Cosponsored by the Real Estate and Land Use Section

Friday, April 27, 2018
9 a.m.–4:15 p.m.

5.75 Practical Skills credits
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## 6. An Update on the Law of Unconstitutional Takings

- 6–i
  - Wendie Kellington, *Kellington Law Group PC, Lake Oswego, Oregon*
  - Peter Livingston, *Beaverton City Attorney's Office, Beaverton, Oregon*
SCHEDULE

8:00   Registration

9:00   Closing and Escrow—The Basics
   ✦ Role of attorney, title company, and escrow agent in transactions
   ✦ Reviewing title reports and exceptions and responding to title objections
   ✦ Closing transactions and title policies
   Marisol McAllister, Farleigh Wada Witt, Portland

10:00  Options, Rights of First Refusal, and Rights of First Opportunity
   ✦ What they are, how they are created, and how they are used
   ✦ Examples of uses
   Jeffrey Tarr, Sussman Shank LLP, Portland

10:45  Break

11:00  Negotiating Leases for Brokers—The Landlord and Tenant’s Objectives and Perspective
   ✦ Premises and project definition and condition of delivery
   ✦ Construction issues
   ✦ Assignments and subleases
   ✦ Defaults
   Evan Lenneberg, Brix Law LLP, Portland
   Bradley Miller, Brix Law LLP, Portland

11:45  Lunch

12:45  Jurisdictional Issues in Land Use Appeals
   ✦ Statutorily defined land use decisions and exceptions
   ✦ Procedural issues that may limit right to appeal
   ✦ Post hoc actions that may moot appeal
   ✦ Interplay between circuit court and LUBA jurisdiction
   Scott Hilgenberg, Crag Law Center, Portland

1:30   Persuading the Local Decision Maker
   ✦ Practical tips for persuading the decision maker
   ✦ Legal traps for the unwary or uninitiated
   ✦ Navigating politics in the land use process
   Laurie Craghead, Attorney at Law, Bend
   Anne Davies, Lane Council of Governments, Eugene

2:45   Break

3:00   Takings and Exactions: Where Do Compensable Property Rights Begin and End?
   ✦ Per se, categorical, temporary, and partial takings
   ✦ The notice rule
   ✦ Unconstitutional conditions
   Wendie Kellington, Kellington Law Group PC, Lake Oswego
   Peter Livingston, Beaverton City Attorney’s Office, Beaverton

4:15   Adjourn
FACULTY

Laurie Craghead, Attorney at Law, Bend.

Anne Davies, Lane Council of Governments, Eugene. Ms. Davies focuses her practice on land use. She has represented applicants, opponents of development, and local governments. She has also served as a hearings official for local governments and the Oregon Department of Energy on land use matters. Ms. Davies is a past member of the Oregon Land Use Board of Appeals.

Scott Hilgenberg, Crag Law Center, Portland. Mr. Hilgenberg has been Crag Law Center’s Land Use Legal Fellow since April 2017. In September 2014, Mr. Hilgenberg became the staff attorney for Oregon’s Land Use Board of Appeals. Prior to that, he was an Aquatics Land Manager for the Washington State Department of Natural Resources. He is treasurer of the Oregon State Bar Real Estate and Land Use Section and contributes to publications for the Washington State Bar Association Administrative Law Section.

Wendie Kellington, Kellington Law Group PC, Lake Oswego. Ms. Kellington’s expertise is in administrative law, including real property development, private property rights, aerial rights, and the emerging law of unmanned vehicles. She represents clients seeking regulatory entitlements and assists clients in monitoring regulatory and legislative developments. She is a member of the Association for Unmanned Vehicle Systems International Cascade Chapter board. She also serves on the Oregon Unmanned Aircraft Systems Legislative Workgroup and as part of Oregon’s Integration Pilot Program team. She has served as a board member and chief referee at the Oregon Land Use Board of Appeals and as a member of the Oregon State Building Structures Board. Ms. Kellington is a member of the faculty of ALI CLE (formerly ALI/ABA) and teaches courses on land use and development rights, as well as all things unmanned. She is a frequent state and national speaker on a variety of topics, including private property rights, development, and navigable airspace. As well, she has written several articles for state and national publications.

Evan Lenneberg, Brix Law LLP, Portland. Mr. Lenneberg focuses his practice on real estate and construction law. His work includes assisting clients with real estate leasing, acquisitions and dispositions, and financing. He also litigates real estate and construction disputes, including claims involving construction liens and bonds and productivity loss. He has several years of experience litigating construction-defect claims. Mr. Lenneberg serves on the Multnomah Bar Association Young Lawyers Section Board of Directors and is past chair of the section’s Pro Bono Committee. He also participates in Lewis & Clark Law School’s Mentorship program as a mentor for first-year law students.

Peter Livingston, Beaverton City Attorney’s Office, Beaverton.

Marisol McAllister, Farleigh Wada Witt, Portland. Ms. McAllister has a specialized real estate and business practice, advising clients involved in simple and complex transactions and developments. She has particular expertise in commercial loan documentation on behalf of lenders and leasing transactions representing landlords and tenants for all product types. She is an active member of the Portland Chapter of Commercial Real Estate Women and the Risk Management Association, Portland Metropolitan Chapter. She serves on the Oregon State Bar Real Estate and Land Use Executive Committee.

Bradley Miller, Brix Law LLP, Portland. Mr. Miller’s primary areas of practice include real estate leasing, acquisitions, development, financing, and general business law. He has extensive experience representing clients in industrial, office, retail, and multi-family purchases and sales transactions, development projects, leasing, and financing transactions. He is a board member of Commercial Association of Brokers and the National Association of Industrial and Office Properties. He has published numerous articles and frequently lectures at continuing education programs on leasing, purchase agreements, loan documentation, and other real estate topics.
Jeffrey Tarr, Sussman Shank LLP, Portland. Mr. Tarr is a real estate, tax, and business attorney and chairs the firm’s Tax Group and Real Estate and Land Use Group. He advises businesses and their owners in a wide variety of complex business, real estate, and tax matters. He represents clients in agriculture, health care, professional services, manufacturing, retail, hotel, travel, restaurant, real estate development, and employment placement. Mr. Tarr’s practice also includes representing banks and other lenders in structuring, negotiating, and documenting loans secured by real property, receivables, inventory, equipment, and other personal property. He also has experience in the sale of distressed assets and working out distressed loans in the context of bankruptcy and receivership proceedings. Mr. Tarr is secretary of the Oregon State Bar Business Law Section and past chair of the Oregon State Bar Taxation Section. He is licensed to practice law in Oregon and California.
Chapter 1
Title, Closing, and Escrow

Marisol McAllister
Farleigh Wada Witt
Portland, Oregon

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Chapter 1—Title, Closing, and Escrow

**TITLE, CLOSING AND ESCROW**

1. **How to Buy a Lawnmower (aka - Real Estate is not a Lawnmower)**

2. **Escrow**

   *Oregon Statutes: ORS 696.505 to 696.590 govern escrow services in the state of Oregon and require escrow agents to be licensed. The provisions of ORS 696.505 to 696.590 do not apply to, and the term “escrow agent” does not include “[a]n attorney at law rendering services in the performance of duties as attorney at law.” ORS 696.520(2).*

   **Definitions:** ORS 696.505 uses the following definitions, which are helpful in understanding what “escrow” and “closing” are:

   (1) “Close an escrow” means the final disbursement of all funds, property and documents in an escrow as directed by written escrow instructions from the principals.

   * * *

   (4) “Escrow” means a transaction in which any written instrument, money, evidence of title to real or personal property or other thing of value is delivered, for the purpose of paying an obligation or effecting the sale, transfer, encumbrance or lease of real or personal property, to a person not otherwise having any right, title or interest therein, to be held by that person as a neutral third party until the happening of a specified event or the performance of a prescribed condition, when it is then to be delivered by the neutral third party to a grantee, grantor, promisee, promisor, obligee, obligor, bailee, bailor or any agent or employee of any of them pursuant to the written instructions of the principals to the transaction.

   (5) “Escrow agent” means a person who engages in the business of receiving escrows for deposit or delivery and who receives or is promised compensation, whether contingent or otherwise, for or in anticipation of performance.

   (6) “Escrow trust account” means a bank account that meets all of the following requirements:

   (a) Is kept separate, distinct and apart from funds belonging to the escrow agent;

   (b) Is designated as an escrow trust account; and

   (c) Is used to deposit trust funds received by an escrow agent on behalf of a principal.

   (7) “Principal” means:
(a) The buyer, seller, lessor, lessee or exchanging party in an escrow transaction involving the sale, lease, lease-option or exchange of real property or personal property;

(b) The borrower in an escrow transaction involving the refinancing of real property or personal property, including but not limited to the refinancing of an obligation secured by a land sale contract requiring a deed to be delivered as part of the refinancing;

(c) The buyer, seller, lender, borrower, vendor or vendee in a collection escrow;

(d) A person directing the escrow agent to hold back funds from a closing escrow for payment of obligations related to the closing or the financing of real property or personal property;

(e) A person who deposits funds, property or documents in a one-sided escrow, as defined by rule of the Real Estate Commissioner; or

(f) A subservicer.

(8) “Real estate closing escrow” means an escrow in which:

(a) The escrow fee is paid in whole or in part by the principals to a real estate transaction; and

(b) The unpaid purchase price is delivered to an escrow agent for disbursal pursuant to the written instructions of the principals to the transaction simultaneously on the transfer of specified title to the real property.

3. Title Companies, Title Products, Title Reports and Title Commitments

Title Companies: Title companies issue title insurance policies to various parties in a transaction. They are regulated insurance companies under ORS Chapter 737. Title insurance is a contract of insurance by a title insurance company to indemnify the insured against loss suffered because of record defects in title, unmarketability, liens, easements, and encumbrances not shown in the policy. The policy is issued after research of the public records. Since the policy is a contract, insureds are protected pursuant to the policy without the necessity of showing negligence on the part of the insurance company.

Agents and Underwriters: Underwriters are the title companies that issue the title policies. The big ones are First American Title Insurance Company, Fidelity National Title Insurance Company, and Stewart Title Guaranty Company, among others. Many title offices are direct issue offices that underwrite and issue policies directly. However, many offices are actually agents of one or more underwriters. For example, Lawyers Title of Oregon, LLC is an agent of Fidelity National Title Insurance Company and policies issued from this company will be from Fidelity.
OTIRO: The Oregon Title Insurance Rating Organization (OTIRO) is a rating organization under ORS Chapter 737. It operates for the purpose of making rates, rating plans or rating systems for title insurance in Oregon. It proposes to the Oregon Insurance Division, for its review and approval, a rating manual and revisions to the rating manual. The rating manual, as approved, sets out a system of rates and forms. Any title insurer authorized to transact title insurance in Oregon may be a member and participant in OTIRO and may elect to use the rates and forms of the OTIRO Rating Manual.


**Practice Tip:** Put a link to this manual in your favorites in your search engine and don’t be afraid to use it and read it! It’s also searchable online.

**Title Reports and Title Commitments:** Section 1.005 of the OTIRO Rating Manual provides: “A preliminary title report or a commitment may be issued in anticipation of a policy of title insurance. A preliminary title report is a report on title without liability for the matters reported. A preliminary title report may be issued for a bona fide order for title insurance without charge other than a cancellation charge consistent with Section 2.009. A commitment may be issued in the form specified on the Schedule of Policy, Guarantee and Commitment Forms (Schedule Three). The charge for a commitment is 5% of the Basic Insurance Rate, minimum $100.00. Payment of the commitment charge may be credited toward the charge for the subsequent policy.”

In 15 years of practice, I have never seen a title company in Oregon issue a title commitment, only title reports. In Washington, title companies generally issue title commitments.

**Exhibits A (title report) [page 9-26] & B (title commitment)[page 27-29]: Review sample title report v. title commitment.**

**Title Products:** Title companies can issue different types of title insurance products including lender’s policies, owner’s policies, trustee’s sale guarantees, and foreclosure guarantees. They can also issue title products that do not carry insurance, but you will get a discount if you later (within a particular period), purchase title insurance based on that report. Title companies use different names for these products including monetary encumbrance reports, lot book reports, plant service report, etc. Subdivision guarantees are also available to submit to local jurisdictions with land use filings.

**Practice Tip:** When representing a seller, obtain a “seller’s policy” to prevent the title company from pursuing claims against the seller based on rights of subrogation for paying claims under the buyer’s owner’s policy. OTIRO Rating Manual 3.011 permits a “joint policy protection” for a seller.
4. **Title Policies – Standard v. Extended Coverage**

**Standard v. Extended Coverage:** Section 1.002A of the OTIRO Rating Manual describes the “Standard Coverage Owner’s Policy” as the ALTA Owner’s Policy-2006 with Standard Coverage Exceptions in Schedule B. “ALTA” is the “American Land Title Association.” Section 1.003C describes the “Extended Coverage Owner’s Policy” as such policy without one or more of the Standard Coverage Exceptions in Schedule B.

Section 1.002B of the OTIRO Rating Manual lists the Standard Coverage Exceptions (*also known as “General Exceptions”*) as follows:

1) Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records; proceedings by a public agency which may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the public records.

2) Facts, rights, interests or claims which are not shown by the public records but which could be ascertained by an inspection of the land or by making inquiry of persons in possession thereof.

3) Easements, or claims of easement, not shown by the public records; reservations or exceptions in patents or in Acts authorizing the issuance thereof; water rights, claims or title to water.

4) Any encroachment (of existing improvements located on the subject land onto adjoining land or of existing improvements located on adjoining land onto the subject land), encumbrance, violation, variation, or adverse circumstance affecting the title that would be disclosed by an accurate and complete land survey of the subject land.

5) Any lien, or right to a lien, for services, labor, material, equipment rental or workers compensation heretofore or hereafter furnished, imposed by law and not shown by the public records.

**Surveys, Inspections, Early Issue:** A survey may be required by the title company in order to issue Extended Coverage. However, many times, a title company will simply do an exterior inspection. In addition, title companies will require the seller to provide the title company with an affidavit and indemnification agreement to issue Extended Coverage. Title companies will not remove Standard Exception 5 relating to mechanics’ liens within the 75-day lien period unless one party pays the hefty premium for an “early issue” policy. This should be negotiated at the time the parties enter into the sales agreement.
Exhibits C (owner’s policy)[page 31-37], A (title report)[page 9-26], D (affidavit and indemnification agreement)[page 39-41]: Review sample owner’s policy, sample title report, and sample affidavit and indemnification agreement.

**Practice Tip:** When representing a buyer, make sure your purchase and sale agreement requires the seller to provide affidavits and indemnification agreements reasonably required by the title company to issue title insurance required by buyer. When I represent receivers and banks in the sale of foreclosed or receivership property, I make sure I state that seller only has to provide affidavits and indemnification agreements in a form satisfactory to seller in its sole discretion.

5. **Anatomy of a Purchase and Sale Agreement**

   **Exhibit E (sale agreement)[page 43-61]:** Review sample.

6. **Title Objection and Response**

   **Title Objection and Response:** Most sale agreements require the seller to provide a title report and legible copies of exception documents within a certain period of time. Buyers then have a certain period of time to review and send written objections to any unacceptable exceptions. Sellers then have a time to respond in writing to the objections. Failure to strictly follow the timelines can lead to consequences set forth in the agreement. For example, a buyer may waive its right to object to certain title exceptions, or a seller may be required to remove exceptions it cannot.

   **Practice Tip:** Follow time lines and notice procedures in purchase and sale agreement. For example, if you have to send a letter certified mail, do it!

   Rule 4.2(c) of the Oregon Rules of Professional Conduct prohibits a lawyer from communicating or causing another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless “a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.”


   **Practice Tip:** When representing the buyer in a transaction, acknowledge that the Standard Exceptions will be removed from a final title policy only when buyer pays for the extended portion of the title insurance premium (if the purchase and sale agreement so provides), but the Standard Exceptions will not be exceptions on the statutory warranty deed. Otherwise, the warranties in the deed are undermined (see ORS 93.850(2)(c) – a statutory warranty deed includes the covenant that “at the time of the delivery of the deed the property is free from encumbrances except as specifically set forth on the deed”).
7. Release of Earnest Money and Written Instructions

**Earnest Money:** Earnest money is generally deposited with a title company acting as the escrow agent for the transaction. However, this is not required. When representing a seller, consider whether the nature of the transaction or the market conditions would warrant you requiring the buyer to deliver the earnest money directly to the seller. If the earnest money is deposited with an escrow agent, the title company will require written instructions from both parties before releasing the earnest money, even if the original sale agreement calls for the release of earnest money after a contingency is met.

**Disbursement of Funds and Written Instructions for Closing:** Oregon statutes and rules keep tight reins on escrow agents and when they are allowed to close and disburse funds.

ORS 696.581 provides as follows:

1. An escrow agent may not accept funds, property or documents in any escrow transaction **without dated, written escrow instructions from the principals to the transaction or a dated executed agreement in writing between the principals to the transaction.**

2. Except as provided in this section, an escrow agent must follow dated, written escrow instructions executed by the principals or a dated executed written agreement between the principals to a transaction.

3. Except as provided in ORS 314.258, **an escrow agent may not close an escrow or disburse any funds or property in an escrow without obtaining dated, separate escrow instructions in writing from the principals to the transaction adequate to administer and close the transaction or, in the case of disbursement, to disburse the funds and property.**

4. * * *

5. An escrow agent may not solicit or accept any original, amended or supplemental escrow instructions containing any blank to be filled in after signing. An escrow agent may not allow any alteration of original, amended or supplemental escrow instructions, unless the alteration is signed or initialed by all principals who signed or initialed the instructions before the alteration.

6. An escrow agent may accept trust funds, in excess of earnest money required in transaction documents to be held, as individual funds of the principal who has paid them into escrow. Such individual trust funds may be disbursed with only the separate written instructions of the principal who deposited the funds into escrow.

4. * * *

8. Except as authorized in ORS 105.475 (buyer’s revocation after delivery of disclosure statement), notwithstanding the requirement for dated, separate
escrow instructions to close an escrow or disburse funds or property in an escrow, an escrow agent:

(a) **May disburse earnest money deposited based on an agreement of the parties executed after the initial sales agreement:** and

(b) May not impose additional requirements on the principals to the transaction, including a requirement that the principals sign a release of liability in favor of the escrow agent.

(9) Notwithstanding any provision of this section, an escrow agent may disburse funds, property or documents deposited in escrow in accordance with an order of a court of competent jurisdiction.

8. **Closing and Post-Closing**

**Closing:** When a title company is acting as the escrow and closing agent, you will need to prepare escrow instructions on behalf of the party you represent at closing. The escrow agent should prepare a closing statement on behalf of each party showing all of the deposits, disbursements, and prorations. As an attorney in the transaction, you should review the closing statement to make sure it is accurate and complies with the purchase and sale agreement and your instructions. You should also prepare escrow instructions based on the purchase and sale agreement, all amendments, and your title review and objection letters.

*Exhibit E (purchase and sale agreement)*[page 43-61], *H (sample buyer’s escrow instructions)*[page 81-88], *I (sample seller’s instructions)*[page 89-93], *K (sample lender’s instructions)*[page 101-108] – Review closing provisions in sale agreement, and sample instructions.

**Practice Tip:** The title company will require a buyer and seller in a transaction to sign title company-prepared escrow instructions in addition to your escrow instructions. Make sure your escrow instructions state that your instructions control over any conflict between the title company’s instructions and your instructions.

**Practice Tip:** If the escrow agent is an agent of the title company and not in a direct-issue office, require that the escrow agent deliver an insured closing letter assuring that all acts of the escrow agent will bind the principal.

**Post-Closing:** After closing, review the final title insurance policy and make sure its matches your escrow instructions.

*Exhibit J (sample buyer’s instruction to compare to owner’s policy)*[page 95-99] and *C (owner’s policy)*[page 31-37] – Review sample buyer’s instructions to compare with owner’s policy
Practice Tip: When representing a buyer or lender, prior to closing, ask the title company to prepare a proforma policy in the form that you require with all of the endorsements. A proforma looks like the final policy. This is a good way to make sure the title company has included everything you require. In addition, reviewing the final title policy against a proforma is faster.

9. Common Endorsements

Exhibit L (sample endorsements)[page 109-124]: Review endorsements.
Ticor Title Company of Oregon
PRELIMINARY REPORT

In response to the application for a policy of title insurance referenced herein Ticor Title Company of Oregon hereby reports that it is prepared to issue, or cause to be issued, as of the specified date, a policy or policies of title insurance describing the land and the estate or interest hereinafter set forth, insuring against loss which may be sustained by reason of any defect, lien or encumbrance not shown or referred to as an exception herein or not excluded from coverage pursuant to the printed Schedules, Conditions and Stipulations or Conditions of said policy forms.

The printed Exceptions and Exclusions from the coverage of said policy or policies are set forth in Exhibit One. The policy to be issued may contain an arbitration clause. When the Amount of Insurance is less than that set forth in the arbitration clause, all arbitrable matters shall be arbitrated at the option of either the Company or the Insured as the exclusive remedy of the parties. Copies of the policy forms should be read. They are available from the office which issued this report.

This report (and any supplements or amendments hereto) is issued solely for the purpose of facilitating the issuance of a policy of title insurance and no liability is assumed hereby.

The policy(s) of title insurance to be issued hereunder will be policy(s) of Chicago Title Insurance Company, a/an Nebraska corporation.

Please read the exceptions shown or referred to herein and the Exceptions and Exclusions set forth in Exhibit One of this report carefully. The Exceptions and Exclusions are meant to provide you with notice of matters which are not covered under the terms of the title insurance policy and should be carefully considered.

It is important to note that this preliminary report is not a written representation as to the condition of title and may not list all liens, defects and encumbrances affecting title to the land.

This preliminary report is for the exclusive use of the parties to the contemplated transaction, and the Company does not have any liability to any third parties nor any liability until the full premium is paid and a policy is issued. Until all necessary documents are placed of record, the Company reserves the right to amend or supplement this preliminary report.

Countersigned

[Signature]
Ticor Title Company of Oregon
1433 SW 6th Avenue, Portland, OR 97201
(503)472-6101  FAX (877)470-2875

PRELIMINARY REPORT

TITLE OFFICER: Deborah Clark

TO: Ticor Title Company
   Attn: Candice Weischedel
   111 SW Columbia, Ste 1000
   Portland, OR 97201

OWNER/SELLER:

BUYER/BORROWER:

PROPERTY ADDRESS:
   McMinnville, Oregon  97128

EFFECTIVE DATE: July 6, 2015, 08:00 AM

1. THE POLICY AND ENDORSEMENTS TO BE ISSUED AND THE RELATED CHARGES ARE:

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<th>Description</th>
<th>Amount</th>
<th>Premium</th>
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<td>Owner's Standard (Short Term Rate)</td>
<td>2,850,000</td>
<td>$3,656.00</td>
</tr>
<tr>
<td>Governmental Service Fee</td>
<td></td>
<td>$20.00</td>
</tr>
</tbody>
</table>

2. THE ESTATE OR INTEREST IN THE LAND HEREINAFTER DESCRIBED OR REFERRED TO COVERED BY THIS REPORT IS:
   A Fee

3. TITLE TO SAID ESTATE OR INTEREST AT THE DATE HEREOF IS VESTED IN:

4. THE LAND REFERRED TO IN THIS REPORT IS SITUATED IN THE CITY OF McMINNVILLE IN THE COUNTY OF YAMHILL, STATE OF OREGON, AND IS DESCRIBED AS FOLLOWS:
   SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF
PRELIMINARY REPORT
(Continued)

Order No.: 

EXHIBIT "A"

PARCEL 1:

All of Lot 5 in Block 12 and the South 45.16 feet of Lot 4 in Block 12 and the South 45.16 feet of Lot 3 of said Block 12 in the Original Town (now City) of McMinnville, County of Yamhill, State of Oregon.

