. A second bill authorizes a residential tenant to install and use a charging station for personal, noncommercial use. Under HB 2511, a landlord may prohibit installation only if the premises do not have at least one parking space per dwelling unit. These provisions do not apply to tenants in manufactured dwellings and floating homes.

Real Estate Agency Regulation

SB 67 removes the requirement that a real estate broker create a client trust account when the broker does not deposit clients' funds into the account but merely acts as a courier in delivery of a client's check to the payee. This bill also prohibits certain individuals from sharing compensation paid to a real estate licensee, and provides that a licensed property manager may not solicit a potential tenant unless the licensee has a written property management agreement with the landlord.

Receiverships

SB 899 establishes the Oregon Receivership Code to create uniform procedures for receiverships initiated in Oregon courts. Under this bill, a receiver must disclose conflicts of interest as well as carry a bond or any court-ordered alternative. A receiver must also obtain court approval before turning over residential real property. While the receiver must evaluate and continue or terminate existing contracts there is a specific court process for the termination of contracts and assumption of all burdens and benefits of continued contracts.

Recreational Immunity

SB 327 extends recreational immunity to employees, agents, and volunteers of a land owner when acting within the scope of their duties.

Seller's Property Disclosure of Seismic Risk

HB 2140 modifies the question on seller's property disclosure statements from "Was the house constructed before 1973?" to add a new "SEISMIC" question category with the following questions: "Was the house constructed before 1974? If yes, has the house been bolted to its foundation?"

Septic System Financing

SB 812 specifies that septic system loan funds may be used to conduct a regional evaluation of community on-site septic systems to determine whether repair or replacement is necessary.

Timeshares

SB 838 modifies the definition of "developer" and excludes persons who are not developers of timeshares from certain compliance requirements.

The Real Estate Legislative Committee (Patricia Ihnat, Rich Bailey, Alan Brickley, John Gibbon, Kyle Grant, Rob Lowe, Marisol McAllister, and Tim Zimmerman)

Spotlight

Water Drainage Cases

Even in this era of "fake news" and disagreement on any given set of facts, everyone can agree that gravity causes water to run downhill. The people in Oregon know that a lot of water falls from the sky and then runs downhill, which often causes problems for the properties below the original source. This article summarizes the common law principles of drainage.

There are two general lines of cases involving drainage. In the first, drainage from one private property to another allegedly causes damage, and the two individual owners are parties. The second line of cases come from allegations of inverse condemnation, where a private landowner is allegedly damaged by drainage because of actions of a city, county, or state agency.

Private Litigation

The facts of *Garbarino v. Van Cleave*, 214 Or. 554 (1958), are relatively straightforward. Defendants, the Van Cleaves, had constructed a drainage system on their land to direct and regulate drainage. Plaintiff Garbarino alleged that the system accelerated the flow of water onto her lands and damaged them. The appeal was from a judgment in favor the Van Cleaves, which was affirmed by the Oregon Supreme Court. In coming to this decision, the court reviewed and restated the basic principles regarding drainage.

Citing *Rehfuss v. Weeks*, 93 Or. 25 (1919), the court stated:

> The defendant as a landowner had the right to turn or expel, upon the land of an adjacent owner, surface water that would naturally flow there, and in such quantities as would naturally drain in such direction, without liability for damages. The owner of upper lands is not prohibited by the rule from cultivating his lands or draining them by artificial ditches, though the surface water is thereby precipitated more rapidly upon the lands of the adjacent owner below, provided he does not cause

> water to flow on such lands which, but for the artificial ditches, would have flowed in a different direction and provided he acts with a prudent regard for the interests of such adjacent owner. (Citations omitted)

The court responded to Gabarino's reliance on the "prudent regard" language from *Rehfuss*, as well as similar language from *Harbison v. City of Hillsboro*, 103 Or. 257 (1922), which states that flows may be accelerated, with "due regard being observed for the interest of the adjacent owner so as to cause no unreasonable inconvenience."

The court acknowledges that neither *Rehfuss* nor *Harbison* "give a clue" about the scope of limitations upon an upland owner's right to accelerate natural water flow, but then goes on to state that it was not necessary to decide that issue in the case, especially given findings of exceptionally heavy rainfall during the time cited in the complaint. While the case does not offer specific guidelines to resolve the questions raised, it does seem to provide adequate direction for future litigants.

Inverse Condemnation

Vokoun v. City of Lake Oswego, 335 Or. 19 (2002), is an example of an inverse condemnation case. The Vokouns purchased a home in the Red Fox Hills subdivision, which is north of Rocking Horse Lane. Their property slopes down and into a ravine at the bottom of a hill. The city built a storm drain that runs underground from Rocking Horse Lane along an easement near the western border of the Vokoun property. The outfall, located near the property's northwest corner, discharged the water into the ravine, then along the ravine to Tryon Creek.

Prior to the subdivision, the area drained to the storm drain consisted of approximately one acre. After the subdivision, about seven acres were drained. The additional water in the outfall caused severe erosion. The Vokouns notified the city of the erosion, which was extensive enough to have swallowed the northwest corner property marker. The city maintenance crew filled the erosion with chunks of asphalt but did not inspect to determine whether that had been sufficient to solve the problem.

In 1996, unusually heavy rain was followed by a landslide on the hillside where the Vokoun property was located. The landslide continued over the following months, resulting in a 4-foot drop in the land 9 feet from their house, and a 20-foot drop some 19 feet from the house. The landslide damaged a deck, which had to be removed, as well as many trees and a dog run. The Vokouns took remedial action to halt the landslide.

The Vokouns then filed an action against the city for inverse condemnation, alleging the city had taken the property by constructing a storm drain and outfall pipe that destabilized the soils, ultimately causing the landslide. At trial, the Vokouns offered expert testimony that the storm drain and outfall pipe were the cause of the erosion, which led to the landslide.

A jury found in favor of the Vokouns. The court of appeals reversed, holding that negligence would not support a claim of inverse condemnation, and that further the city was entitled to discretionary immunity under ORS 30.265. The Oregon Supreme Court reversed.

The high court stated: "This court has held that a claim for inverse condemnation requires a showing that the government acts alleged to constitute a taking of private property were done with the intent to take the property." However, the court held that the jury could reasonably infer from the evidence that the landslide was the "natural and ordinary (even inevitable) consequence of the city's construction of the storm drain in that manner." The court rejected the discretionary immunity defense because the city's response to the erosion problem was a "routine decision" made by city employees in the course of their day-to-day duties, and those actions did not qualify for discretionary immunity.

Alan Brickley