PARCEL 2:

Lot 6 in Block 12, the West 8 feet of Lot 7 in Block 12, and the West 8 feet of Lot 2 of Block 12, all in the Original Town (now City) of McMinnville, County of Yamhill, State of Oregon.
Order No.:  

AS OF THE DATE OF THIS REPORT, ITEMS TO BE CONSIDERED AND EXCEPTIONS TO COVERAGE IN ADDITION TO THE PRINTED EXCEPTIONS AND EXCLUSIONS IN THE POLICY FORM WOULD BE AS FOLLOWS:

GENERAL EXCEPTIONS:

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the Public Records; proceedings by a public agency which may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the Public Records.

2. Facts, rights, interests or claims which are not shown by the Public Records but which could be ascertained by an inspection of the Land or by making inquiry of persons in possession thereof.

3. Easements, or claims of easement, not shown by the Public Records; reservations or exceptions in patents or in Acts authorizing the issuance thereof; water rights, claims or title to water.

4. Any encroachment (of existing improvements located on the subject land onto adjoining land or of existing improvements located on adjoining land onto the subject land), encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land.

5. Any lien or right to a lien for services, labor, material, equipment rental or workers compensation heretofore or hereafter furnished, imposed by law and not shown by the Public Records.

SPECIFIC ITEMS AND EXCEPTIONS:

6. Property taxes in an undetermined amount, which are a lien but not yet payable, including any assessments collected with taxes to be levied for the fiscal year 2015-2016.

7. City lien in favor of the City of McMinnville,
   Purpose:  Downtown Economic Improvement District
   Amount:  $1,421.56, plus interest and penalties, if any.
   Reference No:  Balwit, John B and Weinstein, Julie

8. A party wall agreement, disclosed by Deed
   Executed by:  Pearl Campbell et al. and J. B. Mardis
   Affects:  Parcels 1 and 2
   Recording Date:  April 5, 1910
   Recording No:  Book 56, Page 388, Deed Records
   Reference is hereby made to said document for full particulars.

9. A party wall agreement
   Executed by:  Doris R. Mardis Tibbetts, Elmo R. Tibbetts and Oregon Mutual Fire Insurance Company
   Affects:  Parcel 1
   Recording Date:  October 20, 1947
   Recording No:  Book 145, Page 398, Deed Records
   Reference is hereby made to said document for full particulars.
10. Easement(s) for the purpose(s) shown below and rights incidental thereto, as granted in a document:

   Granted to:  Pierre D. Mead, Jr. and Kelton F. Peery  
   Purpose: Entering adjoining property and transporting merchandise  
   Recording Date: April 18, 1962  
   Recording No: Film Volume 22, Page 104  
   Affects: Parcel 2

11. A party wall agreement

   Executed by: United States National Bank of Oregon and Linfield College  
   Affects: Parcel 2 (East wall)  
   Recording Date: October 31, 1967  
   Recording No: Film Volume 63, Page 837

   Reference is hereby made to said document for full particulars.

12. A party wall agreement

   Affects: Parcel 1  
   Recording Date: March 17, 1977  
   Recording No: Film Volume 118, Page 1560

   Reference is hereby made to said document for full particulars.

13. Easement(s) for the purpose(s) shown below and rights incidental thereto, as granted in a document:

   Granted to: United States National Bank of Oregon  
   Purpose: Vehicle and pedestrian access  
   Recording Date: September 3, 1987  
   Recording No: Film Volume 216, Page 448  
   Affects: Parcel 2 (West 8 feet of Lot 2, Block 12)

14. A deed of trust to secure an indebtedness in the amount shown below,

   Amount: $606,800.00  
   Dated: August 28, 2012  
   Trustor/Grantor: John B. Balwit and Julie Weinstein, as tenants by the entirety  
   Trustee: David Haugeberg  
   Beneficiary: First Federal Savings & Loan Assn of McMinnville  
   Loan No.: None Shown  
   Recording Date: August 29, 2012  
   Recording No: 2012-12149

15. An assignment of all the moneys due, or to become due as rental, as additional security for the obligations secured by deed of trust shown

   Recording Date: August 29, 2012  
   Recording No: 2012-12150  
   Assigned to: First Federal Savings & Loan Assn of McMinnville
16. If requested to issue an extended coverage ALTA loan policy, the following matters must be addressed:

   a) The rights of tenants holding under unrecorded leases or tenancies
   b) Any facts which would be disclosed by an accurate survey of the Land
   c) Matters disclosed by a statement as to parties in possession and as to any construction, alterations or repairs to the Land within the last 75 days. The Company must be notified in the event that any funds are to be used for construction, alterations or repairs.

ADDITIONAL REQUIREMENTS/NOTES:

A. Note: Property taxes for the fiscal year shown below are paid in full.

   Fiscal Year: 2014-2015
   Amount: $16,289.76
   Levy Code: 40.51
   Account No.: 160319
   Map No.: R4421BC 06400

   Prior to close of escrow, please contact the Tax Collector's Office to confirm all amounts owing, including current fiscal year taxes, supplemental taxes, escaped assessments and any delinquencies.

B. In addition to the standard policy exceptions, the exceptions enumerated above shall appear on the final 2006 ALTA policy unless removed prior to issuance.

C. Note: No utility search has been made or will be made for water, sewer or storm drainage charges unless the City/Service District claims them as liens (i.e. foreclosable) and reflects them on its lien docket as of the date of closing. Buyers should check with the appropriate city bureau or water service district and obtain a billing cutoff. Such charges must be adjusted outside of escrow.

D. Note: There are NO conveyances affecting said Land recorded within 24 months of the date of this report.

E. Note: There are no matters against the party(ies) shown below which would appear as exceptions to coverage in a title insurance product:

   Parties: Dudley Slater

F. Recording Charge (Per Document) is the following:

<table>
<thead>
<tr>
<th>County</th>
<th>First Page</th>
<th>Each Additional Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Marion</td>
<td>$46.00</td>
<td>$5.00</td>
</tr>
<tr>
<td>Benton</td>
<td>$68.00</td>
<td>$5.00</td>
</tr>
<tr>
<td>Polk</td>
<td>$51.00</td>
<td>$5.00</td>
</tr>
<tr>
<td>Linn</td>
<td>$65.00</td>
<td>$5.00</td>
</tr>
<tr>
<td>Yamhill</td>
<td>$41.00</td>
<td>$5.00</td>
</tr>
</tbody>
</table>

   Note: When possible the company will record electronically. An additional charge of $5.00 applies to each document that is recorded electronically.

G. Note: Effective January 1, 2008, Oregon law (ORS 314.258) mandates withholding of Oregon income taxes from sellers who do not continue to be Oregon residents or qualify for an exemption. Please contact your Escrow Closer for further information.
H. THE FOLLOWING NOTICE IS REQUIRED BY STATE LAW: YOU WILL BE REVIEWING, APPROVING AND SIGNING IMPORTANT DOCUMENTS AT CLOSING. LEGAL CONSEQUENCES FOLLOW FROM THE SELECTION AND USE OF THESE DOCUMENTS. YOU MAY CONSULT AN ATTORNEY ABOUT THESE DOCUMENTS. YOU SHOULD CONSULT AN ATTORNEY IF YOU HAVE QUESTIONS OR CONCERNS ABOUT THE TRANSACTION OR ABOUT THE DOCUMENTS. IF YOU WISH TO REVIEW TRANSACTION DOCUMENTS THAT YOU HAVE NOT SEEN, PLEASE CONTACT THE ESCROW AGENT.

I. Note: This map/plat is being furnished as an aid in locating the herein described Land in relation to adjoining streets, natural boundaries and other land. Except to the extent a policy of title insurance is expressly modified by endorsement, if any, the Company does not insure dimensions, distances or acreage shown thereon.
Chapter 1—Title, Closing, and Escrow

2006 AMERICAN LAND TITLE ASSOCIATION LOAN POLICY (06-17-06)
EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys’ fees, or expenses that may be caused by:

(a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to:
   (i) the occupancy, use, or enjoyment of the Land;
   (ii) the character, dimensions, or location of any improvement erected on the Land;
   (iii) the subdivision of land; or
   (iv) environmental protection;

(b) Any governmental police power. This Exclusion (b) does not modify or limit the coverage provided under Covered Risk 6.

(c) resulting in no loss or damage to the Insured Claimant;

(d) attaching or extending to Date of Policy (however, this does not modify or limit the coverage provided, under Covered Risk 11, 13, or 14);

(e) resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Insured Mortgage;

(f) the unenforceability of the lien of the Insured Mortgage because of the inability or failure of an Insured to comply with applicable duly enacted laws of the state where the Land is situated;

(g) the Unenforceability in whole or in part of the lien of the Insured Mortgage that arises out of the transaction evidenced by the Insured Mortgage and is based upon usury or any consumer credit protection or truth-in-lending law;

(h) Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors’ rights laws, that the transaction creating the lien of the Insured Mortgage is:
   (a) a fraudulent conveyance or fraudulent transfer, or
   (b) a preferential transfer for any reason not stated in Covered Risk 13(b) of this policy.

(i) Any lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching between Date of Policy and the date of recording of the Insured Mortgage in the Public Records. This exclusion does not modify or limit the coverage provided under Covered Risk 11(b).

The above policy form may be issued to afford either Standard Coverage or Extended Coverage. In addition to the above:

Exclusions from Coverage, the Exceptions from Coverage in a Standard Coverage policy will also include the following Exceptions from Coverage:

SCHEDULE B—GENERAL EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys’ fees or expenses) which arise by reason of:

Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the Public Records; proceedings by a public agency which may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the Public Records.

1. Facts, rights, interests or claims which are not shown by the Public Records but which could be ascertained by an inspection of the Land or by making inquiries of persons in possession thereof.

Easements, or claims of easement, not shown by the Public Records; reservations or exceptions in patents or in Acts authorizing the issuance thereof; water rights, claims or title to water.

2. Any encroachment, encumbrance, violation, variance, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term “encroachment” includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.

3. Any lien for services, labor or material herebefore or hereafter furnished, or for contributions due to the State of Oregon for unemployment compensation or worker’s compensation, imposed by law and not shown by the Public Records.

EXHIBIT ONE
2006 AMERICAN LAND TITLE ASSOCIATION OWNER’S POLICY (66-17-06)
EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys’ fees, or expenses that may be caused by:

(a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to:
   (i) the occupancy, use, or enjoyment of the Land;
   (ii) the character, dimensions, or location of any improvement erected on the Land;
   (iii) the subdivision of land; or
   (iv) environmental protection;

(b) Any governmental police power. This Exclusion (b) does not modify or limit the coverage provided under Covered Risk 6.

(c) resulting in no loss or damage to the Insured Claimant;

(d) attaching or extending to Date of Policy (however, this does not modify or limit the coverage provided, under Covered Risk 11, 13, or 14);

(e) resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Insured Mortgage;

(f) the unenforceability of the lien of the Insured Mortgage because of the inability or failure of an Insured to comply with applicable duly enacted laws of the state where the Land is situated;

(g) the Unenforceability in whole or in part of the lien of the Insured Mortgage that arises out of the transaction evidenced by the Insured Mortgage and is based upon usury or any consumer credit protection or truth-in-lending law;

(h) Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors’ rights laws, that the transaction creating the lien of the Insured Mortgage is:
   (a) a fraudulent conveyance or fraudulent transfer, or
   (b) a preferential transfer for any reason not stated in Covered Risk 13(b) of this policy.

(i) Any lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching between Date of Policy and the date of recording of the Insured Mortgage in the Public Records. This exclusion does not modify or limit the coverage provided under Covered Risk 11(b).

The above policy form may be issued to afford either Standard Coverage or Extended Coverage. In addition to the above:

Exclusions from Coverage, the Exceptions from Coverage in a Standard Coverage policy will also include the following Exceptions from Coverage:

SCHEDULE B—GENERAL EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys’ fees or expenses) which arise by reason of:

Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the Public Records; proceedings by a public agency which may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the Public Records.

1. Facts, rights, interests or claims which are not shown by the Public Records but which could be ascertained by an inspection of the Land or by making inquiries of persons in possession thereof.

Easements, or claims of easement, not shown by the Public Records; reservations or exceptions in patents or in Acts authorizing the issuance thereof; water rights, claims or title to water.

2. Any encroachment, encumbrance, violation, variance, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term “encroachment” includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.

3. Any lien for services, labor or material herebefore or hereafter furnished, or for contributions due to the State of Oregon for unemployment compensation or worker’s compensation, imposed by law and not shown by the Public Records.
Chapter 1—Title, Closing, and Escrow

Sentry Dynamics, Inc. and its customers make no representations, warranties or conditions, express or implied, as to the accuracy or completeness of information contained in this report.

geoAdvantage

www.sentrydynamics.net
Chapter 1—Title, Closing, and Escrow

This instrument witnessed: That We, Hattie L. Campbell, a widow, Pearl Campbell, unmar., and W. C. Campbell, unmar., for and in consideration of the sum of One Thousand Dollars ($1000.00) to us paid here bargained and sold, and by these presents do bargain, sell and transfer unto J. B. Hardie, all of our right, the best interest in and to the west half of that certain brick wall built upon the lot line on the north side of (5) and Six (6) of Block Twelve (12) in the original township of Yamhillville, Oregon, said wall serving as a part wall between the two story brick buildings now owned by the said Hattie L. Campbell, Pearl Campbell, and W. C. Campbell, and the two story brick building now being constructed by the said J. B. Hardie on Lot Five (5) on said Block the said J. B. Hardie, to have the right to connect its said brick building now in course of construction to the said wall, and to use the same as a party wall, provided, however, that the said J. B. Hardie shall in addition to the sum of said One Hundred Fifty Dollars ($150.00) and at his own expense close up all openings now in said wall by brick structure of the same thickness, as the present wall.

To HAVE AND TO USE the same unto the said J. B. Hardie, his heirs and assigns,

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 26th day of March, 1910.

[Signatures]

[Notary Public]

Recorded April 29th, 1910 at 10:30 A.M.

Notary Public for Oregon.
EASEMENT

DATE: February 1, 1977

PARTIES:

GRANTOR: Kelton F. Peery and Pierre D. Mead, Jr.
448 West Eighth Street
McMinnville, Oregon 97128

GRANTEE: United States National Bank of Oregon
111 S.W. Fifth Avenue
Portland, Oregon 97208

RECITALS

By this Agreement the parties intend to create a non-exclusive easement for a period of twenty (20) years permitting
Grantee's use of the described property of Grantor for vehicle
and pedestrian access purposes.

AGREEMENT

1. GRANT OF EASEMENT

Grantor hereby grants and conveys to Grantee, its
successors and assigns, a non-exclusive easement for that
certain period commencing upon the execution of this Agreement
and to expire twenty (20) years hence to use the following
described real property (hereinafter "Easement") as hereinafter
indicated:

The West 8 feet of Lot 2, Block 12, all in the
original town of McMinnville, Yamhill County, Oregon,
as further indicated on the partial plat map attached
hereto as Exhibit A and by this reference incorporated
herein.

Page 1 - EASEMENT

[Seal and Signature]

YAMHILL COUNTY TITLE & ESCROW, INC.

9-3-87
2. TERMS AND CONDITIONS
   (a) USE. Grantee, its successors, assigns, agents, employees, independent contractors, licensees, invitees and all persons within the control of Grantee, shall use the Easement only for vehicle and pedestrian access to the property described in Exhibit "B" attached hereto and by this reference incorporated herein.

   (b) CONSIDERATION. During the term of this Agreement (20 years), Grantee shall pay to Grantor the sum of $438.00 per year with the first of such payments to be due on the execution of this Agreement and subsequent payments on the same date each year thereafter. Said annual payments shall be increased each year by an amount proportionate to the increases during the preceding year in the United States Department of Agriculture's Consumer Price Index for all consumer items for the Portland, Oregon metropolitan area. The most recent indexes published on the dates to be compared shall be deemed to be the indexes for such dates. Grantee shall further pay to Grantor one-half of the ad valorem real property taxes and McMinnville Downtown Association tax assessment for the subject property (Easement) upon receipt from Grantor of statements of such taxes indicating Grantee's share.

   (c) INDEMNIFICATION AND INSURANCE. [Illegible text: indemnify, hold harmless and defend Grantor from any loss, claim of damage, cause of action or injury to persons or property]
described in subparagraph (a) SEE above. Grantee shall carry
premises liability coverage on the Easement in an amount not
less than $500,000.00 insuring Grantor against loss due to
injury to persons or property and providing for the costs of any
SEE INSERT 4 OF ONE)

(d) MAINTENANCE AND REPAIR. Grantee shall maintain the
pavement of the Easement in good condition and repair, and said
pavement shall be continuously restored by Grantee so that the
passage of vehicles and pedestrians shall not be unreasonably
impaired, impeded or rendered unsafe.

(e) GRANTOR'S RESERVATION. Grantor, its successors and
assigns, reserve the right to use the Easement for vehicle and
pedestrian access to appurtenant properties owned or leased by
Grantor, its successor or assigns, the location of refuse
containers, and in any other manner, provided that such use
shall not interfere with the flow of traffic on the Easement or
to and from Grantee's property described in Exhibit "B" attached
hereto. The parties shall cooperate so that each party's use
shall cause a minimum of interference to the other. Any lessee
of Grantor, its successors or assigns, shall have all rights of
Grantor to the use of the Easement as conditioned herein.

(f) SALE OR TRANSFER OF DOMINANT ESTATE. This Easement is
appurtenant to the real property owned by the Grantee and
described in Exhibit "D," and in the event of any sale of a
portion of the property described in subparagraphs (a) or (b) of

Page 3 - EASEMENT
Chapter 1—Title, Closing, and Escrow

1–22

Real Estate and Land Use Fundamentals

INDEMNIFICATION

During the term of this Agreement, Grantor will indemnify and save Grantee harmless from any loss, cost or expense of any kind or nature, and from any liability to any person on account of any damage to person or property arising out of any failure of Grantee to perform any of the requirements and provisions of this Agreement, provided that such damage does not result directly or indirectly by reason of the conduct of Grantee, its agents and employees.

INDEMNITY

9-3-87

F2160451

SEP-3-FL4-11
said Exhibit "B," this Easement shall remain appurtenant to any portion of the property, retained or used by Grantee, its parent corporation, U.S. Bancorp, or any subsidiary or affiliate of U.S. Bancorp for the term hereof.

(g) TERMINATION. This Agreement and the Easement herein provided shall terminate upon the earlier occurrence of (1) its expiration 20 years hence, (2) upon 30 days' written notice by Grantee to Grantor of Grantee's intent to abandon said Easement, (3) upon Grantee's breach of any condition of this Agreement, which breach has not been cured within 30 days following written notice from Grantor. Upon termination, Grantee, if requested by Grantor, shall execute a recordable document evidencing such termination, and thereafter, Grantee's obligations hereunder shall terminate.

(h) TERMINATION OF PRIOR EASEMENT. The Easement Agreement between Grantors and Grantee recorded March 12, 1977, at pages 1566 to 1569, Film 118, Deed Records, Yamhill County, Oregon, is terminated.

(i) ATTORNEY FEES. Should suit or action be instituted to enforce any of the terms of this Agreement, the prevailing party shall be entitled to an award of reasonable attorney fees, in addition to all other remedies allowed by law or this Agreement, both at trial and on any appeal.
DATED and effective this 15th day of February,
1987.

GRANTOR:  

Kelton F. Peery  
Pierre D. Mead, Jr.

GRANTEE:

UNITED STATES NATIONAL BANK
OF OREGON

By:  

Arthur Marchetti

Title:  Assistant Vice President
The foregoing instrument was acknowledged before me on this 21\textsuperscript{st} day of August, 1987, by Arthur Marchetti

a Assistant Vice President of The United States National Bank of Oregon, a National Banking Association, on behalf of the association.

Michel K. Ulwini
Notary Public for the State of Oregon
My commission expires: 9.17.90
ACKNOWLEDGEMENTS FOR EASEMENT

Dated February 1, 1987

STATE OF OREGON  )  ss.
County of Yamhill  )

Personally appeared the above-named Pierre D. Mead and acknowledged the foregoing Easement, dated February 1, 1987, to be his voluntary act and deed on the 31st day of July, 1987.

[Signature]
Notary Public for Oregon
My Commission Expires: 11-17-89

STATE OF OREGON  )  ss.
County of Yamhill  )

Personally appeared the above-named Kelton F. Peery and acknowledged the foregoing Easement, dated February 1, 1987, to be his voluntary act and deed on the 18th day of August, 1987.

[Signature]
Notary Public for Oregon
My Commission Expires: 11-17-89

ACKNOWLEDGEMENTS FOR EASEMENT

9-3-87
COMMITMENT FOR TITLE INSURANCE

Issued by

FIRST AMERICAN TITLE INSURANCE COMPANY

First American Title Insurance Company, herein called the Company, for valuable consideration, hereby commits to issue its policy or policies of title insurance, as identified in Schedule A, in favor of the proposed Insured named in Schedule A, as owner or mortgagor of the estate or interest covered hereby in the land described or referred to in Schedule A, upon payment of the premiums and charges therefor; all subject to the provisions of Schedules A and B and to the Conditions and Stipulations hereof.

This Commitment shall be effective only when the identity of the proposed Insured and the amount of the policy or policies committed for have been inserted in Schedule A hereof by the Company, either at the time of the issuance of the Commitment or by subsequent endorsement.

This Commitment if preliminary to the issuance of such policy or policies of title insurance and all liability and obligations hereunder shall cease and terminate six (6) months after the effective date hereof or when the policy or policies committed for shall issue, whichever first occurs, provided that the failure to issue such policy or policies is not the fault of the Company. This Commitment shall not be valid or binding until countersigned by an authorized officer or agent.

IN WITNESS WHEREOF, the Company has caused this commitment to be signed, to become valid when countersigned by an authorized officer or agent of the Company, all in accordance with its By-Laws. This Commitment is effective as of the date shown in Schedule A as "Effective Date."

First American Title Insurance Company

[Signatures of officers]

First American Title Insurance Company
First American Title Insurance Company

National Commercial Services

COMMITMENT

Conditions and Stipulations

1. The term "mortgage" when used herein shall include deed of trust, trust deed, or other security instrument.

2. If the proposed Insured has or acquires actual knowledge of a defect, lien, encumbrance, adverse claim or other matter affecting the estate or interest or mortgage thereon covered by this Commitment, other than those shown in Schedule B hereof, and shall fail to disclose such knowledge to the Company in writing, the Company shall be relieved from liability for any loss or damage resulting from any act or reliance hereon to the extent the Company is prejudiced by failure to so disclose such knowledge. If the proposed Insured shall disclose such knowledge to the Company, or if the Company otherwise acquires actual knowledge of any such defect, lien, encumbrance, adverse claim or other matter, the Company at its option, may amend Schedule B of this Commitment accordingly, but such amendment shall not relieve the Company from liability previously incurred pursuant to paragraph 3 of these Conditions and Stipulations.

3. Liability of the Company under this Commitment shall be only to the named proposed Insured and such parties included under the definition of Insured in the form of Policy or Policies committed for, and only for actual loss incurred in undertaking in good faith (a) to comply with the requirements hereof, or (b) to eliminate exceptions shown in Schedule B, or (c) to acquire or create the estate or interest or mortgage thereon covered by this Commitment. In no event shall such liability exceed the amount stated in Schedule A for the Policy or Policies committed for and such liability is subject to the Insuring provisions, exclusion from coverage, and the Conditions and Stipulations of the form of Policy or Policies committed for in favor of the proposed Insured which are hereby incorporated by references, and are made a part of this Commitment except as expressly modified herein.

4. Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the title to the estate or interest or the lien of the Insured mortgage covered hereby or any action asserting such claim, shall be restricted to the provisions and Conditions and Stipulations of this Commitment.
We Are Committed to Safeguarding Customer Information

In order to better serve your needs now and in the future, we may ask you to provide us with certain information. We understand that you may be concerned about what we will do with such information particularly any personal or financial information. We agree that you have a right to know how we will utilize the personal information you provide to us. Therefore, together with our parent company, The First American Corporation, we have adopted this Privacy Policy to govern the use and handling of your personal information.

Applicability

This Privacy Policy governs our use of the information which you provide to us. It does not govern the manner in which we may use information we have obtained from any other source, such as information obtained from a public record or from another person or entity. First American has also adopted broader guidelines that govern our use of personal information regardless of its source. First American calls these guidelines its Fair Information Values, a copy of which can be found on our website at www.firstam.com.

Types of Information

Depending upon which of our services you are utilizing, the types of nonpublic personal information that we may collect include:

- Information we receive from you on applications, forms and in other communications to us, whether in writing, in person, by telephone or any other means;
- Information about your transactions with us, our affiliated companies, or others; and·
- Information we receive from a consumer reporting agency.

Use of Information

We request information from you for our own legitimate business purposes and not for the benefit of any nonaffiliated party. Therefore, we will not release your information to nonaffiliated parties except: (1) as necessary for us to provide the product or service you have requested of us; or (2) as permitted by law. We may, however, store such information indefinitely, including the period after which any customer relationship has ceased. Such information may be used for any internal purpose, such as quality control efforts or customer analysis. We may also provide all of the types of nonpublic personal information listed above to one or more of our affiliated companies. Such affiliated companies include financial service providers, such as title insurers, property and casualty insurers, and trust and investment advisory companies, or companies involved in real estate services, such as appraisal companies, home warranty companies, and escrow companies. Furthermore, we may also provide all the information we collect, as described above, to companies that perform marketing services on our behalf, on behalf of our affiliated companies, or to other financial institutions with whom we or our affiliated companies have joint marketing agreements.

Former Customers

Even if you are no longer our customer, our Privacy Policy will continue to apply to you.

Confidentiality and Security

We will use our best efforts to ensure that no unauthorized parties have access to any of your information. We restrict access to nonpublic personal information about you to those individuals and entities who need to know that information to provide products or services to you. We will use our best efforts to train and oversee our employees and agents to ensure that your information will be handled responsibly and in accordance with this Privacy Policy and First American's Fair Information Values. We currently maintain physical, electronic, and procedural safeguards that comply with federal regulations to guard your nonpublic personal information.

c 2001 The First American Corporation - All Rights Reserved
Owner’s Policy of Title Insurance

ISSUED BY
First American Title Insurance Company
POLICY NUMBER

Owner’s Policy

Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at the address shown in Section 18 of the Conditions.

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS,
FIRST AMERICAN TITLE INSURANCE COMPANY, a Nebraska corporation (the “Company”) insures, as of Date of Policy and, to the extent stated in Covered Risks 9 and 10, after Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. Title being vested other than as stated in Schedule A,
2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from
   (a) A defect in the Title caused by
      (i) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
      (ii) failure of any person or Entity to have authorized a transfer or conveyance;
      (iii) a document affecting Title not properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;
      (iv) failure to perform those acts necessary to create a document by electronic means authorized by law;
      (v) a document executed under a falsified, expired, or otherwise invalid power of attorney;
      (vi) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or
      (vii) a defective judicial or administrative proceeding.
   (b) The lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.
   (c) Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term “encroachment” includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.
3. Unmarketable Title.
4. No right of access to and from the Land.

(Covered Risks Continued on Page 2)

In Witness Whereof, First American Title Insurance Company has caused its corporate name to be hereunto affixed by its authorized officers as of Date of Policy shown in Schedule A.

First American Title Insurance Company

Dennis J. Gilmore
President

Jeffrey S. Robinson
Secretary

(This Policy is valid only when Schedules A and B are attached)

This Jacket was created electronically and constitutes an original document

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Form 5011416 (7-1-14)  Page 1 of 7
ALTA Owner’s Policy of Title Insurance (6-17-06)
Chapter 1—Title, Closing, and Escrow

COVERED RISKS (Continued)

5. The violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to
   (a) the occupancy, use, or enjoyment of the Land;
   (b) the character, dimensions, or location of any improvement erected on the Land;
   (c) the subdivision of land; or
   (d) environmental protection.
if a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice.

6. An enforcement action based on the exercise of a governmental police power not covered by Covered Risk 5 if a notice of the enforcement action, describing any part of the Land, is recorded in the Public Records, but only to the extent of the enforcement referred to in that notice.

7. The exercise of the rights of eminent domain if a notice of the exercise, describing any part of the Land, is recorded in the Public Records.

8. Any taking by a governmental body that has occurred and is binding on the rights of a purchaser for value without Knowledge.

9. Title being vested other than as stated in Schedule A or being defective
   (a) as a result of the avoidance in whole or in part, or from a court order providing an alternative remedy, of an transfer of all or any part of the title to or any interest in the Land occurring prior to the transaction vesting Title as shown in Schedule A because that prior transfer constituted a fraudulent or preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws; or
   (b) because the instrument of transfer vesting Title as shown in Schedule A constitutes a preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws by reason of the failure of its recording in the Public Records
      (i) to be timely, or
      (ii) to impart notice of its existence to a purchaser for value or to a judgment or lien creditor.

10. Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 9 that has been created or attached or has been filed or recorded in the Public Records subsequent to Date of Policy and prior to the recording of the deed or other instrument of transfer in the Public Records that vests Title as shown in Schedule A.

The Company will pay the costs, attorneys' fees, and expenses incurred in defense of any matter insured against by this Policy, but only to the extent provided in the Conditions.

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:

1. (a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to
    (i) the occupancy, use, or enjoyment of the Land;
    (ii) the character, dimensions, or location of any improvement erected on the Land;
    (iii) the subdivision of land; or
    (iv) environmental protection;
    or the effect of any violation of these laws, ordinances, or governmental regulations. This Exclusion 1(a) does not modify or limit the coverage provided under Covered Risk 5.
   (b) Any governmental police power. This Exclusion 1(b) does not modify or limit the coverage provided under Covered Risk 6.

2. Rights of eminent domain. This Exclusion does not modify or limit the coverage provided under Covered Risk 7 or 8.

3. Defects, liens, encumbrances, adverse claims, or other matters
   (a) created, suffered, assumed, or agreed to by the Insured Claimant;
   (b) not Known to the Company, not recorded in the Public Records at Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy;
   (c) resulting in no loss or damage to the Insured Claimant;
   (d) attaching or created subsequent to Date of Policy (however, this does not modify or limit the coverage provided under Covered Risk 9 and 10); or
   (e) resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Title.

4. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction vesting the Title as shown in Schedule A, is
   (a) a fraudulent conveyance or fraudulent transfer; or
   (b) a preferential transfer for any reason not stated in Covered Risk 9 of this policy.

5. Any lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching between Date of Policy and the date of recording of the deed or other instrument of transfer in the Public Records that vests Title as shown in Schedule A.
1. **DEFINITION OF TERMS**

The following terms when used in this policy mean:

(a) "Amount of Insurance": The amount stated in Schedule A, as may be increased or decreased by endorsement to this policy, increased by Section 8(b), or decreased by Sections 10 and 11 of these Conditions.

(b) "Date of Policy": The date designated as "Date of Policy" in Schedule A.

(c) "Entity": A corporation, partnership, trust, limited liability company, or other similar legal entity.

(d) "Insured": The Insured named in Schedule A.

(i) The term "Insured" also includes

(A) successors to the Title of the Insured by operation of law as distinguished from purchase, including heirs, devisees, survivors, personal representatives, or next of kin;

(B) successors to an Insured by dissolution, merger, consolidation, distribution, or reorganization;

(C) successors to an Insured by its conversion to another kind of Entity;

(D) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title:

(1) If the stock, shares, memberships, or other equity interests of the grantee are wholly-owned by the named Insured;

(2) If the grantee wholly owns the named Insured;

(3) If the grantee is wholly-owned by an affiliated Entity of the named Insured, provided the affiliated Entity and the named Insured are both wholly-owned by the same person or Entity, or

(4) If the grantee is a trustee or beneficiary of a trust created by a written instrument established by the Insured named in Schedule A for estate planning purposes.

(ii) With regard to (A), (B), (C), and (D) reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor Insured.

(e) "Insured Claimant": An Insured claiming loss or damage.

(f) "Knowledge" or "Known": Actual knowledge, not constructive knowledge or notice that may be imputed to an Insured by reason of the Public Records or any other records that impart constructive notice of matters affecting the Title.

(g) "Land": The land described in Schedule A, and affixed improvements that by law constitute real property. The term "Land" does not include any property beyond the lines of the area described in Schedule A, nor any right, title, interest, estate, or easement in abutting streets, roads, avenues, alleys, lanes, ways, or waterways, but this does not modify or limit the extent that a right of access to and from the Land is insured by this policy.

(h) "Mortgage": Mortgage, deed of trust, trust deed, or other security instrument, including one evidenced by electronic means authorized by law.

(i) "Public Records": Records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge. With respect to Covered Risk 5(d), "Public Records" shall also include environmental protection liens filed in the records of the clerk of the United States District Court for the district where the Land is located.

(j) "Title": The estate or interest described in Schedule A.

(k) "Unmarketable Title": Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title or lender on the Title to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title.

2. **CONTINUATION OF INSURANCE**

The coverage of this policy shall continue in force as of Date of Policy in favor of an Insured, but only so long as the Insured retains an estate or interest in the Land, or holds an obligation secured by a purchase money Mortgage given by a purchaser from the Insured, or only so long as the Insured shall have liability by reason of warranties in any transfer or conveyance of the Title.

This policy shall not continue in force in favor of any purchaser from the Insured of either (i) an estate or interest in the Land, or (ii) an obligation secured by a purchase money Mortgage given to the Insured.

3. **NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT**

The Insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 5(a) of these Conditions, (ii) in case Knowledge shall come to an Insured hereunder of any claim of title or interest that is adverse to the Title, as insured, and that might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if the Title, as insured, is rejected as Unmarketable Title. If the Company is prejudiced by the failure of the Insured Claimant to provide prompt notice, the Company’s liability to the Insured Claimant under the policy shall be reduced to the extent of the prejudice.

4. **PROOF OF LOSS**

In the event the Company is unable to determine the amount of loss or damage, the Company may, at its option, require as a condition of payment that the Insured Claimant furnish a signed proof of loss. The proof of loss must describe the defect, lien, encumbrance, or other matter insured against by this policy that constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage.

5. **DEFENSE AND PROSECUTION OF ACTIONS**

(a) Upon written request by the Insured, and subject to the options contained in Section 7 of these Conditions, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured. This obligation is limited to only those stated causes of action alleging matters insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those stated causes of action. It shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs, or expenses incurred by the Insured in the defense of those causes of action that allege matters not insured against by this policy.
(b) The Company shall have the right, in addition to the options contained in Section 7 of these Conditions, at its own cost, to institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the Title, as insured, or to prevent or reduce loss or damage to the Insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable to the Insured. The exercise of these rights shall not be an admission of liability or waiver of any provision of this policy. If the Company exercises its rights under this subsection, it must do so diligently.

(c) Whenever the Company brings an action or asserts a defense as required or permitted by this policy, the Company may pursue the litigation to a final determination by a court of competent jurisdiction, and it expressly reserves the right, in its sole discretion, to appeal any adverse judgment or order.

6. DUTY OF INSURED CLAIMANT TO COOPERATE

(a) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding and any appeals, the Insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, including the right to use, at its option, the name of the Insured for this purpose. Whenever requested by the Company, the Insured, at the Company’s expense, shall give the Company all reasonable aid and (i) in securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act that in the opinion of the Company may be necessary or desirable to establish the Title or any other matter as insured. If the Company is prejudiced by the failure of the Insured to furnish the required cooperation, the Company’s obligations to the Insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

(b) The Company may reasonably require the Insured Claimant to submit to examination under oath by any authorized representative of the Company and to produce for examination, inspection, and copying, at such reasonable times and places as may be designated by the authorized representative of the Company, all records, in whatever medium maintained, including books, ledgers, checks, correspondence, reports, e-mails, disks, tapes, and videos whether bearing a date before or after Date of Policy, that reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the Insured Claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect, and copy all of these records in the custody or control of a third party that reasonably pertain to the loss or damage. All information designated as confidential by the Insured Claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the Insured Claimant to submit for examination under oath, produce any reasonably requested information, or grant permission to secure reasonably necessary information from third parties as required in this subsection, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

7. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY

In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance. To pay or tender payment of the Amount of Insurance under this policy together with any costs, attorneys’ fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment or tender of payment and that the Company is obligated to pay. Upon the exercise by the Company of this option, all liability and obligations of the Company to the Insured under this policy, other than to make the payment required in this subsection, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

(b) To Pay or Otherwise Settle With Parties Other Than the Insured or With the Insured Claimant.

(i) To pay or otherwise settle with other parties for or in the name of an Insured Claimant any claim insured against under this policy. In addition, the Company will pay any costs, attorneys’ fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay; or

(ii) To pay or otherwise settle with the Insured Claimant the loss or damage provided for under this policy, together with any costs, attorneys’ fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay. Upon the exercise by the Company of either of the options provided for in subsections (b)(i) or (ii), the Company’s obligations to the Insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

8. DETERMINATION AND EXTENT OF LIABILITY

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy.

(a) The extent of liability of the Company for loss or damage under this policy shall not exceed the lesser of

(i) the Amount of Insurance; or

(ii) the difference between the value of the Title as insured and the value of the Title subject to the risk insured against by this policy.

(b) If the Company pursues its rights under Section 5 of these Conditions and is unsuccessful in establishing the Title, as insured,

(i) the Amount of Insurance shall be increased by 10%, and

(ii) the Insured Claimant shall have the right to have the loss or damage determined either as of the date the claim was made by the Insured Claimant or as of the date it is settled and paid.

(c) In addition to the extent of liability under (a) and (b), the Company will also pay those costs, attorneys’ fees, and expenses incurred in accordance with Sections 5 and 7 of these Conditions.
9. LIMITATION OF LIABILITY
   (a) If the Company establishes the Title, or removes the alleged defect, lien, or encumbrance, or cures the lack of a right of access to or from the Land, or cures the claim of Unmarketable Title, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused to the Insured.
   (b) In the event of any litigation, including litigation by the Company or with the Company’s consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals, adverse to the Title, as insured.
   (c) The Company shall not be liable for loss or damage to the Insured for liability voluntarily assumed by the Insured in settling any claim or suit without the prior written consent of the Company.

10. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY
    All payments under this policy, except payments made for costs, attorneys’ fees, and expenses, shall reduce the Amount of Insurance by the amount of the payment.

11. LIABILITY NONCUMULATIVE
    The Amount of Insurance shall be reduced by any amount the Company pays under any policy insuring a Mortgage to which exception is taken in Schedule B or to which the Insured has agreed, assumed, or taken subject, or which is executed by an Insured after Date of Policy and which is a charge or lien on the Title, and the amount so paid shall be deemed a payment to the Insured under this policy.

12. PAYMENT OF LOSS
    When liability and the extent of loss or damage have been definitely fixed in accordance with these Conditions, the payment shall be made within 30 days.

13. RIGHTS OF RECOVERY UPON PAYMENT OR SETTLEMENT
    (a) Whenever the Company shall have settled and paid a claim under this policy, it shall be subrogated and entitled to the rights of the Insured Claimant in the Title and all other rights and remedies in respect to the claim that the Insured Claimant has against any person or property, to the extent of the amount of any loss, costs, attorneys’ fees, and expenses paid by the Company. If requested by the Company, the Insured Claimant shall execute documents to evidence the transfer to the Company of these rights and remedies. The Insured Claimant shall permit the Company to sue, compromise, or settle in the name of the Insured Claimant and to use the name of the Insured Claimant in any transaction or litigation involving these rights and remedies. If a payment on account of a claim does not fully cover the loss of the Insured Claimant, the Company shall defer the exercise of its right to recover until after the Insured Claimant shall have recovered its loss.
    (b) The Company’s right of subrogation includes the rights of the Insured to indemnities, guaranties, other policies of insurance, or bonds, notwithstanding any terms or conditions contained in those instruments that address subrogation rights.

14. ARBITRATION
    Either the Company or the Insured may demand that the claim or controversy shall be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association ("Rules"). Except as provided in the Rules, there shall be no joinder or consolidation with claims or controversies of other persons. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the Insured arising out of or relating to this policy, any service in connection with its issuance or the breach of a policy provision, or to any other controversy or claim arising out of the transaction giving rise to this policy. All arbitrable matters when the Amount of Insurance is $2,000,000 or less shall be arbitrated at the option of either the Company or the Insured. All arbitrable matters when the Amount of Insurance is in excess of $2,000,000 shall be arbitrated only when agreed to by both the Company and the Insured. Arbitration pursuant to this policy and under the Rules shall be binding upon the parties. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court of competent jurisdiction.

15. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT
    (a) This policy together with all endorsements, if any, attached to it by the Company is the entire policy and contract between the Insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.
    (b) Any claim of loss or damage that arises out of the status of the Title or by any action asserting such claim shall be restricted to this policy.
    (c) Any amendment of or endorsement to this policy must be in writing and authenticated by an authorized person, or expressly incorporated by Schedule A of this policy.
    (d) Each endorsement to this policy issued at any time is made a part of this policy and is subject to all of its terms and provisions. Except as the endorsement expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsement, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance.

16. SEVERABILITY
    In the event any provision of this policy, in whole or in part, is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision or such part held to be invalid, but all other provisions shall remain in full force and effect.

17. CHOICE OF LAW; FORUM
    (a) Choice of Law: The Insured acknowledges the Company has underwritten the risks covered by this policy and determined the premium charged therefor in reliance upon the law affecting interests in real property and applicable to the interpretation, rights, remedies, or enforcement of policies of title insurance of the jurisdiction where the Land is located. Therefore, the court or an arbitrator shall apply the law of the jurisdiction where the Land is located to determine the validity of claims against the Title that are adverse to the Insured and to interpret and enforce the terms of this policy. In neither case shall the court or arbitrator apply its conflicts of law principles to determine the applicable law.
    (b) Choice of Forum: Any litigation or other proceeding brought by the Insured against the Company must be filed only in a state or federal court within the United States of America or its territories having appropriate jurisdiction.

18. NOTICES, WHERE SENT
    Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at First American Title Insurance Company, Attn: Claims National Intake Center, 1 First American Way; Santa Ana, CA 92707, Phone: 888-632-1642.
Name and Address of Title Insurance Company:
First American Title Insurance Company, 1 First American Way, Santa Ana, CA 92707.

File No.:

Address Reference: . Portland, Amount of Insurance: $

OR 97202

Premium: $ Date of Policy: July 29, 2016 at 1:43 p.m.

1. Name of Insured:

2. The estate or interest in the Land that is insured by this policy is:
   Fee Simple

3. Title is vested in:

4. The Land referred to in this policy is described as follows:
   . MIDWAY ANNEX, IN THE CITY OF PORTLAND, COUNTY OF MULTNOMAH, AND STATE OF OREGON.
EXCEPTIONS FROM COVERAGE

File No.:

This policy does not insure against loss or damage, and the Company will not pay costs, attorneys' fees, or expenses that arise by reason of:

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records; proceedings by a public agency which may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the public records.

2. Facts, rights, interests or claims which are not shown by the public records but which could be ascertained by an inspection of the land or by making inquiry of persons in possession thereof.

3. Easements, or claims of easement, not shown by the public records; reservations or exceptions in patents or in Acts authorizing the issuance thereof; water rights, claims or title to water.

4. Any encroachment (of existing improvements located on the subject land onto adjoining land or of existing improvements located on adjoining land onto the subject land), encumbrance, violation, variation, or adverse circumstance affecting the title that would be disclosed by an accurate and complete land survey of the subject land.

5. Taxes for the fiscal year 2016-2017 a lien due, but not yet payable.

6. Operations & Maintenance form Private stormwater management facilities, including terms and provisions thereof.
   Recorded: August 14, 2015 as Fee No. 2015-104405

7. A deed of trust to secure an indebtedness in the original principal amount of $409,000.00 recorded July 29, 2016 as Document No. 2016-093842 of Official Records.
   Dated: July 18, 2016
   Trustor: Douglas D. Lindahl and Violet Y. Lindahl
   Trustee: Fidelity National Title Insurance Company
   Beneficiary: First Republic Bank

8. Assignment of leases and/or rents and the terms and conditions thereof:
   Assignor: Douglas D. Lindahl and Violet Y. Lindahl
   Assignee: First Republic Bank
   Recorded: July 29, 2016
   Recording Information: 2016-093843
COMMERCIAL OWNER'S AFFIDAVIT

STATE OF ___________________
COUNTY OF _________________

Date: April 17, 2018

WFG National Title Insurance Company (“WFG”) Order No.

Property: See Exhibit “A” attached hereto and incorporated herein by this reference.

The undersigned affiant (“Affiant”) first being duly sworn, deposes, represents, warrants and covenants to WFG as follows:

1. There have been no repairs, alterations, improvements or other construction made, ordered or contracted to be made on or to the Property, and no materials have been ordered within the last 3 months, which in either case have not been paid for in full; there are no fixtures attached to the Property that have not been paid for in full; and there are no outstanding or disputed claims for any such work or materials except:

   __________________________________________________________________________________

   (if left blank, automatically deemed to be “None”).

   If there have been any repairs, alterations, improvements or other construction, the same:

   □ started on _________________________________________________________
   □ were or will be completed on __________________________________________

2. Check the following as applicable:
   □ A. There have been no changes or additions affecting the location of the improvements on the Property during Affiant’s ownership thereof.
   □ B. During Affiant’s ownership or since the date of the attached survey, the following changes or additions have been made to the Property:__________________________
   □ C. The attached survey accurately reflects the present location of the improvements on the Property.

3. To Affiant’s actual knowledge: (i) there is no discrepancy in the location of the boundary lines of and no boundary line disputes affecting the Property; (ii) there are no gaps or overlaps affecting the Property; (iii) there are no encroachments of any above or below-ground improvements on the Property onto adjoining property or any easement on the Property; and (iv) there are no encroachments of any above or below-ground improvements located on adjoining property onto the Property, except:

   __________________________________________________________________________________

   (if left blank, automatically deemed to be “None”).

4. There has been no work done or notice received that work is to be done on or near the Property by any governmental entity (state, city, or local) or at its direction, including but not limited to, the installation of water or sewer lines or improvements such as paving or repaving of streets or alleys, the installation of curbs or sidewalks, etc.
5. There are no unrecorded leases or other agreements affecting the Property, and there is no one in possession or that has access to the Property other than:

- the Affiant
- tenants based on month-to-month rental agreements
- lessees based on existing leases, copies of which are attached hereto (*remember to attach leases)

6. There are no (i) private charges or assessments against the Property, (ii) rights of prior approval of a future purchaser or occupant of the Property, or (iii) rights of first refusal or options to purchase all or any part of the Property except: ______________________________________________________

(if left blank, automatically deemed to be “None”).

7. There are no unpaid real estate taxes or assessments except as shown on the current tax roll. Affiant has not received any notice of omitted taxes and/or any supplemental tax bill which is unpaid.

8. No actions in bankruptcy have been filed by or against Affiant in any federal court or any other court having jurisdiction.

9. There are no matters pending against Affiant that could give rise to a lien that would attach to the Property between the most recent effective date of the preliminary title report in this transaction and the recording of the interest to be insured by WFG, and Affiant has not and will not execute any instrument that would adversely affect the title or interest to be insured by WFG.

10. This Commercial Owner’s Affidavit is given for the purpose of inducing WFG and/or its agent to issue its policy or policies of title insurance that may provide coverage as to the matters listed above. Affiant acknowledges that it has read the foregoing and fully understands the significant legal consequences of any misrepresentation and/or untrue statements made herein.

11. Affiant shall indemnify, defend and hold WFG harmless from any claim, loss, expense or damage of any kind or nature whatsoever arising directly or indirectly from a breach of the foregoing representations, warranties and covenants, including payment of attorneys’ fees and costs, if any, for consultation, trial, appeal and/or review, together with all other costs and expenses incurred in connection therewith.

12. The liability of Affiant under this Affidavit is direct and primary and is not conditioned or contingent upon pursuit of any remedies by WFG. If any suit or action is filed to interpret, enforce or otherwise protect Affiant or WFG under the terms of this Affidavit, the prevailing party shall be entitled to its reasonable attorney fees and costs incurred at or before trial or on any appeal or review therefrom. This Affidavit shall be governed by and construed in accordance with the laws of the State of Oregon.

IN WITNESS WHEREOF, Affiant has executed this Affidavit as of the date set forth above.

___________________________________
By:

STATE OF OREGON
COUNTY OF

This instrument was acknowledged before me this _____ day of April, 2018 by______________________, of______________________, on behalf of the company.

________________________________
Notary Public for Oregon
My Commission Expires: ____________
EXHIBIT "A"
LEGAL DESCRIPTION
AGENCY ACKNOWLEDGMENT

Buyer shall execute this Acknowledgment concurrent with the execution of the Agreement below and prior to delivery of that Agreement to Seller. Seller shall execute this Acknowledgment upon receipt of the Agreement by Seller, even if Seller intends to reject the Agreement or make a counter-offer. In no event shall Seller’s execution of this Acknowledgment constitute acceptance of the Agreement or any terms contained therein.

Pursuant to the requirements of Oregon Administrative Rules (OAR 863-015-0215), both Buyer and Seller acknowledge having received the Oregon Real Estate Agency Disclosure Pamphlet, and by execution below acknowledge and consent to the agency relationships in the following real estate purchase and sale transaction as follows:

(a) Seller Agent: of firm (the “Selling Firm”) are the agents of (check one):

☐ Buyer exclusively; ☒ Seller exclusively; ☐ both Seller and Buyer (“Disclosed Limited Agency”).

(b) Buyer Agent: , firm (the “Buying Firm”) are the agents of (check one):

☒ Buyer exclusively; ☐ Seller exclusively; ☐ both Seller and Buyer (“Disclosed Limited Agency”).

If the name of the same real estate firm appears in both Paragraphs (a) and (b) above, Buyer and Seller acknowledge that a principal broker of that real estate firm shall become the Disclosed Limited Agent for both Buyer and Seller, as more fully set forth in the Disclosed Limited Agency Agreements that have been reviewed and signed by Buyer, Seller and the named real estate agent(s).

ACKNOWLEDGED

Buyer: (print) _____________________________ (sign) _____________________________ Date: ______________
Buyer: (print) _____________________________ (sign) _____________________________ Date: ______________
Seller: (print) _____________________________ (sign) _____________________________ Date: ______________
Seller: (print) _____________________________ (sign) _____________________________ Date: ______________

[No further text appears on this page.]
PURCHASE AND SALE AGREEMENT AND RECEIPT FOR EARNEST MONEY

This PURCHASE AND SALE AGREEMENT AND RECEIPT FOR EARNEST MONEY (this "Agreement") is accepted, made and entered into on the later of the two dates shown beneath the parties' signatures on the signature page attached hereto (the "Execution Date"): BETWEEN: ("Seller")

Address: Home Phone: Office Phone: Fax No.: E-Mail:

AND: ("Buyer")

Address: Home Phone: Office Phone: Fax No.: E-Mail:

1. Purchase and Sale.

1.1 Generally. In accordance with this Agreement, Buyer agrees to buy and acquire from Seller, and Seller agrees to sell to Buyer the following, all of which are collectively referred to in this Agreement as the "Property:" 
(a) the real property and all improvements thereon generally described as__________________________ located in the City of M__________________________, County of __________________________, Oregon legally described on Exhibit A, attached hereto (the "Real Estate") (if no legal description is attached, the legal description shall be based on the legal description provided in the Preliminary Report (described in Section 5), subject to the review and approval of both parties hereto), including all of Seller’s right, title and interest in and to all fixtures, appurtenances, and easements thereon or related thereto; (b) all of Seller’s right, title and interest, if any, in and to any and all lease(s) to which the Real Estate is subject (each, a "Lease"); and (c) any and all personal property located on and used in connection with the operation of the Real Estate and owned by Seller (the "Personal Property"). If there are any Leases, see Section 21.1, below. The occupancies of the Property pursuant to any Leases are referred to as the "Tenancies" and the occupants thereunder are referred to as "Tenants." If there is any Personal Property, see Section 21.2, below.

1.2 Purchase Price. The purchase price for the Property shall be __________________________ dollars __________________________) (the "Purchase Price"). The Purchase Price shall be adjusted, as applicable, by the net amount of credits and debits to Seller’s account at Closing (defined below) made by Escrow Holder pursuant to the terms of this Agreement. The Purchase Price shall be payable as follows:

1.2.1 Earnest Money Deposit. 
(a) Within three (3) business days of the Execution Date, Buyer shall deliver into Escrow (as defined herein), for the account of Buyer, $__________________________as earnest money (the "Earnest Money") in the form of:

- Promissory note (the "Note");
- Check;
- Cash or other immediately available funds.

If the Earnest Money is being held by the Selling Firm Buying Firm, then the firm holding such Earnest Money shall deposit the Earnest Money in the Escrow (as hereinafter defined) Selling Firm’s Client Trust Account

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Buying Firm's Clients' Trust Account, no later than 5:00 PM Pacific Time three (3) business days after such firm's receipt, but in no event later than the date set forth in the first sentence of this Section 1.2.1(a).

(b) If the Earnest Money is in the form of a Note, it shall be due and payable [ ] no later than 5:00 PM Pacific Time three (3) days after the Execution Date; [ ] after satisfaction or waiver by Buyer of the conditions to Buyer's obligation to purchase the Property set forth in this Agreement; or [ ] Other: ___. If the terms of the Note and this Agreement conflict, the terms of this Agreement shall govern. If the Note is not redeemed and paid in full when due, then: (i) the Note shall be delivered and endorsed to Seller (if not already in Seller's possession); (ii) Seller may collect the Earnest Money from Buyer, either pursuant to an action on the Note or an action on this Agreement; and (iii) Seller shall have no further obligations under this Agreement.

(c) The purchase and sale of the Property shall be accomplished through an escrow (the "Escrow") that Seller has established or will establish with __________________________ (the "Escrow Holder") within three (3) business days after the Execution Date. Except as otherwise provided in this Agreement: (i) any interest earned on the Earnest Money shall be considered to be part of the Earnest Money; (ii) the Earnest Money shall be non-refundable upon satisfaction or waiver of all Conditions as defined in Section 2.1; and (iii) the Earnest Money shall be applied to the Purchase Price at Closing.

1.2.2 Balance of Purchase Price. Buyer shall pay the balance of the Purchase Price at Closing by [ ] cash or other immediately available funds; or [ ] Other: ___.

1.3 Section 1031 Like-Kind Exchange. Each party acknowledges that either party (as applicable, the "Exchanging Party") may elect to engage in and affect a like-kind exchange under Section 1031 of the Internal Revenue Code of 1986, as amended, involving the Property (or any legal lot thereof) (a "1031 Exchange"). The non-exchanging party with respect to a 1031 Exchange is referred to herein as the "Cooperating Party." Buyer and Seller each hereby agrees to reasonably cooperate with the other in completing each such 1031 Exchange; provided, however, that such cooperation shall be at the Exchanging Party's sole expense and shall not delay the Closing for the Property. Accordingly, the Exchanging Party may assign the Exchanging Party's rights with respect to the Property (or any legal lot thereof) to a person or entity for the purpose of consummating a 1031 Exchange ("Intermediary"), provided that such assignment does not delay the Closing for the Property (or applicable legal lot thereof), or otherwise reduce or diminish the Exchanging Party's liabilities or obligations hereunder. Such assignment by the Exchanging Party shall not release the Exchanging Party from the obligations of the Exchanging Party under this Agreement. The Cooperating Party shall not suffer any costs, expenses or liabilities for cooperating with the Exchanging Party and shall not be required to take title to the exchange property. The Exchanging Party agrees to indemnify, defend and hold the Cooperating Party harmless from any liability, damages and costs arising out of the 1031 Exchange.

2. Conditions to Purchase.

2.1 Buyer's obligation to purchase the Property is conditioned on the following:

[ ] None;
[ ] Within 35 days of the Execution Date, Buyer's approval of the results of (collectively, the "General Conditions"): (a) the Property inspection described in Section 3 below; (b) the document review described in Section 4 below; and (c) (describe any other condition) ___;
[ ] Within ___ days of the Execution Date, Buyer's receipt of confirmation of satisfactory financing (the "Financing Condition"); and/or
[ ] Other ___ [Other conditions must be specifically identified].

The General Conditions, Financing Conditions or any other Conditions noted shall be defined as "Conditions."
2.2 If, for any reason in Buyer's sole discretion, Buyer has not timely given written waiver of the Conditions set forth in Section 2.1, or stated in writing that such Conditions have been satisfied, by notice given to Seller within the time periods for such conditions set forth above, this Agreement shall be deemed automatically terminated, the Earnest Money shall be promptly returned to Buyer, and thereafter, except as specifically provided to the contrary herein, neither party shall have any further right or remedy hereunder.

3. Property Inspection. Seller shall permit Buyer and its agents, at Buyer's sole expense and risk, to enter the Property at reasonable times after reasonable prior notice to Seller and after prior notice by Seller to the Tenants as required by the applicable Leases, if any, to conduct any and all inspections, tests, and surveys concerning the structural condition of the improvements, all mechanical, electrical and plumbing systems, hazardous materials, pest infestation, soils conditions, wetlands, Americans with Disabilities Act compliance, zoning, and all other matters affecting the suitability of the Property for Buyer's intended use and/or otherwise reasonably related to the purchase of the Property including the economic feasibility of such purchase. If the transaction contemplated in this Agreement fails to close for any reason (or no reason) as a result of the act or omission of Buyer or its agents, Buyer shall promptly restore the Property to substantially the condition the Property was in prior to Buyer's performance of any inspections or work. Buyer shall indemnify, hold harmless, and defend Seller from all liens, costs, and expenses, including reasonable attorneys' fees and experts' fees, arising from or relating to Buyer's entry on and inspection of the Property. This agreement to indemnify, hold harmless, and defend Seller shall survive Closing or any termination of this Agreement.

4. Seller's Documents. Within five (5) business days after the Execution Date, Seller shall deliver to Buyer or Buyer's designee, legible and complete copies of the following documents, including without limitation, a list of the Personal Property, and other items relating to the ownership, operation, and maintenance of the Property to the extent now in existence and to the extent such items are or come within Seller's possession or control: ___.

5. Title Insurance. Within five (5) business days after the Execution Date, Seller shall cause to be delivered to Buyer a preliminary title report from the title company (the "Title Company") selected by Seller (the "Preliminary Report"), showing the status of Seller's title to the Property, together with complete and legible copies of all documents shown therein as exceptions to title ("Exceptions"). Buyer shall have five (5) business days after receipt of a copy of the Preliminary Report and Exceptions within which to give notice in writing to Seller of any objection to such title or to any liens or encumbrances affecting the Property. Within five (5) business days after receipt of such notice from Buyer, Seller shall give Buyer written notice of whether it is willing and able to remove the objected-to Exceptions. Without the need for objection by Buyer, Seller shall, with respect to liens and encumbrances that can be satisfied and released by the payment of money, eliminate such exceptions to title on or before Closing. Within five (5) business days after receipt of such notice from Seller (the "Title Contingency Date"), Buyer shall elect whether to: (i) purchase the Property subject to those objected-to Exceptions which Seller is not willing or able to remove; or (ii) terminate this Agreement. If Buyer fails to give Seller notice of Buyer's election, then such inaction shall be deemed to be Buyer's election to terminate this Agreement. On or before the Closing Date (defined below), Seller shall remove all Exceptions to which Buyer objects and which Seller agrees, or is deemed to have agreed, Seller is willing and able to remove. All remaining Exceptions set forth in the Preliminary Report and those Exceptions caused by or agreed to by Buyer shall be deemed "Permitted Exceptions."

6. Default; Remedies. Notwithstanding anything to the contrary contained in this Agreement, in the event Buyer fails to deposit the Earnest Money in Escrow strictly as and when contemplated under Section 1.2.1 above, Seller shall have the right at any time thereafter, but prior to Buyer's deposit of the Earnest Money to Escrow, to terminate this Agreement and all further rights and obligations hereunder by giving written notice thereof to Buyer. If the conditions, if any, to Buyer's obligation to consummate this transaction are satisfied or waived by Buyer and Buyer fails, through no fault of Seller, to close on the purchase of the Property, Seller's sole remedy shall be to retain the Earnest Money paid by Buyer. In the event Seller fails, through no fault of Buyer, to close the sale of the Property, Buyer shall be entitled to pursue any remedies available at law or in equity, including without limitation, the return of
Chapter 1—Title, Closing, and Escrow

7. Closing of Sale.

7.1 Buyer and Seller agree the sale of the Property shall be consummated, in Escrow, on or before August 1, 2015 or ___ days after the conditions set forth in Sections 2.1, 3, 4 and 5 have been satisfied or waived in writing by Buyer (the "Closing" or the "Closing Date"). The sale of the Property shall be deemed closed when the document(s) conveying title to the Property is/are delivered and recorded and the Purchase Price is disbursed to Seller.

7.2 At Closing, Buyer and Seller shall deposit with the Escrow Holder all documents and funds required to close the transaction in accordance with the terms of this Agreement. At Closing, Seller shall deliver a certification in a form provided by the Escrow Holder confirming whether Seller is or is not a "foreign person" as such term is defined by applicable law and regulations.

7.3 At Closing, Seller shall convey fee simple title to the Property to Buyer by statutory warranty deed or ____ (the "Deed"). At Closing, Seller shall cause the Title Company to deliver to Buyer a standard ALTA form owner's policy of title insurance (the "Title Policy") in the amount of the Purchase Price insuring fee simple title to the Property in Buyer subject only to the Permitted Exceptions and the standard preprinted exceptions contained in the Title Policy. Seller shall reasonably cooperate in the issuance to Buyer of an ALTA extended form policy of title insurance. Buyer shall pay any additional expense resulting from the ALTA extended coverage and any endorsements required by Buyer.

8. Closing Costs; Prorations. Seller shall pay the premium for the Title Policy, provided, however, if Buyer elects to obtain an ALTA extended form policy of title insurance and/or any endorsements, Buyer shall pay the difference in the premium relating to such election. The ALTA additional premium for the title policy shall be paid by Buyer and Seller shall pay the CLTA portion of the premium. Seller and Buyer shall each pay one-half (1/2) of the escrow fees charged by the Escrow Holder. Any excise tax and/or transfer tax shall be paid in accordance with the local custom determined by the Title Company and applicable law. Real property taxes for the tax year of the Closing, assessments (if a Permitted Exception), personal property taxes, rents and other charges arising from existing Tenancies paid for the month of Closing, interest on assumed obligations, and utilities shall be prorated as of the Closing Date. If applicable, prepaid rents, security deposits, and other unearned refundable deposits relating to Tenancies shall be assigned and delivered to Buyer at Closing. Seller Buyer N/A shall be responsible for payment of all taxes, interest, and penalties, if any, upon removal of the Property from any special assessment or program.

9. Possession. Seller shall deliver exclusive possession of the Property, subject to the Tenancies (if any) existing as of the Closing Date, to Buyer on the Closing Date or ____.

10. Condition of Property. Seller represents that Seller has received no written notices of violation of any laws, codes, rules, or regulations applicable to the Property ("Laws"). Seller represents that, to the best of Seller's knowledge without specific inquiry, Seller is not aware of any such violations or any concealed material defects in the Property. Unless caused by Buyer, Seller shall bear all risk of loss and damage to the Property until Closing, and Buyer shall bear such risk at and after Closing. Except for Seller's representations set forth in this Section 10 and the attached Exhibit E, Buyer shall acquire the Property "AS IS" with all faults and Buyer shall rely on the results of its own inspection and investigation in Buyer's acquisition of the Property. It shall be a condition of Buyer's Closing obligation that all of Seller's representations and warranties stated in this Agreement are materially true and correct on the Closing Date. Seller's representations and warranties stated in this Agreement shall survive Closing for one (1) year.

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Real Estate and Land Use Fundamentals 1–47
11. Operation of Property. Between the Execution Date and the Closing Date, Seller shall continue to operate, maintain and insure the Property consistent with Seller's current operating practices. After Buyer has satisfied or waived the conditions to Buyer's obligation to purchase the Property, and the Earnest Money is non-refundable, Seller may not, without Buyer's prior written consent, which consent shall not be unreasonably withheld, conditioned, or delayed, enter into: (a) any new leases or occupancy agreements for the Property; (b) any material amendments or modification agreements for any existing leases or occupancy agreements for the Property; or (c) any service contracts or other agreements affecting the Property that are not terminable at the Closing.

12. Assignment. Assignment of this Agreement: ☐ is PROHIBITED; ☐ is PERMITTED, without consent of Seller; ☑ is PERMITTED ONLY UPON Seller's written consent; ☒ is PERMITTED ONLY IF the assignee is an entity owned and controlled by Buyer. Assignment is PROHIBITED, if no box is checked. If Seller's written consent is required for assignment, such consent may be withheld in Seller's reasonable discretion. In the event of a permitted assignment, Buyer shall remain liable for all Buyer's obligations under this Agreement.

13. Arbitration. IF AND ONLY IF THIS SECTION IS INITIALED BY EACH OF BUYER AND SELLER, THE FOLLOWING SHALL APPLY TO THIS AGREEMENT:

ANY DISPUTE BETWEEN BUYER AND SELLER RELATED TO THIS AGREEMENT, THE PROPERTY, OR THE TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT WILL BE RESOLVED BY ARBITRATION GOVERNED BY THE OREGON UNIFORM ARBITRATION ACT (ORS 36.600 et seq.) AND, TO THE EXTENT NOT INCONSISTENT WITH THAT STATUTE, CONDUCTED IN ACCORDANCE WITH THE RULES OF PRACTICE AND PROCEDURE FOR THE ARBITRATION OF COMMERCIAL DISPUTES OF ARBITRATION SERVICES OF PORTLAND (“ASP”). THE ARBITRATION SHALL BE CONDUCTED IN PORTLAND, OREGON AND ADMINISTERED BY ASP, WHICH WILL APPOINT A SINGLE ARBITRATOR HAVING AT LEAST FIVE (5) YEARS EXPERIENCE IN THE COMMERCIAL REAL ESTATE FIELD IN THE __ GEOGRAPHIC AREA (IF BLANK IS NOT COMPLETED, PORTLAND METROPOLITAN AREA). ALL ARBITRATION HEARINGS WILL BE COMMENCED WITHIN THIRTY (30) DAYS OF THE DEMAND FOR ARBITRATION UNLESS THE ARBITRATOR, FOR SHOWING OF GOOD CAUSE, EXTENDS THE COMMENCEMENT OF SUCH HEARING. THE DECISION OF THE ARBITRATOR WILL BE BINDING ON BUYER AND SELLER, AND JUDGMENT UPON ANY ARBITRATION AWARD MAY BE ENTERED IN ANY COURT HAVING JURISDICTION. THE PARTIES ACKNOWLEDGE THAT, BY AGREEING TO ARBITRATE DISPUTES, EACH OF THEM IS WAIVING CERTAIN RIGHTS, INCLUDING ITS RIGHTS TO SEEK REMEDIES IN COURT (INCLUDING A RIGHT TO A TRIAL BY JURY), TO DISCOVERY PROCESSES THAT WOULD BE ATTENDANT TO A COURT PROCEEDING, AND TO PARTICIPATE IN A CLASS ACTION.

14. Attorneys’ Fees. In the event a suit, action, arbitration, or other proceeding of any nature whatsoever, including without limitation any proceeding under the U.S. Bankruptcy Code, is instituted, or the services of an attorney are retained, to interpret or enforce any provision of this Agreement or with respect to any dispute relating to this Agreement, the prevailing or non-defaulting party shall be entitled to recover from the losing or defaulting party its attorneys', paralegals', accountants', and other experts' fees and all other fees, costs, and expenses actually incurred in connection therewith (the "Fees"). In the event of suit, action, arbitration, or other proceeding, the amount of Fees shall be determined by the judge or arbitrator, shall include all costs and expenses incurred on any appeal or review, and shall be in addition to all other amounts provided by law.

REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY THAT THE UNIT OF LAND BEING TRANSFERRED IS A LAWFULLY ESTABLISHED LOT OR PARCEL, AS DEFINED IN ORS 92.010 OR 215.010, TO VERIFY THE APPROVED USES OF THE LOT OR PARCEL, TO DETERMINE ANY LIMITS ON LAWSUITS AGAINST FARMING OR FOREST PRACTICES, AS DEFINED IN ORS 30.930, AND TO INQUIRE ABOUT THE RIGHTS OF NEIGHBORING PROPERTY OWNERS, IF ANY, UNDER ORS 195.300, 195.301 AND 195.305 TO 195.336 AND SECTIONS 5 TO 11, CHAPTER 424, OREGON LAWS 2007, AND SECTIONS 2 TO 9 AND 17, CHAPTER 855, OREGON LAWS 2009.

16. Cautionary Notice About Liens. UNDER CERTAIN CIRCUMSTANCES, A PERSON WHO PERFORMS CONSTRUCTION-RELATED ACTIVITIES MAY CLAIM A LIEN UPON REAL PROPERTY AFTER A SALE TO THE PURCHASER FOR A TRANSACTION OR ACTIVITY THAT OCCURRED BEFORE THE SALE. A VALID CLAIM MAY BE ASSERTED AGAINST THE PROPERTY THAT YOU ARE PURCHASING EVEN IF THE CIRCUMSTANCES THAT GIVE LIFE TO THAT CLAIM HAPPENED BEFORE YOUR PURCHASE OF THE PROPERTY. THIS INCLUDES, BUT IS NOT LIMITED TO, CIRCUMSTANCES WHERE THE OWNER OF THE PROPERTY CONTRACTED WITH A PERSON OR BUSINESS TO PROVIDE LABOR, MATERIAL, EQUIPMENT OR SERVICES TO THE PROPERTY AND HAS NOT PAID THE PERSONS OR BUSINESS IN FULL.

17. Brokerage Agreement. For purposes of Sections 14 and 17 of this Agreement, the Agency Acknowledgement on page 1 this Agreement is incorporated into this Agreement as if fully set forth herein. Seller agrees to pay a commission to Buying Firm in the amount of either: ☑️ two percent (2%) of the Purchase Price or ☐️ $__ . Such commission shall be divided between Selling Firm and Buying Firm such that Selling Firm receives percent (%) and Buying Firm receives percent (%). Seller shall cause the Escrow Holder to deliver to Selling Firm and Buying Firm the real estate commission on the Closing Date or upon Seller's breach of this Agreement, whichever occurs first. If the Earnest Money is forfeited by Buyer and retained by Seller in accordance with this Agreement, in addition to any other rights the Selling Firm and Buying Firm may have, the Selling Firm and the Buying Firm, together, shall be entitled to the lesser of: (i) fifty percent (50%) of the Earnest Money; or (ii) the commission agreed to above, and Seller hereby assigns such amount to the Selling Firm and the Buying Firm.

18. Notices. Unless otherwise specified, any notice required or permitted in, or related to this Agreement must be in writing and signed by the party to be bound. Any notice will be deemed delivered: (a) when personally delivered; (b) when delivered by facsimile or electronic mail transmission (in either case, with confirmation of delivery); (c) on the day following delivery of the notice by reputable overnight courier; or (d) on the day following delivery of the notice by certified or registered U.S. mail, postage prepaid, return receipt requested; and in any case shall be sent by the applicable party to the address of the other party shown at the beginning of this Agreement, unless that day is a Saturday, Sunday, or federal or Oregon State legal holiday, in which event such notice will be deemed delivered on the next following business day.

19. Miscellaneous. Time is of the essence of this Agreement. If the deadline under this Agreement for delivery of a notice or performance of any obligation is a Saturday, Sunday, or federal or Oregon State legal holiday, such deadline will be deemed extended to the next following business day. The facsimile and/or electronic mail transmission of any signed document including this Agreement in accordance with Section 18 shall be the same as delivery of an original. At the request of either party, the party delivering a document by facsimile and/or electronic mail will confirm such transmission by signing and delivering to the other party a duplicate original document. This Agreement may be executed in counterparts, each of which shall constitute an original and all of which together shall constitute one and the same Agreement. This Agreement contains the entire agreement and understanding of the parties with respect to the subject matter of this Agreement and supersedes all prior and contemporaneous agreements between them. Without limiting the provisions of Section 12 of this Agreement, this Agreement shall be binding upon and shall inure to the benefit of Buyer and Seller and their respective successors and assigns. Solely with respect to Sections 14 and 17, Selling Firm and Buying Firm are third party beneficiaries of this Agreement. The person signing this Agreement on behalf of Buyer and the person signing this Agreement on behalf of Seller each
Chapter 1—Title, Closing, and Escrow

represents, covenants and warrants that such person has full right and authority to enter into this Agreement and to
bind the party for whom such person signs this Agreement to its terms and provisions. Neither this Agreement nor a
memorandum hereof shall be recorded unless the parties otherwise agree in writing.

20. Governing Law. This Agreement is made and executed under, and in all respects shall be governed
and construed by, the laws of the State of Oregon.

21. Lease(s) and Personal Property.

21.1 Leases.

21.1.1 If required by Buyer or Buyer’s lender and provided for in such Tenant’s Lease, Seller shall
use commercially reasonable efforts to deliver to Buyer, at least 5 days before the Closing Date, a Tenant estoppel
certificate, reasonably acceptable to Buyer, pertaining to each Lease at the Property in effect as of the Closing Date
(each, a “Tenant Estoppel”). Such Tenant Estoppels shall be dated no more than 15 days prior to the Closing Date
and shall certify, among other things: (a) that the Lease is unmodified and in full force and effect, or is in full force
and effect as modified, and stating the modifications; (b) the amount of the rent and the date to which rent has been
paid; (c) the amount of any security deposit held by Seller; and (d) that neither party is in default under the Lease or if
a default by either party is claimed, stating the nature of any such claimed default. If Seller has not obtained Tenant
Estoppels from all Tenants of the Property, then Seller shall execute and deliver to Buyer a Tenant Estoppel with
respect to any such Lease setting forth the information required by this Section 21.1 and confirming the accuracy
thereof. Seller will provide estoppel certificates from all ground floor tenants, US Bank, and a minimum of
four of the six office tenants.

21.1.2 If applicable, the assignment of the Lease(s) by Seller, and assumption of the Lease(s) by
Buyer shall be accomplished by executing and delivering to each other through Escrow an Assignment of Lessor’s
Interest under Lease substantially in the form of Exhibit B attached hereto (the “Assignment”).

21.2 Personal Property. If applicable, Seller shall convey all Personal Property to Buyer by
executing and delivering to Buyer at Closing through Escrow (as defined below), a Bill of Sale substantially in the form
of Exhibit C attached hereto (the “Bill of Sale”). A list of such Personal Property shall be attached to the Bill of Sale.

22. Residential Lead-Based Paint Disclosure. IF THE PROPERTY CONSISTS OF RESIDENTIAL
HOUSING BUILT PRIOR TO 1978, BUYER AND SELLER MUST COMPLETE THE LEAD-BASED PAINT
DISCLOSURE ADDENDUM ATTACHED HERETO AS EXHIBIT D.

23. Addenda; Exhibits. The following named addenda and exhibits are attached to this Agreement and
incorporated within this Agreement:

☐ Exhibit A – Legal Description of Property [REQUIRED]
☐ Exhibit B – Assignment of Lessor’s Interest under Lease (if applicable)
☐ Exhibit C – Bill of Sale (if applicable)
☐ Exhibit D – Lead Paint Disclosure Addendum (if applicable)
☐ Exhibit E – AS IS Exceptions (if applicable)

24. Time for Acceptance. If Seller does not return to Buyer a signed and dated version of this Agreement
on or before 5:00 PM Pacific Time on June 24, 2015, then the Earnest Money shall be promptly refunded to Buyer
and thereafter, neither party shall have any further right or obligation hereunder.
25. OFAC Certification. The Federal Government, Executive Order 13224, requires that business persons of the United States not do business with any individual or entity on a list of “Specially Designated nationals and Blocked Persons” - that is, individuals and entities identified as terrorists or other types of criminals. Buyer hereinafter certifies that:

25.1 It is not acting, directly or indirectly, for or on behalf of any person, group, entity, or nation named by any Executive Order or the United States Treasury Department as a terrorist, specially designated national and/or blocked person, entity, nation, or transaction pursuant to any law, order, rule, or regulation that is enforced or administered by the Office of Foreign Assets Control; and

25.2 It has not executed this Agreement, directly or indirectly on behalf of, or instigating or facilitating this Agreement, directly or indirectly on behalf of, any such person, group, entity, or nation.

Buyer hereby agrees to defend, indemnify, and hold harmless Seller from and against any and all claims, damages, losses, risks, liabilities, and expenses (including attorney’s fees and costs) arising from or related to any breach of the foregoing certification. This certification by Buyer and agreement to indemnify, hold harmless, and defend Seller shall survive Closing or any termination of this Agreement.

Buyer Signature: ___ Date:

CONSULT YOUR ATTORNEY. THIS DOCUMENT HAS BEEN PREPARED FOR SUBMISSION TO YOUR ATTORNEY FOR REVIEW AND APPROVAL PRIOR TO SIGNING. NO REPRESENTATION OR RECOMMENDATION IS MADE BY THE COMMERCIAL ASSOCIATION OF BROKERS OREGON/SW WASHINGTON OR BY THE REAL ESTATE AGENTS INVOLVED WITH THIS DOCUMENT AS TO THE LEGAL SUFFICIENCY OR TAX CONSEQUENCES OF THIS DOCUMENT.

THIS FORM SHOULD NOT BE MODIFIED WITHOUT SHOWING SUCH MODIFICATIONS BY REDLINING, INSERTION MARKS, OR ADDENDA.

Buyer __________________________
By __________________________
Title __________________________
Date __________________________
Seller Acceptance. By execution of this Agreement, Seller agrees to sell the Property on the terms and conditions in this Agreement.

Seller __________________________
By __
Title __
Date __

Seller __________________________
By __
Title __
Date __
CRITICAL DATE LIST:
The last party to execute this Agreement shall complete the information below (the “Critical Date List”), initial where indicated, and return a copy of the same to the other party for such party’s review. This Critical Date List is for reference purposes only and, in the event of a conflict between this Critical Date List and the Agreement, the terms of the Agreement shall prevail.

<table>
<thead>
<tr>
<th>Event Description</th>
<th>Date Requirement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Execution Date (Introductory paragraph):</td>
<td></td>
</tr>
<tr>
<td>Earnest Money due date (Section 1.2.1(a)):</td>
<td></td>
</tr>
<tr>
<td>Seller shall open Escrow with the Escrow Holder (Section 1.2.1(a)):</td>
<td>Before</td>
</tr>
<tr>
<td>Seller shall deliver Seller’s documents to Buyer (Section 4):</td>
<td>Within ___ days after the Execution Date</td>
</tr>
<tr>
<td>Seller shall deliver Preliminary Report to Buyer (Section 5):</td>
<td>Within ___ days after the Execution Date</td>
</tr>
<tr>
<td>Buyer’s title objection notice due to Seller (Section 5):</td>
<td>Within ___ days after receipt of the Preliminary Report</td>
</tr>
<tr>
<td>Seller’s title response due to Buyer (Section 5):</td>
<td>Within ___ days after receipt of Buyer’s title objection notice</td>
</tr>
<tr>
<td>Title Contingency Date (Section 5):</td>
<td>Within ___ days after receipt of Seller’s title response</td>
</tr>
<tr>
<td>Expiration date for satisfaction of General Conditions (Section 2.1):</td>
<td>Within ___ days of the Execution Date</td>
</tr>
<tr>
<td>Expiration date for satisfaction of Financing Condition (Section 2.1):</td>
<td>Within ___ days of the Execution Date</td>
</tr>
<tr>
<td>By this date, Buyer must deliver the notice to proceed contemplated in Section 2.2.</td>
<td>Within ___ days of the Execution Date</td>
</tr>
<tr>
<td>Closing Date (Section 7.1):</td>
<td></td>
</tr>
</tbody>
</table>

Initials of Buyer: ___  Initials of Seller: ___

Initials of Buyer: ___  Initials of Seller: ___
EXHIBIT A
LEGAL DESCRIPTION OF PROPERTY

__________________________
ASSIGNMENT OF LEASES

THIS ASSIGNMENT OF LEASES (this “Assignment”) is made and entered into as of this ___ day of ____, 20___ by and between ___, a ___ (“Assignor”), and ___, a ___ (“Assignee”).

REcitals

This Assignment is entered into on the basis of and with respect to the following facts, agreements and understandings:

A. On ___, ____, Assignor, as “Lessor,” and ___, ___ as “Lessee,” entered into a certain Lease, pursuant to which said Lessor leased to said Lessee certain real property in the City of ____, County of ____, State of ___ (the “Premises”), which Premises are a portion of the property more particularly described on Exhibit A attached hereto and made part hereof by this reference (the “Property”). Said Lease is hereinafter referred to as the “Lease.”

B. By an instrument dated of even date herewith and recorded prior to this instrument, Assignor sold and conveyed its fee interest in and to the Property to Assignee and, in conjunction therewith, Assignor agreed to assign its interest as Lessor under the Lease to Assignee and Assignee agreed to assume the obligations of the Lessor under the Lease, all as more particularly set forth in this Assignment.

NOW, THEREFORE, for good and valuable consideration, including the mutual covenants and agreements set forth herein, Assignor and Assignee agree as follows:

1. Assignment. Assignor hereby sells, assigns, grants, transfers and sets over to Assignee, its heirs, personal representatives, successors and assigns, all of Assignor’s right, title and interest as Lessor under the Lease.

2. Acceptance of Assignment and Assumption of Obligations. Assignee hereby accepts the assignment of the Lessor’s interest under the Lease and, for the benefit of Assignor, assumes and agrees faithfully to perform all of the obligations which are required to be performed by the Lessor under the Lease on or after the Effective Date (defined below).

3. Effective Date. The effective date of this Assignment and each and every provision hereof is and shall be ____, (the “Effective Date”). (If no date is identified, the Effective Date shall be the date the deed from Assignor to Assignee is recorded.)

4. Assignor’s Indemnity of Assignee. Assignor hereby agrees to defend (with counsel reasonably satisfactory to Assignee) and indemnify Assignee, its heirs, personal representatives, successors and assigns, and each of them, from and against any and all claims, suits, demands, causes of action, actions, liabilities, losses, damages, costs and expenses (including attorneys’ fees) arising out of or resulting from any act or omission committed or alleged to have been committed by Assignor as Lessor under the Lease, including without limitation any breach or default committed or alleged to have been committed by the Lessor under the Lease, prior to the Effective Date.
5. **Assignee’s Indemnity of Assignor.** Assignee, for itself and on behalf of its heirs, personal representatives, successors and assigns, hereby agrees to defend (with counsel reasonably satisfactory to Assignor) and indemnify Assignor, its partners, and their respective directors, officers, employees, agents, representatives, successors and assigns, and each of them, from and against any and all claims, suits, demands, causes of action, actions, liabilities, losses, damages, costs and expenses (including attorneys’ fees) arising out of or resulting from any act or omission committed or alleged to have been committed by Assignee, its heirs, personal representatives, successors and assigns, as Lessor under the Lease, including without limitation any breach or default committed or alleged to have been committed by the Lessor under the Lease, on or after the Effective Date.

6. **Successors and Assigns.** This Assignment, and each and every provision hereof, shall bind and inure to the benefit of the parties hereto and their respective heirs, personal representatives, successors and assigns.

7. **Governing Law.** This Assignment shall be construed and interpreted and the rights and obligations of the parties hereto determined in accordance with the laws of the state where the Property is located.

8. **Headings and Captions.** The headings and captions of the paragraphs of this Assignment are for convenience and reference only and in no way define, describe or limit the scope or intent of this Assignment or any of the provisions hereof.

9. **Gender and Number.** As used in this Assignment, the neuter shall include the feminine and masculine, the singular shall include the plural and the plural shall include the singular, as the context may require.

10. **Multiple Counterparts.** This Assignment may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

11. **Attorneys’ Fees.** In the event a suit, action, arbitration, or other proceeding of any nature whatsoever, including without limitation any proceeding under the U.S. Bankruptcy Code, is instituted, or the services of an attorney are retained, to interpret or enforce any provision of this Assignment or with respect to any dispute relating to this Assignment, the prevailing or non-defaulting party shall be entitled to recover from the losing or defaulting party its attorneys’, paralegals’, accountants’, and other experts’ fees and all other fees, costs, and expenses actually incurred in connection therewith (the “Fees”). In the event of suit, action, arbitration, or other proceeding, the amount of Fees shall be determined by the judge or arbitrator, shall include all costs and expenses incurred on any appeal or review, and shall be in addition to all other amounts provided by law.

IN WITNESS WHEREOF, the parties hereto have executed this Assignment on the respective dates set opposite their signatures below, but this Assignment on behalf of such party shall be deemed to have been dated as of the date first above written.

ASSIGNOR:

ASSIGNEE:

[Acknowledgement page follows.]
Chapter 1—Title, Closing, and Escrow

Acknowledgment for Assignor

STATE OF ___________________ )
 ) ss.

County of ___________________ )

This instrument was acknowledged before me this _____ day of _____, 2______, by
_________________ as ________________ of  ___________________ a(n) _____________________, on behalf of
the ________________.

Notary Public for Oregon
Printed Name:
My Commission Expires:

Acknowledgment for Assignee

STATE OF ___________________ )
 ) ss.

County of ___________________ )

This instrument was acknowledged before me this _____ day of _____, 2______, by
_________________ as ________________ of  ___________________ a(n) _____________________, on behalf of
the ________________.

Notary Public for Oregon
Printed Name:
My Commission Expires:
EXHIBIT C
BILL OF SALE

[ ] a ("Seller"), for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, does hereby bargain, transfer, convey and deliver to [ ], a ("Buyer"), its successors and/or assigns:

All of the personal property owned by Seller (collectively, “Personal Property”) located in or on the real property located at [ ] in the City of [ ], County of [ ], State of [ ], which Personal Property is more particularly described on Schedule 1 attached hereto and incorporated herein by reference.

Seller hereby covenants with Buyer that said Personal Property is free and clear of and from all encumbrances, security interests, liens, mortgages and claims whatsoever and that Seller is the owner of and has the right to sell same. Seller, on behalf of itself and its successors, does hereby warrant and agree to defend the title in and to said Personal Property unto Buyer, its successors or assigns against the lawful claims and demands of all persons claiming by or through Seller.

IT IS UNDERSTOOD AND AGREED THAT BUYER HAS EXAMINED THE PERSONAL PROPERTY HEREIN SOLD AND THAT THIS SALE IS MADE “AS IS, WHERE IS” AND SELLER DISCLAIMS ANY EXPRESS OR IMPLIED WARRANTY OTHER THAN THE WARRANTY OF TITLE SET FORTH ABOVE, AS TO THE PERSONAL PROPERTY INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

Buyer and Seller agree that this Bill of Sale shall be effective upon the delivery thereof by Seller to Buyer.

IN WITNESS WHEREOF, the parties have caused this Bill of Sale to be executed this __________ day of _______________________.

SELLER:

____________________________________

______________________________

BUYER:

____________________________________
EXHIBIT D

LEAD-BASED PAINT DISCLOSURE ADDENDUM

(TO BE COMPLETED IF THE PROPERTY CONSISTS OF RESIDENTIAL HOUSING BUILT PRIOR TO 1978)

Seller and Buyer are parties to that certain Commercial Association of Brokers Oregon / SW Washington Purchase and Sale Agreement and Receipt for Earnest Money (Oregon Commercial Form) dated ___ ___, 20___ (the “Purchase Agreement”) for the sale of the Property described therein. Capitalized terms used in this addendum without definition shall have the meanings given them in the Purchase Agreement. Except as expressly modified by this addendum and any other addendum to the Purchase Agreement executed by Buyer and Seller, the Purchase Agreement is unmodified. This addendum and the Purchase Agreement may not be modified except in a writing signed by both Seller and Buyer.

LEAD WARNING STATEMENT

EVERY PURCHASER OF ANY INTEREST IN RESIDENTIAL REAL PROPERTY ON WHICH A RESIDENTIAL DWELLING WAS BUILT PRIOR TO 1978 IS NOTIFIED THAT SUCH PROPERTY MAY PRESENT EXPOSURE TO LEAD FROM LEAD-BASED PAINT THAT MAY PLACE YOUNG CHILDREN AT RISK OF DEVELOPING LEAD POISONING. LEAD POISONING IN YOUNG CHILDREN MAY PRODUCE PERMANENT NEUROLOGICAL DAMAGE, INCLUDING LEARNING DISABILITIES, REDUCED INTELLIGENCE QUOTIENT, BEHAVIORAL PROBLEMS AND IMPAIRED MEMORY. LEAD POISONING ALSO POSES A PARTICULAR RISK TO PREGNANT WOMEN. THE SELLER OF ANY INTEREST IN RESIDENTIAL REAL PROPERTY IS REQUIRED TO PROVIDE THE BUYER WITH ANY INFORMATION ON LEAD-BASED PAINT HAZARDS FROM RISK ASSESSMENTS OR INSPECTIONS IN THE SELLER’S POSSESSION AND NOTIFY THE BUYER OF ANY KNOWN LEAD-BASED PAINT HAZARDS. A RISK ASSESSMENT OR INSPECTION FOR POSSIBLE LEAD-BASED PAINT HAZARDS IS RECOMMENDED PRIOR TO PURCHASE.

AGENT’S ACKNOWLEDGMENT

Seller Agent has informed Seller of Seller’s obligations under 42 U.S.C. 4852(d) and Agent is aware of his/her responsibility to ensure compliance.

SELLER’S DISCLOSURE

.1 Presence of lead-based paint and/or lead-based paint hazards (check one below):

☐ Seller has knowledge of lead-based paint and/or lead-based paint hazards in the housing (explain).

.2 Records and reports available to Seller (check one below):

☐ Seller has provided Buyer with all available records and reports relating to lead-based paint and/or lead-based paint hazards in the housing (list documents below):

☐ Seller has no reports or records relating to lead-based paint and/or lead-based paint hazards in the housing.
The following parties have reviewed the information above and certify, to the best of their knowledge, that the information they provided is true and accurate. A photocopy of this completed LEAD-BASED PAINT DISCLOSURE ADDENDUM, together with a copy of any documents listed in Section 2 of Seller’s Disclosure above, may be treated as an original.

Selling Agent: ___________________________  Date: __________  Seller: ___________________________  Date: __________

Selling Firm: ___________________________  Seller: ___________________________  Date: __________

BEFORE BUYER IS OBLIGATED TO PURCHASE THIS PROPERTY UNDER ANY PURCHASE AND SALE AGREEMENT, BUYER’S AND SELLER’S SIGNATURES ARE REQUIRED ON THE FORM BELOW.

BUYER’S ACKNOWLEDGMENT

.1 Buyer has received copies of all information listed above in Section 2 of Seller’s Disclosure of this form.

.2 Buyer has received the pamphlet “Protect Your Family from Lead in Your Home.”

.3 Buyer has (check one below):
   □ Elected a ten (10) day opportunity (or mutually agreed upon period) to conduct a □ risk assessment or □ inspection of the Property for the presence of lead-based paint and/or lead-based paint hazards, providing Buyer the right to rescind the Purchase Agreement by written notice to Seller no later than the end of such agreed upon 10 day period if Buyer is not satisfied in Buyer’s sole discretion with the results of such risk assessments or inspection, as applicable. Buyer and Seller hereby agree the ten (10) day period described in the preceding sentence shall begin and end ___. Buyer’s failure to provide written notice of Buyer’s election to rescind the Purchase Agreement to Seller on or before _____, 20___ shall be deemed a waiver of Buyer’s right to rescind as provided in this addendum. If Buyer timely elects to rescind the Purchase Agreement as provided herein, the Earnest Money shall be returned to Buyer, together with any interest thereon.
   □ Waived the opportunity to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards.

Buyer: ___________________________  Date: __________

CERTIFICATION OF ACCURACY

This section must be signed by Buyer before Seller signs lines below. The following parties have reviewed the information and certify, to the best of their knowledge, that the information they provided herein is true and accurate.

Buyer: ___________________________  Date: __________  Seller: ___________________________  Date: __________

Buyer: ___________________________  Date: __________  Seller: ___________________________  Date: __________

Buyer Agent: ___________________________  Date: __________  Seller Agent: ___________________________  Date: __________

Buying Firm: ___________________________  Seller Firm: ___________________________
EXHIBIT E
AS IS EXCEPTIONS

None
Thank you, Deborah.

Good afternoon Mr. McAllister:

Thank you for your comments.

I have reviewed the exceptions you have referenced and yes, I do agree that Exception 8 and 13 should be removed. I have located the two maps that were recorded with Exception 12 and will re-send that document to you momentarily.

Regards,

Deborah Clark
Sr. Title Officer/Asst. Vice Pres.
Portland Title Group representing
Ticor Title Company and Fidelity National Title
105 NE 4th Street
McMinnville, OR 97128
(503) 472-6101 Office Phone
(503) 535-3743 Direct
(877) 470-2875 Fax
deborah.clark@titlegroup.fntg.com

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I represent the Buyer in the transaction reflected in the title report you prepared that is attached. I have the following questions/comments:

1. Exception 8 – This is a 1910 party wall agreement that appears to be between Lots 5 and 6. I believe this should be removed because both Lots 5 and 6 are owned by the same party, so this agreement would have merged.

2. Exception 12 – This is a 1977 party wall agreement. I did not get the Exhibits to this agreement so I don’t know what Lots the agreement encumbers. Could you please send me the Exhibits?

3. Exception 13 – This is a 1987 easement. By the terms of this easement, it expired after 20 years. It recorded in 1987, so it expired in 2007. Please remove unless you see something different.

Thanks,

Marisol McAllister | mmcallister@fwwlaw.com
Farleigh Wada Witt | 121 SW Morrison Street, Suite 600 | Portland, Oregon 97204
Tel: 503.228.6044 | Fax: 503.228.1741 | http://www.fwwlaw.com
Direct Dial: 503-553-0262

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July 14, 2015

Via email: balwit@gmail.com

McMinnville, OR 97128

Re: Street, McMinnville, Yamhill County, Oregon ("Property")

Dear

This firm represents and/or assigns ("Buyer"), the buyer under that certain Purchase and Sale Agreement and Receipt for Earnest Money dated effective June 30, 2015 ("Purchase Agreement"), with seller ("Seller") for the purchase and sale of the Property.

Pursuant to Section 5 of the Purchase Agreement, Buyer hereby submits its objections to the following Exceptions as shown on Exhibit A of the Preliminary Report prepared by Ticor Title Company of Oregon (the "Title Company"), under Order No. dated effective July 6, 2015.

1. Exception 6 is the property taxes for the fiscal year 2015-2016. These shall be prorated as of the closing date under the Purchase Agreement.

2. Buyer objects to Exception 7, which references a City lien in favor of the City of McMinnville for the purpose of Downtown Economic Improvement District. This must be paid by Seller at closing. If there are other amounts owning in addition to what is indicated, Buyer will require a reduction in the sale price for such amounts.

3. Title Company has agreed to remove Exception 8.

4. Buyer objects to Exceptions 9, 11, and 12 relating to Party Wall Agreement, to the extent they are no longer applicable to the Property. Buyer is still determining their applicability.
5. Title Company has agreed to remove Exception 13.

6. Buyer objects to Exceptions 14 and 15, a Commercial Real Estate Deed of Trust and an Assignment of Leases and Rents in favor of First Federal Savings & Loan Assn of McMinnville. These must be paid by Seller and removed at closing.

7. Exception 16 references requirements for an extended ALTA loan policy. Seller shall cooperate with Title Company to sign such affidavits and do things necessary (at no cost to Seller) as required by Title Company for Buyer’s lender to obtain such policy.

Please let me know if you have any questions.

Sincerely,

Marisol Ricoy McAllister

MRM/kcw
cc: Kristin Hammond (Kristin.Hammond@cbre.com)  
Denis O’Neill (doneill@nai-nbs.com)  
Carol Prause (cprause@ppllp.net)
PRELIMINARY REPORT

In response to the application for a policy of title insurance referenced herein Fidelity National Title Company of Oregon hereby reports that it is prepared to issue, or cause to be issued, as of the specified date, a policy or policies of title insurance describing the land and the estate or interest hereinafter set forth, insuring against loss which may be sustained by reason of any defect, lien or encumbrance not shown or referred to as an exception herein or not excluded from coverage pursuant to the printed Schedules, Conditions and Stipulations or Conditions of said policy forms.

The printed Exceptions and Exclusions from the coverage of said policy or policies are set forth in Exhibit One. The policy to be issued may contain an arbitration clause. When the Amount of Insurance is less than that set forth in the arbitration clause, all arbitrable matters shall be arbitrated at the option of either the Company or the Insured as the exclusive remedy of the parties. Copies of the policy forms should be read. They are available from the office which issued this report.

This report (and any supplements or amendments hereto) is issued solely for the purpose of facilitating the issuance of a policy of title insurance and no liability is assumed hereby.

The policy(s) of title insurance to be issued hereunder will be policy(s) of Fidelity National Title Company of Oregon, a/an Oregon corporation.

Please read the exceptions shown or referred to herein and the Exceptions and Exclusions set forth in Exhibit One of this report carefully. The Exceptions and Exclusions are meant to provide you with notice of matters which are not covered under the terms of the title insurance policy and should be carefully considered.

It is important to note that this preliminary report is not a written representation as to the condition of title and may not list all liens, defects and encumbrances affecting title to the land.

This preliminary report is for the exclusive use of the parties to the contemplated transaction, and the Company does not have any liability to any third parties nor any liability until the full premium is paid and a policy is issued. Until all necessary documents are placed of record, the Company reserves the right to amend or supplement this preliminary report.

Countersigned

[Signature]
Chapter 1—Title, Closing, and Escrow

Preliminary Report

ESCROW OFFICER: Lori Medak
TITLE OFFICER: Robert Fleming

TO: Fidelity National Title Company of Oregon
Lori Medak
900 SW 5th Avenue
Portland, OR 97204

OWNER/SELLER:

BUYER/BORROWER:

PROPERTY ADDRESS:

EFFECTIVE DATE: August 28, 2015, 08:00 AM

1. THE POLICY AND ENDORSEMENTS TO BE ISSUED AND THE RELATED CHARGES ARE:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
<th>Premium</th>
</tr>
</thead>
<tbody>
<tr>
<td>ALTA Owner's Policy 2006</td>
<td>TBD</td>
<td>TBD</td>
</tr>
<tr>
<td>ALTA Loan Policy 2006</td>
<td>TBD</td>
<td>TBD</td>
</tr>
<tr>
<td>Government Lien Search</td>
<td>160.00</td>
<td></td>
</tr>
</tbody>
</table>

2. THE ESTATE OR INTEREST IN THE LAND HEREINAFTER DESCRIBED OR REFERRED TO COVERED BY THIS REPORT IS:

   A Fee

3. TITLE TO SAID ESTATE OR INTEREST AT THE DATE HEREOF IS VESTED IN:

4. THE LAND REFERRED TO IN THIS REPORT IS SITUATED IN THE CITY OF PORTLAND, COUNTY OF MULTNOMAH, STATE OF OREGON, AND IS DESCRIBED AS FOLLOWS:

   SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF
EXHIBIT "A"
Legal Description

PARCEL I:
Lot 1, Block 4, HOLGATE ADDITION, in the City of Portland, County of Multnomah and State of Oregon.

PARCEL II:
Lot 2, Block 4, HOLGATE ADDITION, in the City of Portland, County of Multnomah and State of Oregon.

PARCEL III:
Lot 3, Block 4, HOLGATE ADDITION, in the City of Portland, County of Multnomah and State of Oregon.

PARCEL IV:
Lot 4, Block 4, HOLGATE ADDITION, in the City of Portland, County of Multnomah and State of Oregon. EXCEPTING THEREFROM that portion by decree entered in Multnomah County Circuit Court Case No. 355-662.

PARCEL V:
Lots 19 and 20, Block 4, HOLGATE ADDITION, in the City of Portland, County of Multnomah and State of Oregon. EXCEPTING THEREFROM that portion taken for the widening of SE 17th Avenue ALSo EXCEPTING THEREFROM that portion conveyed to Tri-County Metropolitan Transportation District in Warranty Deed recorded October 10, 2012, Recorder’s No. 2012-129198.

PARCEL VI:
Lots 5, 16, 17 and 18, Block 4, HOLGATE ADDITION, in the City of Portland, County of Multnomah and State of Oregon. EXCEPTING THEREFROM that portion of Lots 16, 17 and 18 taken for the widening of SE 17th Avenue and that portion of Lot 5 conveyed to the State of Oregon, by and through its State Highway Commission by deed recorded August 6, 1970 in Book 745, Page 1631, Deed Records. ALSO EXCEPTING THEREFROM that portion conveyed to Tri-County Metropolitan Transportation District in Warranty Deed recorded October 10, 2012, Recorder’s No. 2012-129198.
AS OF THE DATE OF THIS REPORT, ITEMS TO BE CONSIDERED AND EXCEPTIONS TO COVERAGE IN ADDITION TO THE PRINTED EXCEPTIONS AND EXCLUSIONS IN THE POLICY FORM WOULD BE AS FOLLOWS:

GENERAL EXCEPTIONS:

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the Public Records; proceedings by a public agency which may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the Public Records.

2. Any facts, rights, interests or claims, which are not shown by the Public Records but which could be ascertained by an inspection of the Land or which may be asserted by persons in possession thereof.

3. Easements, or claims thereof, which are not shown by the Public Records; reservations or exceptions in patents or in Acts authorizing the issuance thereof; water rights, claims or title to water.

4. Any encroachment, encumbrance, violation, variation or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land and not shown by the Public Records. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.

5. Any lien, or right to a lien, for services, labor, material or equipment rental, or for contributions due to the State of Oregon for unemployment compensation or worker's compensation, heretofore or hereafter furnished, imposed by law and not shown by the Public Records.

SPECIFIC ITEMS AND EXCEPTIONS:

6. Property taxes, which are a lien not yet due and payable, including any assessments collected with taxes to be levied for the fiscal year 2015-2016.

Tax Identification No.: 
and

7. City Liens, if any, in favor of the City of Portland. None found as of September 11, 2015.

8. Limited access to and from the Land as contained in Decree of Condemnation entered in the proceedings as set forth below, which provides that there shall be no right of easement or right of access from the Land to the highway other than as expressly provided for in said Decree:

   Suit No.: 355-662
   County: Multnomah
   Court: Circuit
   In favor of: State of Oregon, by and through its State Highway Commission
   Name of Highway: SE McLoughlin Blvd

9. Easement(s) for the purpose(s) shown below and rights incidental thereto, as granted in a document:

   Granted to: Tri-County Metropolitan Transportation District of Oregon
   Purpose: Temporary construction
   Recording Date: October 10, 2012
   Recording No: 2012-129198
   Affects: Various portions of Parcels III, IV, V and VI
NOTE: The duration of various easements are from 6 months to 2 years. However, there is no recorded evidence of the start date of said easements.

10. Please be advised that our search did not disclose any open Deeds of Trust of record. If you should have knowledge of any outstanding obligation, please contact the Title Department immediately for further review prior to closing.

11. Existing leases and tenancies, if any, and any interests that may appear upon examination of such leases.

12. If requested to issue an extended coverage ALTA loan policy, the following matters must be addressed:

   a) The rights of tenants holding under unrecorded leases or tenancies
   b) Matters disclosed by a statement as to parties in possession and as to any construction, alterations or repairs to the Land within the last 75 days. The Company must be notified in the event that any funds are to be used for construction, alterations or repairs.
   c) Any facts which would be disclosed by an accurate survey of the Land

ADDITIONAL REQUIREMENTS/NOTES:

A. Note: Property taxes for the fiscal year shown below are paid in full.

<table>
<thead>
<tr>
<th>Fiscal Year:</th>
<th>2014-2015</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amount:</td>
<td>$1,713.77</td>
</tr>
<tr>
<td>Levy Code:</td>
<td>201</td>
</tr>
<tr>
<td>Account No.:</td>
<td>R181754</td>
</tr>
<tr>
<td>Map No.:</td>
<td>1S1E1448-05200</td>
</tr>
<tr>
<td>Affects Parcel I</td>
<td></td>
</tr>
</tbody>
</table>

B. Note: Property taxes for the fiscal year shown below are paid in full.

<table>
<thead>
<tr>
<th>Fiscal Year:</th>
<th>2014-2015</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amount:</td>
<td>$1,585.92</td>
</tr>
<tr>
<td>Levy Code:</td>
<td>201</td>
</tr>
<tr>
<td>Account No.:</td>
<td>R181755</td>
</tr>
<tr>
<td>Map No.:</td>
<td>1S1E1448-05100</td>
</tr>
<tr>
<td>Affects Parcel II</td>
<td></td>
</tr>
</tbody>
</table>

C. Note: Property taxes for the fiscal year shown below are paid in full.

<table>
<thead>
<tr>
<th>Fiscal Year:</th>
<th>2014-2015</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amount:</td>
<td>$1,763.66</td>
</tr>
<tr>
<td>Levy Code:</td>
<td>201</td>
</tr>
<tr>
<td>Account No.:</td>
<td>R181756</td>
</tr>
<tr>
<td>Map No.:</td>
<td>1S1E1448-05000</td>
</tr>
<tr>
<td>Affects Parcel III</td>
<td></td>
</tr>
</tbody>
</table>

D. Note: Property taxes for the fiscal year shown below are paid in full.

<table>
<thead>
<tr>
<th>Fiscal Year:</th>
<th>2014-2015</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amount:</td>
<td>$2,002.86</td>
</tr>
<tr>
<td>Levy Code:</td>
<td>201</td>
</tr>
<tr>
<td>Account No.:</td>
<td>R181757</td>
</tr>
<tr>
<td>Map No.:</td>
<td>1S1E1448-04900</td>
</tr>
<tr>
<td>Affects Parcel IV</td>
<td></td>
</tr>
</tbody>
</table>
E. Note: Property taxes for the fiscal year shown below are paid in full.

Fiscal Year: 2014-2015  
Amount: $766.00  
Levy Code: 201  
Account No.: R181769  
Map No.: 1S1E14AB-04500  
Affects a portion of Parcel V

F. Note: Property taxes for the fiscal year shown below are paid in full.

Fiscal Year: 2014-2015  
Amount: $377.34  
Levy Code: 201  
Account No.: R181768  
Map No.: 1S1E14AB-04600  
Affects a portion of Parcel V

G. Note: Property taxes for the fiscal year shown below are paid in full.

Fiscal Year: 2014-2015  
Amount: $1,685.70  
Levy Code: 201  
Account No.: R181759  
Map No.: 1S1E14AB-04800  
Affects a portion of Parcel VI

H. Note: Property taxes for the fiscal year shown below are paid in full.

Fiscal Year: 2014-2015  
Amount: $1,671.54  
Levy Code: 201  
Account No.: R181767  
Map No.: 1S1E14AB-04700  
Affects a portion of Parcel VI

I. Note: Property taxes for the fiscal year shown below are paid in full.

Fiscal Year: 2014-2015  
Amount: $411.88  
Levy Code: 201  
Account No.: R181760  
Map No.: 1S1E14AB-04800-A1  
Affects Billboard only on portion of Parcel VI

Prior to close of escrow, please contact the Tax Collector's Office to confirm all amounts owing, including current fiscal year taxes, supplemental taxes, escaped assessments and any delinquencies.

J. NOTE: This report is subject to any amendments which might occur when the names of prospective purchasers are submitted to us for examination.

K. Note: There are NO conveyances affecting said Land recorded within 24 months of the date of this report.
Chapter 1—Title, Closing, and Escrow

L. Note: No utility search has been made or will be made for water, sewer or storm drainage charges unless the City/Service District claims them as liens (i.e. foreclosable) and reflects them on its lien docket as of the date of closing. Buyers should check with the appropriate city bureau or water service district and obtain a billing cutoff. Such charges must be adjusted outside of escrow.

M. Note: Effective January 1, 2008, Oregon law (ORS 314.258) mandates withholding of Oregon income taxes from sellers who do not continue to be Oregon residents or qualify for an exemption. Please contact your Escrow Closer for further information.

N. Recording Charge (Per Document) is the following:

<table>
<thead>
<tr>
<th>County</th>
<th>First Page</th>
<th>Each Additional Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Multnomah</td>
<td>$46.00</td>
<td>$5.00</td>
</tr>
<tr>
<td>Washington</td>
<td>$41.00</td>
<td>$5.00</td>
</tr>
<tr>
<td>Clackamas</td>
<td>$53.00</td>
<td>$5.00</td>
</tr>
<tr>
<td>Yamhill</td>
<td>$41.00</td>
<td>$5.00</td>
</tr>
</tbody>
</table>

Note: When possible the company will record electronically. An additional charge of $5.00 applies to each document that is recorded electronically.

O. In addition to the standard policy exceptions, the exceptions enumerated above shall appear on the final 2006 ALTA Policy unless removed prior to issuance.

P. THE FOLLOWING NOTICE IS REQUIRED BY STATE LAW: YOU WILL BE REVIEWING, APPROVING AND SIGNING IMPORTANT DOCUMENTS AT CLOSING. LEGAL CONSEQUENCES FOLLOW FROM THE SELECTION AND USE OF THESE DOCUMENTS. YOU MAY CONSULT AN ATTORNEY ABOUT THESE DOCUMENTS. YOU SHOULD CONSULT AN ATTORNEY IF YOU HAVE QUESTIONS OR CONCERNS ABOUT THE TRANSACTION OR ABOUT THE DOCUMENTS. IF YOU WISH TO REVIEW TRANSACTION DOCUMENTS THAT YOU HAVE NOT SEEN, PLEASE CONTACT THE ESCROW AGENT.

Q. Note: This map/plat is being furnished as an aid in locating the herein described Land in relation to adjoining streets, natural boundaries and other land. Except to the extent a policy of title insurance is expressly modified by endorsement, if any, the Company does not insure dimensions, distances or acreage shown thereon.
March 31, 2016

[LETTERHEAD]

VIA OVERNIGHT DELIVERY AND VIA EMAIL

[ Seller Name ]
[ Seller Address ]
Email: __________

[ Seller Attorney Name ]
[ Address ]
Email: _________________


Dear [Seller Name]:

I am an attorney representing Buyer and sending you this letter on its behalf. Section 4.01(a) of the PSA provides that Buyer has a Due Diligence Contingency which expires on April 1, 2016. The Due Diligence Contingency includes Buyer’s review of certain matters related to the condition of the Property including the title to the Property.

Buyer hereby waives the Due Diligence Contingency contained in Section 4.01(a) of the PSA subject to the following terms and conditions:

A. Title, Permitted Exceptions. Buyer’s waiver of the Due Diligence Contingency is subject to the Title Company issuing the Title Policy, provided however that the Permitted Exceptions which shall be contained in the Title Policy shall be limited as follows:

1. Exception #8 approved by Buyer: Preliminary Report, General Exceptions #8 (Re: Limited Access as contained in Decree of Condemnation). Buyer accepts Exception #8. This is the only exception in the Preliminary Report which Buyer accepts as a Permitted Exception.

2. Exceptions disapproved by Buyer: Buyer disapproves all of the remaining exceptions in the Preliminary Report (Preliminary Report, General Exceptions 1-5, 7, 9-11, 13-15) and such exceptions shall either be deleted from the Title Policy or modified in accordance with the following comments:

i. General Exceptions 1 & 7, Taxes. The Title Policy may contain an exception for property taxes limited to amounts not yet due and property taxes shall be prorated as of the Closing Date as provided in the PSA. General Exception #1 & #7 in the Preliminary Report will be deleted or limited in accordance with the foregoing.

ii. General Exceptions 2, 3, 4, 13, &15: Since the Title Policy will be an ALTA extended coverage policy Buyer acknowledges that the Title Policy
will contain a survey exception which will note the matters disclosed by the final ALTA survey. Buyer has ordered the ALTA survey and will provide a copy to the Title Company for its review upon completion. Buyer reserves the right to object to any matter disclosed by the ALTA survey or the Title Company’s exceptions related thereto (if any). General Exception #2, 3, 4, 13, & 15 in the Preliminary Report will be deleted or limited to matters disclosed in the completed ALTA Survey.

iii. **General Exception #5 & 14:** Liens for services, labor, materials, equipment. General Exception #5 & #14 will be deleted from the Title Policy. Buyer assumes that Seller will provide customary affidavits to Title Company to delete these exceptions.

iv. **General Exception #9:** Buyer rejects/disapproves General Exception #9. Seller’s counsel has previously indicated that it has contacted Tri-Met and that it has or will procure documents acceptable to the Title Company for deletion of General Exception #9.

v. **General Exception #10:** Seller financing. General Exception #10 will be deleted.

vi. **General Exception #11, Leases:** At Closing, the Property shall not be subject to any Leases except for those Leases which were expressly listed and described in Seller’s Certified Rent Roll dated February 18, 2016 and provided that with respect to the leases described in the Rent Roll: (a) the Sign Lease shall be amended on terms acceptable to the Buyer, consistent with the terms contained in the Second Amendment to PSA; and (b) with respect to the residential leases Seller has timely provided the 90 day notice (with copy to Buyer) described in Section 4.04 of the PSA. Buyer acknowledges and accepts that the final Title Policy will include an exception for the rights of parties in possession pursuant to leases in accordance with the foregoing provisions. Buyer will require that General Exception #11 will be modified in accordance with the foregoing.

B. Buyer expressly reserves all other terms, conditions and contingencies contained in the PSA which are not expressly addressed in this letter, including but not limited to the CUP Approval Contingency (PSA Section 4.01(b)), Environmental Contingency (PSA Section 4.01(c)), and Seller’s obligation to obtain the amendment to the sign lease, described in Section 7(a) of the Second Amendment to PSA. Buyer reserves the right to object to any supplemental title report.

Please feel free to contact me with questions.

Very truly yours,
[Name]
Attorney for Buyer

Cc: (via email only):

[Client Name]
April 6, 2015

VIA EMAIL ONLY

Mill Creek, WA 98012

Bellevue, Washington 98006

Re: Purchase and Sale Agreement, between (“Seller”) and (“Buyer”) dated November 18, 2015, as amended (the “Sale Agreement”)

Dear :

As you know, this firm represents Seller in connection with the sale of its property located at (the “Property”), as described in that certain Preliminary Report dated November 17, 2015 (the “Report”) issued by Fidelity National Title Company of Oregon (the “Title Company”). This letter is in response to Buyer’s letter dated March 31, 2016 with respect to the objections to the exceptions shown in the Report, pursuant to Section 4.02 of the Sale Agreement.

1. General Exceptions 1 and 7: Seller agrees that property taxes will be prorated as of the Closing Date pursuant to the Sale Agreement.

2. General Exceptions 2, 3, 4, 13 and Special Exception 15: Buyer is responsible for the premium for the extended coverage title policy to remove the general exceptions and for obtaining the survey required by the title company to issue the extended coverage. Seller acknowledges that Buyer has a right to object to matters disclosed by such survey.

3. General Exception 5 and Special Exception 14: If the transaction closes within 75 days of the environmental work being completed at the Property, the Title Company has committed to issuing an “early issue” policy to remove these exceptions upon Seller fulfilling certain conditions, including payment of an early issue premium. Seller will fulfill the Title Company’s conditions and pay such premium.
FARLEIGH WADA WITT

April 6, 2016
Page 2

4. Special Exception 9: This easement has now been removed.

5. Special Exception 10: This will be removed.

6. Special Exception 11: Seller agrees that the Property will be subject to only the leases identified in Seller’s Certified Rent Roll dated February 18, 2016. Seller has provided Buyer with the signed amendment to the sign lease, and Seller will provide the 90-day notice pursuant to Section 4.04 of the PSA.

Sincerely,

Marisol Ricoy McAllister

MRM/mrm
cc: Nick Ostroff, William Elliott, Joe Kappler, (via email)
P:

Real Estate and Land Use Fundamentals
VIA E-MAIL (Candice.Weischedel@TicorTitle.com)

Ticor Title Company
111 SW Columbia Street, Suite 1000
Portland, OR 97201
Attn: Candice Weischedel
Escrow Officer

Re: in the City of McMinnville, Yamhill County, Oregon (the “Property”)

Dear Candice:

This office represents (“Buyer”), the buyer under that Purchase and Sale Agreement and Receipt for Earnest Money dated as of June 30, 2015, as amended by that certain First Amendment to Purchase and Sale Agreement and Receipt for Earnest Money dated as of August 4, 2015, that certain Second Amendment to Purchase and Sale Agreement and Receipt for Earnest Money dated as of August 4, 2015, that certain Third Amendment to Purchase and Sale Agreement and Receipt for Earnest Money dated as of August 12, 2015, that certain Fourth Amendment to Purchase and Sale Agreement and Receipt for Earnest Money dated as of August 24, 2015, and that certain Fifth Amendment to Purchase and Sale Agreement and Receipt for Earnest Money dated as of August 28, 2015 (collectively, the “Sale Agreement”), between as seller (collectively, “Seller”), and , as the original buyer. The Sale Agreement relates to the purchase and sale of the Property and legally described in that certain Preliminary Report, effective July 6, 2015, as updated by that certain supplemental report (the “Title Report”) issued by Ticor Title Company (the “Title Company”). This letter constitutes the escrow instructions of Buyer.

A. Deliveries.

1. Seller. Seller will cause the following documents to be deposited into escrow, executed by Seller:

   a. A Statutory Warranty Deed (the “Deed”);
b. An Escrow Holdback Agreement;

c. An Assignment of Leases;

d. A Bill of Sale;

e. An Assignment of Intangible Property; and

f. Other closing documents Title Company requires.

2. **Buyer.** Buyer has caused or will cause the following to be deposited into escrow:

a. **Purchase Price.** The full Purchase Price identified in the Sale Agreement of $2,850,000.00, plus Buyer's share of closing costs as identified below, less the original Earnest Money deposit of $140,500.00. A portion of Buyer’s funds will come from a loan from Opus Bank in the amount of $1,260,000.00.

b. **Closing Documents.** The following documents executed by Buyer:

i. An Assignment of Purchase and Sale Agreement;

ii. A counterpart to the Escrow Holdback Agreement;

iii. A counterpart to the Assignment of Leases;

iv. Other closing documents Title Company requires; and

v. Loan documents with respect to Buyer’s financing with Opus Bank.

B. **Pre-Closing Requirements.** You must comply with the following requirements as a condition to closing:

3. **Closing Costs and Prorations.**

a. **Buyer.** Buyer shall pay one-half of the escrow fees (including one-half of the fees for the escrow holdback described below), the recording fees for the Deed, and all costs related to Buyer’s financing with Opus Bank.
b. **Seller.** Seller shall pay the premium for the ALTA standard owner's policy of title insurance in favor of Buyer, one-half of the escrow fees (including one-half of the fees for the escrow holdback described below), and all real estate excise and transfer taxes, if any.

c. **Prorations.** Real property taxes for the tax year of closing, and rent under the leases at the Property shall be prorated as of the closing date.

4. **Closing Statement.** Buyer shall have approved the settlement statement prepared by you, and should reflect that $13,000.00 of the proceeds of the sale shall be held-back in an escrow account pursuant to the Escrow Holdback Agreement. You shall sign the Escrow Holdback Agreement.

5. **Title Insurance.** Title Company shall be irrevocably committed to issue on closing an ALTA owner’s policy of title insurance in the amount of the Purchase Price, subject only to those exceptions identified Specific Items and Exceptions 6 and 9-12 on the Title Report.

6. **Escrow Instructions.** You shall return a signed copy of these instructions to me.

C. **Closing.** You are authorized to close this transaction when you have complied with all of the pre-closing requirements listed in Section B. above, received Sellers documents, and you can do all of the following:

1. **Recording.** Record the Deed, and the applicable documents relating to Buyer’s financing with Bank, in the Yamhill County records.

2. **Title Policies.** Issue and deliver the original owner’s policy to Buyer.

3. **Documents.** Email me copies of all of the fully signed closing documents (but not any documents related to Buyer’s financing with Opus Bank), and a copy of the recorded Deed. Deliver the original closing documents to Buyer.

D. **General.** If, at any time during the process of closing, you are unable to comply with these instructions or in the event you need additional instructions, you are directed to stop the closing and not proceed until you have received further instructions from me. The closing date is scheduled to be on or before September 2, 2015. If the transaction does not close by that date, you are directed to stop the closing and not proceed until you have received further
instructions from me. These instructions may only be amended by e-mail from me. The provisions of these instructions will control in the event of any conflict between these instructions and any other instructions signed by Buyer.

Please acknowledge your receipt of these instructions and your agreement to comply with its terms by executing a copy of these instructions and e-mailing them to me. Thank you for your assistance in this matter.

Sincerely,

Marisol Ricoy McAllister

MRM/kcw
cc:

Agreed and Accepted By:

Ticor Title Company

By: ________________________________
   Candice Weischedel
   Escrow Officer
ESCROW HOLDBACK AGREEMENT

THIS ESCROW HOLDBACK AGREEMENT ("Agreement") is dated as of September _, 2015 and is by and among (collectively, "Seller"), , an Oregon limited liability company ("Buyer"), and TICOR TITLE COMPANY OF OREGON ("Escrow Agent").

RECITALS

A. Buyer, as successor in interest to , and Seller are parties to that certain Purchase and Sale Agreement and Receipt for Earnest Money dated as of June 30, 2015, as amended by that certain First Amendment to Purchase and Sale Agreement and Receipt for Earnest Money dated as of August 4, 2015, that certain Second Amendment to Purchase and Sale Agreement and Receipt for Earnest Money dated as of August 4, 2015, that certain Third Amendment to Purchase and Sale Agreement and Receipt for Earnest Money dated as of August 12, 2015, and that certain Fourth Amendment to Purchase and Sale Agreement and Receipt for Earnest Money dated as of August 24, 2015 (collectively, the “Sale Agreement”) for the purchase and sale of Buildings, located at in the City of McMinnville, Oregon, and legally described in the Sale Agreement. Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Sale Agreement.

B. Capitalized terms not defined herein have the meaning given them in the Sale Agreement.

C. Seller and Buyer agree that Thirteen Thousand and 00/100 Dollars ($13,000.00) of the Purchase Price shall be held back at Closing and shall be deposited into a non-interest-bearing account with Escrow Agent pursuant to the terms of this Agreement.

AGREEMENT

In consideration of the mutual promises and covenants contained herein and for other good and valuable consideration, receipt whereof is hereby acknowledged, the parties hereto agree as follows:

1. Deposit of Funds. Buyer and Seller hereby appoint Escrow Agent to act in accordance with the terms and provisions of this Agreement. Escrow Agent shall hold $13,000.00 of the Purchase Price (the “Funds”) at Closing and deposit the Funds in a separate non-interest-bearing account. By its execution below, Escrow Agent acknowledges receipt of the Funds and accepts the foregoing appointment.

2. Escrow Fees. The escrow fees for this holdback transaction shall be split equally between Seller and Buyer and shall be paid at Closing.

3. Repairs. Buyer shall give Seller access to the Property on dates and at times arranged in advance with Buyer, to complete the following repairs (the “Work”) to the Property:
<table>
<thead>
<tr>
<th>Item/Issue Identified</th>
<th>Repairs to be done</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Elevator</td>
<td>State required repairs, upgrade the phone to an ADA compliant elevator-phone, upgrade the door edge sensor to the newer infrared strip recommended</td>
<td>$7,000.00</td>
</tr>
<tr>
<td>Loose or damaged roof cap flashing on both buildings</td>
<td>Reattach and replace where necessary</td>
<td>$500</td>
</tr>
<tr>
<td>Observed debris on roof to include nails, hoist mechanism and garbage.</td>
<td>Debris will be removed</td>
<td>$500</td>
</tr>
<tr>
<td>Compromised roofing noted at several areas.</td>
<td>ensure that there are no leaks in the roof above, including the bridal room associated with the HVAC</td>
<td>$500</td>
</tr>
<tr>
<td>Missing windows above lower roof of Campbell building</td>
<td>block off these two windows and weather proof them</td>
<td>$500</td>
</tr>
<tr>
<td>Improperly terminated wiring for an HVAC unit was noted on the Thrifty building</td>
<td>This wiring will be terminated inside a weatherproof junction box with power and thermostat wiring preserved for potential future use</td>
<td>$500</td>
</tr>
<tr>
<td>Missing downspouts on the southwest corner of the corner building</td>
<td>Replace downspouts and clear storm sewer laters. Water drainage will work as intended. This will not include replacement of under sidewalk laterals and concrete work.</td>
<td>$500</td>
</tr>
<tr>
<td>Verify that roof above Creekside Church Nursery is leak-free</td>
<td>A hose will be used to inundate the roof and test for leaks, if any are present, the seller will repair the leaks and</td>
<td>$3000</td>
</tr>
<tr>
<td>Item/Issue Identified</td>
<td>Repairs to be done</td>
<td>Value</td>
</tr>
<tr>
<td>-----------------------</td>
<td>--------------------</td>
<td>-------</td>
</tr>
<tr>
<td></td>
<td>retest the roof above the nursery to ensure that the repair is complete.</td>
<td></td>
</tr>
</tbody>
</table>

3.1. **Performance of Repairs.** All Work shall be performed in a good and workmanlike manner. Buyer or its agents or contractors may be present during the performance of all Work.

3.2. **No Disturbance.** Seller’s access shall in no way disturb the rights of tenants.

3.3. **Seller’s Indemnity.** Seller will defend, indemnify and save Buyer harmless from all liability and expense (including reasonable attorneys’ fees) in connection with all claims, suits and actions of every name, kind and description brought against Buyer or Buyer’s agents by any person or entity as a result of or on account of injuries or damages to persons, entities and/or property received or sustained, arising out of, in connection with or as a result of the acts or omissions of Seller or its agents or contractors in exercising its right of entry and performing the Work. Seller shall protect, defend and indemnify Buyer and its agents from and against any construction or other liens or encumbrances arising out of or in connection with its exercise of this right of entry or the performance of the Work and shall cause any such liens or encumbrances to be promptly released. Buyer, in its sole discretion, may pay such liens without notice to Seller, and charge Seller therefore.

3.4. **Warranties.** Seller shall promptly assign all warranties with respect to the Work to Buyer after completion.

4. **Disbursement of Funds by Escrow Agent.** Buyer will inspect the Work within ten (10) days after notice from Seller that a particular item of the Work is completed. Buyer will instruct Escrow Agent to release amounts to Seller from the escrow account equal to the value of the Work attributed to that item after Buyer approves the item of Work in its reasonable discretion.

5. **Term.** This Agreement shall remain in effect until all Funds have been disbursed. Any remaining amount of the Funds in the escrow account will be released to Buyer immediately in the event all items of Work have not been completed by October 15, 2015. Upon Seller’s and Buyer’s certification to Escrow Agent that the Work has been completed, any Funds remaining in escrow shall be disbursed to Seller by Escrow Agent after all approved disbursement requests have been paid.

6. **Notice.** All notices required or permitted to be given hereunder shall be given in the manner and to the addresses set forth in the Sale Agreement.
Chapter 1—Title, Closing, and Escrow

7. **Duties of Escrow Agent.** Escrow Agent's rights, duties and obligations are strictly limited to those expressly set forth in this Agreement and Escrow Agent shall be under no implied obligation or subject to any implied liability hereunder. Escrow Agent shall not be required to take notice of any default or any other matter, nor be bound nor required to give notice or demand, nor required to take any action whatever except as herein expressly provided. Escrow Agent shall not be liable for any loss or damage unless caused by its own gross negligence or willful misconduct. If any controversy arises between the parties hereto or with any third person, Escrow Agent shall not be required to resolve the same or to take any action to do so but may, at its discretion, institute such interpleader or other proceedings as it deems proper. Escrow Agent may rely on any joint written instructions as to the disposition of the Funds.

8. **Attorneys’ Fees.** In the event of any litigation between Buyer and Seller arising under this Agreement or concerning the meaning or interpretation of any provision contained herein, the losing party shall pay the prevailing party's costs and expenses of litigation, including, without limitation, reasonable attorneys' fees at trial and upon appeal or petition for review.

9. **Miscellaneous.** This Agreement shall bind the parties and their heirs, successors and assigns. This Agreement will be construed, and the rights, duties, and obligations of the parties will be determined, in accordance with the laws of the State of Oregon. If any provision of this Agreement or any application of any provision is determined to be unenforceable, the remainder of this Agreement shall be unaffected. If the provision is found to be unenforceable when applied to particular persons or circumstances, the application of the provision to other persons or circumstances shall be unaffected. This Agreement may be executed in any number of counterparts, each of which will be deemed to be an original and all of which together will constitute a single agreement. This Agreement represents the entire understanding of the parties with respect to the subject matter of the Agreement. There are no other prior or contemporaneous agreements, either written or oral, among the parties with respect to this subject.

DATED the date and year above first written.

**BUYER:**

, an Oregon limited liability company

By: __________________________

, Member

**SELLER:**

________________________________________

her attorney-in-fact

**ESCROW AGENT:**

Ticor Title Company of Oregon

By: __________________________

Candice Weischedel, Escrow Agent
June 21, 2016

Via e-mail: lori.medak@fnf.com

Lori Medak
Fidelity National Title Insurance Company
900 SW Fifth Ave., Lobby Level
Portland, OR, 97204

RE: Escrow No.

Dear Lori:

This firm represents (collectively “Seller”), the seller under that Purchase and Sale Agreement dated November 18, 2015, as amended by that certain First Amendment to Purchase Sale Agreement dated February 10, 2016, and that Second Amendment to Purchase Sale Agreement dated March 29, 2016 (collectively, the “PSA”), with , a Washington limited liability company (“Original Buyer”). The PSA involves the purchase and sale of property located at , Portland, Oregon 97202 (“Property”) as more particularly described in that Preliminarily Report issued by Fidelity National Title Insurance Company dated June 9, 2016 (“Title Company”), as supplemented. Buyer will assign the PSA to a Washington limited liability company (“Buyer”) at closing.

Seller is completing this transaction as a like-kind exchange under IRC 1031 (the “Exchange”). Investment Property Exchange Services, Inc. (“IPX”) is the qualified intermediary for the Exchange and has delivered to you unsigned documents related to the Exchange (the “Exchange Documents”). This letter shall serve as escrow instructions of Seller in connection with the closing.
A. Deliveries.

1. Seller. Seller will cause the following documents to be deposited into escrow:
   
   a. Statutory Warranty Deed (the “Deed”);
   
   b. Updated Certificate Rent Roll Per Purchase and Sale Agreement Section 4.05 (“Rent Roll”);
   
   c. Seller’s Certificate of Compliance;
   
   d. Assignment of Purchase and Sale Agreement (“Assignment of PSA”);
   
   e. Assignment and Bill of Sale (“Assignment of BOS”);
   
   f. Supplemental Escrow Instruction Funds Held (the “Holdback Agreement”);
   
   g. Exchange Documents; and
   
   h. Owner’s Affidavit, Construction Lien Indemnity, Preliminary Report Approval, and tax documents.

   The Title Company must get all of aforementioned Seller documents completed, signed, dated, notarized, and, if required, acknowledged by all parties thereto.

2. Buyer. Buyer has caused or will cause the following documents to be deposited into escrow:

   a. Purchase Price. The full Purchase Price identified in the PSA of $3,300,000.00 less the $100,000.00 earnest money, plus Buyer’s share of Closing Costs as identified in Section C.1.b. below, to be deposited in escrow;

   b. Countersigned Holdback Agreement, via email,

   c. Assignment of PSA, via email, and

   d. Assignment of BOS, via email.

   Electronic signatures of the above documents are acceptable.

B. Prorations. All prorations shall be apportioned as of closing, except as provided below:
1. Real property taxes and any assessments shall be prorated between Buyer and Seller based on the latest available billing with respect to property taxes except the billboard taxes, which are payable by Pacific Outdoor Advertising; and

2. The following rent from the Property, shall be prorated as follows:
   a. $600.00 per month at paid through June 30, 2016 with no deposit;
   b. $1,200.00 per month at paid through June 30, 2016 with no deposit; and
   c. $1,870.00 per year for a sign with paid through December, 2016.

C. Preclosing Requirements. You must comply with the following requirements as a condition to closing:

   a. Seller. Seller shall pay the premium for the ALTA standard owner's policy of title insurance (the “Title Policy”) in favor of Buyer, real estate commissions, all costs and expenses related to the Exchange, and one-half of the escrow fees.
   b. Buyer. Buyer shall pay the premium for any extended coverage or additional endorsements requested by Buyer to the Title Policy, the cost of recording the Deed, and one-half of the escrow fees.

2. Closing Statement. Seller shall have approved the settlement statement prepared by you.

3. Escrow Instructions. You shall return a signed copy of these instructions to me.

4. Escrow Holdback Agreement. You shall have obtained a countersignature from the Title Company on the Holdback Agreement.

5. Exchange. You shall have complied with all pre-closing instructions of IPX related to the Exchange.

D. Closing. You are authorized to close this transaction when you have complied with all of the preclosing requirements listed in Section C. above, received all of Buyer's funds identified in Section A.2.a. above, received all of Buyer’s documents identified in Sections A.2.b. and A.2.c. above, and you can do all of the following:
1. **Recording.** Record the Deed in the Official Records of Multnomah County, Oregon.

2. **Title Policies.** Issue and deliver the original Title Policy to Buyer.

3. **Funds.** Disburse all funds as required by Seller's approved closing statement.

4. **Holdback.** Set up an escrow for $15,000.00 which shall be withheld by the Title Company from the Purchase Price paid at closing to be held pursuant to the terms of the Holdback Agreement.

5. **Documents.** Deliver originals of the fully executed Holdback Agreement, Rent Roll, Seller’s Certificate of Compliance, and Assignment of PSA to Buyer, and copies of the Assignment of BOS, the Exchange Documents and all other documents signed by Seller, and a conformed copy of the Deed to me.

**E. General.** If, at any time during the process of closing, you are unable to comply with these instructions or in the event you need additional instructions, you are directed to stop the closing and not proceed until you have received further instructions from me. The closing date is scheduled to be on June 22, 2016. If the transaction does not close by June 22, 2016, you are directed to stop the closing and not proceed until you have received further instructions from me. These instructions may be amended only by e-mail or by facsimile from me. The provisions of these instructions will control in the event of any conflict between these instructions and any other instructions signed by Seller.

Please acknowledge your receipt of these instructions and your agreement to comply with its terms by executing a copy of these instructions and e-mailing them to me. Thank you for your assistance in this matter.

Sincerely,

Marisol Ricoy McAllister

MRM/rs
P:\DOCS\LINDAD\17518\DOC\3OH082902.DOC
RECEIPT AND ACKNOWLEDGMENT

I hereby acknowledge receipt of and agree to comply with all terms and conditions of the above instructions by .

Dated: June 21, 2016.

Fidelity National Title Insurance Company

By: ________________________________
   Lori Medak, Escrow Officer
July 28, 2016

Via e-mail: dchase@firstam.com

First American Title Company of Oregon
9200 SE Sunnybrook, Suite 400
Clackamas, OR 97015
Attn: Debbie J. Chase
Escrow Branch Manager

Re: Order No.: Portland, OR 97202 (the “Property”)

Dear Debbie:

This office represents (collectively, “Purchaser”), the buyer under that certain Earnest Money Agreement dated as of April 26, 2016, as amended by that certain First Amendment to Earnest Money Agreement dated as of June 30, 2016, as amended by that certain Second Amendment to Earnest Money Agreement dated as of July 27, 2016 (collectively, the “Purchase Agreement”), with an Oregon limited liability company, as seller (“Seller”). The Purchase Agreement relates to the purchase and sale of the Property and legally described in that certain Preliminary Title Report, effective as of April 21, 2016 (the “Title Report”) issued by First American Title Company of Oregon (the “Title Company”).

Purchaser is completing this transaction as a like-kind exchange under IRC 1031 (the “Exchange”). Investment Property Exchange Services, Inc. (“IPX”) is the qualified intermediary for the Exchange and has delivered to you unsigned documents related to the Exchange (the “Exchange Documents”). This letter constitutes the escrow instructions of Purchaser.

A. Deliveries.

1. Seller. Seller will cause the following documents to be deposited into escrow, executed by Seller:

   a. A Statutory Warranty Deed (the “Deed”);
b. Two originals of an Assignment of Leases;

c. A Bill of Sale;

d. Two originals of an Assignment of Construction Contract, Architect’s Agreement, and Plans and Specifications;

e. Two originals of an Assignment of Contracts, Warranties, and Rights; and

f. Other closing documents Title Company requires.

2. **Purchaser.** Purchaser has caused or will cause the following to be deposited into escrow:

a. **Purchase Price.** The full Purchase Price identified in the Purchase Agreement of $3,500,000.00, plus Purchaser's share of closing costs as identified below, less the original Earnest Money deposit of $100,000.00. A portion of Purchaser’s funds will come from a loan from in the amount of $409,000, and $3,112,077.68, will come from IPX for the Exchange. Purchaser will get a credit for $1,800.00 for the installation of gates.

b. **Closing Documents.** The following documents executed by Purchaser:

i. Two originals of the Assignment of Leases;

ii. Two originals of the Assignment of Construction Contract, Architect’s Agreement, and Plans and Specifications, with consents signed by the contractor and architect;

iii. Two originals of the Assignment of Contracts, Warranties, and Rights;

iv. Exchange Documents;

v. Loan documents with respect to Purchaser’s financing with First Republic Bank; and

vi. Other closing documents Title Company requires.
B. Pre-Closing Requirements. You must comply with the following requirements as a condition to closing:

   
a. Purchaser. Purchaser shall pay one-half of the escrow fees, the recording fees for the Deed, and all costs related to Purchaser’s financing with First Republic Bank.

   b. Seller. Seller shall pay the premium for the ALTA standard owner's policy of title insurance in favor of Purchaser, one-half of the escrow fees, all real estate excise and transfer taxes, if any, and the premium for the early issuance fee for both First Republic Bank’s title policy and the Title Policy described below.

   c. Prorations. Real property taxes for the tax year of closing, and rent under the leases at the Property shall be prorated as of the closing date.

2. Closing Statement. Purchaser shall have approved the settlement statement prepared by you.

3. Title Insurance. Title Company shall be irrevocably committed to issue on closing an ALTA owner’s policy of title insurance in the amount of the Purchase Price (the “Title Policy”), subject only to those exceptions identified General Exceptions 1-4, inclusive, 6, and 10 on the Title Report. In addition, Purchaser requires the following endorsements:

   222-06 – Location

   217-06 – Access and entry

   219.1-06 – Contiguity Single Tax Parcel

   209.2-06 – Covenants, conditions and restrictions

   217.2-06 - Utility Access Fee.

4. Escrow Instructions. You shall return a signed copy of these instructions to me.

C. Closing. You are authorized to close this transaction when you have complied with all of the pre-closing requirements listed in Section B. above, received Sellers documents, and you can do all of the following:
1. **Recording.** Record the Deed, and the applicable documents relating to Purchaser’s financing with First Republic Bank, in the Multnomah County records, and provide me conformed recorded copies.

2. **Title Policy.** Issue and deliver the original Title Policy to Purchaser.

3. **Documents.** Deliver me the original Bill of Sale, one original Assignment of Leases, Assignment of Construction Contract, Architect’s Agreement, and Plans and Specifications, and Assignment of Contracts, Warranties, and Rights, and deliver one original of the assignments to the Seller. Deliver the original Exchange Documents as required by IPX, and the loan documents as required by First Republic Bank.

   **D. General.** If, at any time during the process of closing, you are unable to comply with these instructions or in the event you need additional instructions, you are directed to stop the closing and not proceed until you have received further instructions from me. The closing date is scheduled to be on or before July 29, 2016. If the transaction does not close by that date, you are directed to stop the closing and not proceed until you have received further instructions from me. These instructions may only be amended by e-mail from me. The provisions of these instructions will control in the event of any conflict between these instructions and any other instructions signed by Purchaser.

   Please acknowledge your receipt of these instructions and your agreement to comply with its terms by executing a copy of these instructions and e-mailing them to me. Thank you for your assistance in this matter.

   Very truly yours,

   Marisol Ricoy McAllister

MRM/rs
cc (via email):

   Nick Ostroff
   Greg Dolinajec

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FARLEIGH WADA WITT

First American Title Company of Oregon
July 28, 2016
Page 5

Agreed and Accepted By:

First American Title Company of Oregon

By: ____________________________
   Debbie J. Chase
   Escrow Branch Manager
November 8, 2016

Via Email: Kelly.Norton@ctt.com

Kelly M. Norton
VP, Sr. Commercial Escrow Officer
Chicago Title Company of Oregon
1211 SW Fifth Ave., Suite 2130
Portland, OR 97204

Re: Chicago Title Insurance Company
Preliminary Report dated April 28, 2016 (the “Report”)
Order No.: 
Loan #: 

Dear Kelly:

This firm represents Bank (“Bank”) in connection with a construction loan to an Oregon limited liability company (“Borrower”), in the amount of $10,506,000, which may be converted to a term loan pursuant to the Loan Documents described below, in the amount of $13,000,000 (collectively, the “Loan”). The Loan will be secured by a Deed of Trust described below, against the real property commonly known as and legally described in the Report (the “Property”). Borrower is a tenant under a lease for the Property with (“Landlord”). Both Borrower and Landlord will be pledging their respective interests in the Property to Bank in the Deed of Trust.

In addition, Borrower, as tenant, is, or will be, a party to that certain Master Parking Lot Lease Agreement, dated November 1, 2016 (the “Parking Lease”) with (“Adjacent Parcel”). The Deed of Trust will also include all of Borrower’s rights under the Parking Lease for the Adjacent Parcel. This letter constitutes the instructions of Bank with respect to the Loan.
1. **Delivery of Documents.** I will email you the following loan documents (the “Loan Documents”):
   
   a. Construction and Term Loan Agreement;
   
   b. Promissory Note;
   
   c. Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing (Construction Loan);
   
   d. Assignment of Rents and Income;
   
   e. Certificate and Indemnity Regarding Hazardous Substances;
   
   f. Commercial Security Agreement;
   
   g. Commercial Guaranty –
   
   h. Commercial Guaranty –
   
   i. Commercial Guaranty –
   
   j. Commercial Guaranty –
   
   k. Limited Liability Company Authorization to Borrow - Borrower;
   
   l. Limited Liability Company Authorization to Guarantee -
   
   m. Limited Liability Company Authorization to Guarantee -
   
   n. Limited Liability Company Authorization to Guarantee -
   
   o. Assignment of Architectural Contract and Plans and Specifications;
   
   p. Assignment of Rights under Construction Contract;
   
   q. Assignment of Entitlements;
Chapter 1—Title, Closing, and Escrow

FARLEIGH WADA WITT

Chicago Title
November 8, 2016
Page 3

r. Assignment of Structural Engineering Contract;

s. Assignment of Civil Engineering Contract; and

t. Landlord’s Consent.

2. Conditions. You are authorized to proceed with the instructions in Section 3 below when all of the following conditions have been satisfied:

a. Additional Documents. You have received fully-executed copies of the following documents: (1) the Parking Lease; (2) Assignment of Structural Engineering Contract between and Borrower; (3) Assignment of Professional Services Agreement between and Borrower; and (4) Assignment of Civil Engineering Contract between and Borrower.

b. Loan Documents. The Loan Documents have been completed, signed, dated and, if required, acknowledged by all parties thereto, except Bank. Power of attorney signatures will not be accepted. You shall verify to your satisfaction that each Loan Document was properly executed by the named parties and, if required, was properly acknowledged.

If there are any blanks in the Loan Documents or if any changes are required, please contact Linda Gudjonson, Commercial Loan Administrator (“Loan Administrator”) at (206) 749-7381 for further instructions. Verify the property description on Exhibit A and make sure that it is attached to the applicable Loan Documents. The legal description attached to the Loan Documents must be the same as the legal description in Bank’s title insurance policy.

c. Title. Fee simple title to the Property must be vested as the Landlord’s name appears on the Deed of Trust, and leasehold interest to the Property and the Adjacent Property must be vested as Borrower’s name appears on the Deed of Trust.

d. Title Policy. Chicago Title Insurance Company is unconditionally prepared to issue to Bank a 2006 Lender’s ALTA extended coverage title insurance policy in the amount of $10,506,000, in the form of the proforma policy attached as Exhibit B, incorporated herein by reference. In addition, Bank will require a Foundation Endorsement when the foundation and footings are complete and a Construction Lien Endorsement Datedown Endorsement with each disbursement. Following completion of construction, Bank will require an endorsement eliminating the exception for matters which might be disclosed by a survey. Please collect for these endorsements at closing, including twelve construction lien endorsements.
e. **Closing Statement.** Bank will disburse $203,112.65 of the Loan at closing. Please show the following as Bank’s costs on the Borrower’s closing statement (“Closing Statement”). These amounts will be deducted by Bank from the Loan funds before delivery to you.

- **Loan Fee** $78,795.00
- **External (Surveys)** $2,350.00
- **Processing Fee** $750.00
- **Appraisal** $4,500.00
- **Appraisal Review Fee** $500.00
- **Background Checks** $560.00

**SUBTOTAL:** $87,455.00
**LESS DEPOSIT:** ($25,000.00)
**CREDIT** ($500.00)
**TOTAL:** $61,955.00

In addition please add survey invoice of $1,250 and pay the same from the loan proceeds. Please collect Bank’s attorneys’ fees in the amount of $ for the Loan and wire them to this firm per the instructions attached as Exhibit C, and reference:

f. **Title Costs.** Bank shall not incur any costs in connection with this transaction. Please collect from Borrower all of your title insurance costs, recording and filing fees, escrow costs and other amounts related to the transaction.

g. **Delivery of Executed Loan Documents.** You have delivered (a) copies via email of the executed Deed of Trust, and Assignment of Rents and Income, and Landlord’s Consent to the Loan Administrator and to me; (b) executed originals of the other Loan Documents to the Loan Administrator, and (c) copies of all other Loan Documents to me.

h. **Acknowledgment.** You have returned to me and the Loan Administrator a copy of these instructions which have been acknowledged and accepted by you.

i. **Bank Confirmation.** The Loan Administrator has confirmed that all pre-closing conditions (including without limitation, insurance requirements, permit issuance, and review of all Loan Documents) have been met and has verbally authorized you to proceed with the instructions in Section 3.
3. **Actions.** When all of the conditions in Section 2 have been satisfied, you are instructed to proceed as follows:

   a. **Recording.** Record the Deed of Trust, and Assignment of Rents and Income, and Landlord’s Consent, in Multnomah County, Oregon, in that order. Following recording, please provide recording information to the Loan Administrator. Do not record until you have received approval to do so from the Loan Administrator.

   b. **Wiring of Funds.** When the required applicable Loan Documents have been recorded as set forth above and the Loan Administrator has authorized you to disburse, the Loan proceeds shall be disbursed as provided in the approved Closing Statement. **Wire the attorneys fees to my firm via the wiring instructions attached as Exhibit C.**

   c. **Delivery.** Deliver the Title Policy, recorded Loan Documents and fees and costs payable to Bank as directed by the Loan Administrator.

If this transaction does not close for any reason by 5:00 p.m. on November 9, 2016, return the above Loan Documents and the funds provided by Bank to the Loan Administrator, unless you receive further instructions from me or from the Loan Administrator.

Please acknowledge your receipt and acceptance of these instructions by signing the attached Acknowledgment and returning a copy of this letter to me.

Please contact me if you have any questions.

   Sincerely,

   Marisol Ricoy McAllister

MRM/rs
cc: (via email)
    Kyle Wuepper (via email)
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ACKNOWLEDGMENT AND ACCEPTANCE

The undersigned hereby acknowledges receipt of and agrees to comply with all terms and conditions of the above instructions relating to the Loan to Belmont 44 LLC in the amount of $10,506,000, Order No. .

CHICAGO TITLE COMPANY OF OREGON

By: ____________________________________________
Title: __________________________________________


FARLEIGH WADA WITT

Chicago Title
November 8, 2016
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EXHIBIT B

PROFORMA
Chapter 1—Title, Closing, and Escrow

LOAN POLICY OF TITLE INSURANCE

Issued By: CHICAGO TITLE INSURANCE COMPANY

Policy Number: PROFORMA - (472516002546)

Any notice of claim and any other notice or statement in writing required to be given to the Company under this Policy must be given to the Company at the address shown in Section 17 of the Conditions.

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, CHICAGO TITLE INSURANCE COMPANY, a Nebraska corporation (the "Company") insures as of Date of Policy and, to the extent stated in Covered Risks 11, 13, and 14, after Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. Title being vested other than as stated in Schedule A.

2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from
   (a) A defect in the Title caused by
      (i) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
      (ii) failure of any person or Entity to have authorized a transfer or conveyance;
      (iii) a document affecting Title not properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;
      (iv) failure to perform those acts necessary to create a document by electronic means authorized by law;
      (v) a document executed under a falsified, expired, or otherwise invalid power of attorney;
      (vi) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or
      (vii) a defective judicial or administrative proceeding.
   (b) The lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.
   (c) Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.

3. Unmarketable Title.

4. No right of access to and from the Land.

5. The violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to
   (a) the occupancy, use, or enjoyment of the Land;
   (b) the character, dimensions, or location of any improvement erected on the Land;
   (c) the subdivision of land; or
   (d) environmental protection
   if a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice.

6. An enforcement action based on the exercise of a governmental police power not covered by Covered Risk 5 if a notice of the enforcement action, describing any part of the Land, is recorded in the Public Records, but only to the extent of the enforcement referred to in that notice.

7. The exercise of the rights of eminent domain if a notice of the exercise, describing any part of the Land, is recorded in the Public Records.

This is a PROFORMA Policy. It does not reflect the present state of the Title and is not a commitment to (i) insure the Title or (ii) issue any of the attached endorsements. Any such commitment must be an express written undertaking on appropriate forms of the Company.

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Chapter 1—Title, Closing, and Escrow

ENDORSEMENT
ATTACHED TO POLICY NO. [FILL IN]
ISSUED BY
BLANK TITLE INSURANCE COMPANY

[Date : [FILL IN] ]
[Premium : [FILL IN] ]

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

2. For the purposes of this endorsement only,
   a. “Covenant” means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy.
   b. “Improvement” means a building, structure located on the surface of the Land, road, walkway, driveway, or curb, affixed to the Land at Date of Policy and that by law constitutes real property, but excluding any crops, landscaping, lawn, shrubbery, or trees.

3. The Company insures against loss or damage sustained by the Insured by reason of:
   a. A violation on the Land at Date of Policy of an enforceable Covenant, unless an exception in Schedule B of the policy identifies the violation;
   b. Enforced removal of an Improvement as a result of a violation, at Date of Policy, of a building setback line shown on a plat of subdivision recorded or filed in the Public Records, unless an exception in Schedule B of the policy identifies the violation; or
   c. A notice of a violation, recorded in the Public Records at Date of Policy, of an enforceable Covenant relating to environmental protection describing any part of the Land and referring to that Covenant, but only to the extent of the violation of the Covenant referred to in that notice, unless an exception in Schedule B of the policy identifies the notice of the violation.

4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:
   a. any Covenant contained in an instrument creating a lease;
   b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land; or
   c. except as provided in Section 3.c., any Covenant relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances.
This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Order Reference: [FILL IN] ]

[Witness clause optional]

[BLANK TITLE INSURANCE COMPANY]

[BY: _______________________________

[Authorized Signatory]
ENDORSEMENT
ATTACHED TO POLICY NO. [FILL IN]
ISSUED BY
BLANK TITLE INSURANCE COMPANY

[Date : [FILL IN ]
[Premium : [FILL IN ]

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

2. For the purposes of this endorsement only:
   a. “Covenant” means a covenant, condition, limitation or restriction in a document or instrument recorded in the Public Records at Date of Policy.
   b. “Private Right” means (i) an option to purchase; (ii) a right of first refusal; or (iii) a right of prior approval of a future purchaser or occupant.

3. The Company insures against loss or damage sustained by the Insured under this Owner’s Policy if enforcement of a Private Right in a Covenant affecting the Title at Date of Policy based on a transfer of Title on or before Date of Policy causes a loss of the Insured’s Title.

4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:
   a. any Covenant contained in an instrument creating a lease;
   b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land;
   c. any Covenant relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances; or
   d. any Private Right in an instrument identified in Exception(s) ______ in Schedule B.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Order Reference: [FILL IN ]

[Witness clause optional]

[BLANK TITLE INSURANCE COMPANY]

[BY: _______________________________
[Authorized Signatory]
ENDORSEMENT
ATTACHED TO POLICY NO. [FILL IN]
ISSUED BY
BLANK TITLE INSURANCE COMPANY

[Date : [FILL IN]]
[Premium : [FILL IN]]

The Company insures against loss or damage sustained by the Insured by reason of the failure of the Land as described in Schedule A to be the same as that identified on the survey made by ______________________ dated ______________________, and designated Job No. _____.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Order Reference: [FILL IN]]

[BLANK TITLE INSURANCE COMPANY]

[BY: _______________________________]
[Authorized Signatory]
ENDORSEMENT
ATTACHED TO POLICY NO. [FILL IN]
ISSUED BY
BLANK TITLE INSURANCE COMPANY

[Date : [FILL IN] ]
[Premium : [FILL IN] ]

The Company insures against loss or damage sustained by the Insured if the exercise of the granted or reserved rights to use or maintain the easement(s) referred to in Exception(s) _______________ of Schedule B results in:

(1) damage to an existing building located on the Land, or

(2) enforced removal or alteration of an existing building located on the Land.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Order Reference: [FILL IN] ]

[BLANK TITLE INSURANCE COMPANY]

[BY: _______________________________
[Authorized Signatory]
ENDORSEMENT
ATTACHED TO POLICY NO. [FILL IN]
ISSUED BY
BLANK TITLE INSURANCE COMPANY

[Date : [FILL IN] ]
[Premium : [FILL IN] ]

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

2. For purposes of this endorsement only, “Improvement” means an existing building, located on either the Land or adjoining land at Date of Policy and that by law constitutes real property.

3. The Company insures against loss or damage sustained by the Insured by reason of:
   a. An encroachment of any Improvement located on the Land onto adjoining land or onto that portion of the Land subject to an easement, unless an exception in Schedule B of the policy identifies the encroachment;
   b. An encroachment of any Improvement located on adjoining land onto the Land at Date of Policy, unless an exception in Schedule B of the policy identifies the encroachment;
   c. Enforced removal of any Improvement located on the Land as a result of an encroachment by the Improvement onto any portion of the Land subject to any easement, in the event that the owners of the easement shall, for the purpose of exercising the right of use or maintenance of the easement, compel removal or relocation of the encroaching Improvement; or
   d. Enforced removal of any Improvement located on the Land that encroaches onto adjoining land.

4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys’ fees, or expenses) resulting from the encroachments listed as Exceptions ______________ of Schedule B.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Order Reference: [FILL IN] ]

[Witness clause optional]

[BLANK TITLE INSURANCE COMPANY]

[BY: _______________________________
[Authorized Signatory]
ENDORSEMENT
ATTACHED TO POLICY NO. [FILL IN]
ISSUED BY
BLANK TITLE INSURANCE COMPANY

[Date : [FILL IN] ]
[Premium : [FILL IN] ]

The Company insures against loss or damage sustained by the Insured by reason of the Land being taxed as part of a larger parcel of land or failing to constitute a separate tax parcel for real estate taxes.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

[Order Reference: [FILL IN] ]

[BLANK TITLE INSURANCE COMPANY]

[BY: _______________________________
[Authorized Signatory]
Chapter 1—Title, Closing, and Escrow

ENDORSEMENT
ATTACHED TO POLICY NO. [FILL IN]
ISSUED BY
BLANK TITLE INSURANCE COMPANY

[Date : [FILL IN] ]
[Premium : [FILL IN] ]

The Company insures against loss or damage sustained by the Insured by reason of:

1. those portions of the Land identified below not being assessed for real estate taxes under the listed tax identification numbers or those tax identification numbers including any additional land:

   Parcel: Tax Identification Numbers:

2. the easements, if any, described in Schedule A being cut off or disturbed by the nonpayment of real estate taxes assessed against the servient estate.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

[Order Reference: [FILL IN] ]

[BLANK TITLE INSURANCE COMPANY]

[BY: _______________________________]
[Authorized Signatory]
ENDORSEMENT
ATTACHED TO POLICY NO. [FILL IN]
ISSUED BY
BLANK TITLE INSURANCE COMPANY

[Date : [FILL IN] ]
[Premium : [FILL IN] ]

The Company insures against loss or damage sustained by the Insured by reason of:

1. the failure [of the ______ boundary line of Parcel A] of the Land to be contiguous to [the ______ boundary line of Parcel B] [for more than two parcels, continue as follows: “; of [the ______ boundary line of Parcel B] of the Land to be contiguous to [the ______ boundary line of Parcel C]” and so on until all contiguous parcels described in the policy have been accounted for]; or

2. the presence of any gaps, strips, or gores separating any of the contiguous boundary lines described above.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

[Order Reference: [FILL IN] ]

[BLANK TITLE INSURANCE COMPANY]

[BY: _______________________________
[Authorized Signatory]
Chapter 1—Title, Closing, and Escrow

ENDORSEMENT
ATTACHED TO POLICY NO. [FILL IN]
ISSUED BY
BLANK TITLE INSURANCE COMPANY

[Date : [FILL IN] ]
[Premium : [FILL IN] ]

The Company insures against loss or damage sustained by the Insured by reason of:

1. the failure of the Land to be contiguous to [describe the land that is contiguous to the Land by its legal description or by reference to a recorded instrument – e.g. “. . . that certain parcel of real property legally described in the deed recorded as Instrument No. , records of ______ County, State of _________________”] along the ______ boundary line[s]; or

2. the presence of any gaps, strips, or gores separating the contiguous boundary lines described above.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

[Order Reference: [FILL IN] ]

[BLANK TITLE INSURANCE COMPANY]

[BY: _______________________________
[Authorized Signatory]
ENDORSEMENT
ATTACHED TO POLICY NO. [FILL IN]
ISSUED BY
BLANK TITLE INSURANCE COMPANY

[Date : [FILL IN] ]
[Premium : [FILL IN] ]

The Company insures against loss or damage sustained by the Insured if, at Date of Policy (i) the Land does not abut and have both actual vehicular and pedestrian access to and from [insert name of street, road, or highway] (the “Street”), (ii) the Street is not physically open and publicly maintained, or (iii) the Insured has no right to use existing curb cuts or entries along that portion of the Street abutting the Land.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[List witness clause if necessary]

[Order Reference: [FILL IN] ]

[BLANK TITLE INSURANCE COMPANY]

[BY: _______________________________]
[Authorized Signatory]
ENDORSEMENT
ATTACHED TO POLICY NO. [FILL IN]
ISSUED BY
BLANK TITLE INSURANCE COMPANY

[Date : [FILL IN] ]
[Premium : [FILL IN] ]

The Company insures against loss or damage sustained by the Insured if, at Date of Policy (i) the easement identified [as Parcel _______________] in Schedule A (the “Easement”) does not provide that portion of the Land identified [as Parcel _____________] in Schedule A both actual vehicular and pedestrian access to and from [insert name of street, road, or highway] (the “Street”), (ii) the Street is not physically open and publicly maintained, or (iii) the Insured has no right to use existing curb cuts or entries along that portion of the Street abutting the Easement.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

[Order Reference: [FILL IN] ]

[BLANK TITLE INSURANCE COMPANY]

[BY: _______________________________
[Authorized Signatory]
Chapter 1—Title, Closing, and Escrow

ENDORSEMENT
ATTACHED TO POLICY NO. [FILL IN]
ISSUED BY
BLANK TITLE INSURANCE COMPANY

[Date : [FILL IN] ]
[Premium : [FILL IN] ]

1. The Company insures against loss or damage sustained by the Insured in the event that, at Date of Policy,

   a. According to applicable zoning ordinances and amendments, the Land is not classified Zone
      __________________________;
   
   b. The following use or uses are not allowed under that classification:

2. There shall be no liability under this endorsement based on

   a. Lack of compliance with any conditions, restrictions, or requirements contained in the zoning
      ordinances and amendments, including but not limited to the failure to secure necessary consents or
      authorizations as a prerequisite to the use or uses. This paragraph 2.a. does not modify or limit the
      coverage provided in Covered Risk 5.

   b. The invalidity of the zoning ordinances and amendments until after a final decree of a court of
      competent jurisdiction adjudicating the invalidity, the effect of which is to prohibit the use or uses.

   c. The refusal of any person to purchase, lease or lend money on the Title covered by this policy.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the
terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv)
increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is
inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this
endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Order Reference: [FILL IN] ]

[BLANK TITLE INSURANCE COMPANY]

[BY: _______________________________
[Authorized Signatory]
ENDORSEMENT
ATTACHED TO POLICY NO. [FILL IN]
ISSUED BY
BLANK TITLE INSURANCE COMPANY

[Date : [FILL IN] ]
[Premium : [FILL IN] ]

1. The Company insures against loss or damage sustained by the Insured in the event that, at Date of Policy,
   a. according to applicable zoning ordinances and amendments, the Land is not classified Zone ____________________;
   b. the following use or uses are not allowed under that classification:
   c. There shall be no liability under paragraph 1.b. if the use or uses are not allowed as the result of any lack of compliance with any conditions, restrictions, or requirements contained in the zoning ordinances and amendments, including but not limited to the failure to secure necessary consents or authorizations as a prerequisite to the use or uses. This paragraph 1.c. does not modify or limit the coverage provided in Covered Risk 5.

2. The Company further insures against loss or damage sustained by the Insured by reason of a final decree of a court of competent jurisdiction either prohibiting the use of the Land, with any existing structure, as specified in paragraph 1.b. or requiring the removal or alteration of the structure, because, at Date of Policy, the zoning ordinances and amendments have been violated with respect to any of the following matters:
   a. Area, width, or depth of the Land as a building site for the structure
   b. Floor space area of the structure
   c. Setback of the structure from the property lines of the Land
   d. Height of the structure, or
   e. Number of parking spaces.

3. There shall be no liability under this endorsement based on:
   a. the invalidity of the zoning ordinances and amendments until after a final decree of a court of competent jurisdiction adjudicating the invalidity, the effect of which is to prohibit the use or uses;
   b. the refusal of any person to purchase, lease or lend money on the Title covered by this policy.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Order Reference: [FILL IN] ]

[BLANK TITLE INSURANCE COMPANY]
[BY: _______________________________]

OTIRO Endorsement No. 203.1-06 (10-22-09)          ALTA Endorsement Form 3.1-06 (10-22-09)
Zoning – Improved Land

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ENDORSEMENT
ATTACHED TO POLICY NO. [FILL IN]
ISSUED BY
BLANK TITLE INSURANCE COMPANY

[Date : [FILL IN] ]
[Premium : [FILL IN] ]

1. For purposes of this endorsement:
   a. “Improvement” means a building, structure, road, walkway, driveway, curb, subsurface utility or water well existing at Date of Policy or to be built or constructed according to the Plans that is or will be located on the Land, but excluding crops, landscaping, lawns, shrubbery, or trees.
   b. “Plans” means those site and elevation plans made by [name of architect or engineer] dated ____, last revised ________, designated as [name of project] consisting of ___ sheets.

2. The Company insures against loss or damage sustained by the Insured in the event that, at Date of Policy
   a. according to applicable zoning ordinances and amendments, the Land is not classified Zone ____________________;
   b. the following use or uses are not allowed under that classification:
   c. There shall be no liability under paragraph 2.b. if the use or uses are not allowed as the result of any lack of compliance with any condition, restriction, or requirement contained in the zoning ordinances and amendments, including but not limited to the failure to secure necessary consents or authorizations as a prerequisite to the use or uses. This paragraph 2.c. does not modify or limit the coverage provided in Covered Risk 5.

3. The Company further insures against loss or damage sustained by the Insured by reason of a final decree of a court of competent jurisdiction either prohibiting the use of the Land, with any existing Improvement, as specified in paragraph 2.b. or requiring the removal or alteration of the Improvement, because, at Date of Policy, the zoning ordinances and amendments have been violated with respect to any of the following matters:
   a. Area, width, or depth of the Land as a building site for the Improvement
   b. Floor space area of the Improvement
   c. Setback of the Improvement from the property lines of the Land
   d. Height of the Improvement, or
   e. Number of parking spaces.

4. There shall be no liability under this endorsement based on:
   a. the invalidity of the zoning ordinances and amendments until after a final decree of a court of competent jurisdiction adjudicating the invalidity, the effect of which is to prohibit the use or uses;
   b. the refusal of any person to purchase, lease or lend money on the Title covered by this policy.
This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Order Reference: [FILL IN] ]

[Witness clause optional]

[BLANK TITLE INSURANCE COMPANY]

[BY: _______________________________]

[Authorized Signatory]
Chapter 2
Options, Rights of First Refusal, and Rights of First Opportunity

JEFFREY TARR
Sussman Shank LLP
Portland, Oregon

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I. Basic Descriptions and Attributes

A. Options

- An Option is a contractual right between an owner of real property (the “Owner”) and a potential purchaser of real property (the “Optionee”) pursuant to which the Optionee has the right to acquire real property from the Owner at a price and pursuant to the terms and conditions set forth in the option agreement.

- Unlike with an earnest money purchase and sale agreement, which is bilateral in nature and requires some level of performance by both parties, an Option is more unilateral in nature in that the Optionee has the right, but not the obligation, to purchase the real property.

- If the Optionee timely exercises the Option, the Owner must sell the real property to the Optionee at the price and on the terms and conditions set forth in the option agreement. It is because the Optionee has the unilateral right to decide if and when (within the option term) to purchase the real property that Owners of real property do not like Options, and prefer Rights of First Refusals or Rights of First Opportunity.

- Typically, an Option can be exercised by the Optionee for a fixed period of time, which is negotiated and mutually agreed upon by the parties and included in the option agreement. If the Optionee fails to timely exercise the Option, the Option will expire, the Optionee will no longer have a unilateral right to purchase the real property (on the purchase price and terms and conditions set forth in the option agreement or otherwise), and often the consideration paid to get the option is forfeited.

- In order for an Option to be enforceable (i.e., exercisable) for a fixed period of time, the Option must be supported by “consideration.” An Option that is not supported by consideration can be revoked by the Owner at any time prior to the Optionee exercising the Option. Therefore, typically Optionees pay an “option fee” to obtain the Option. The amount of the option fee is negotiated and mutually agreed upon by the parties and then memorialized in the option agreement. If the Optionee fails to timely exercise the Option, the option fee typically is forfeited by the Optionee and retained by the Owner. However, on the other hand, if the Optionee timely exercises the Option, typically the option fee is applied to and credited against the purchase price for the real property at the closing of the purchase transaction.

- As a general rule, unless otherwise provided in the option agreement, an Option is assignable by the Optionee. Therefore, most option agreements contain provisions prohibiting or limiting the assignment of the
Option, as the Owner does not want the Optionee to speculate with the Owner’s real property.

- Typically, an option agreement also contains most all of the typical terms and conditions of a purchase and sale agreement so that if the Option is timely exercised, the parties have already agreed upon all of the other matters necessary to complete and close a real property sale transaction. So the typical option agreement is a hybrid, including therein all of the terms and conditions of the Option as well as all of the typical terms and conditions of a purchase and sale agreement. Option agreements that do not contain all of the typical terms and conditions of a purchase and sale agreement amount to an agreement-to-agree-later (i.e., after the Option is timely exercised, the parties would then need to agree on the terms of the purchase and sale transaction). This which can lead to disputes among the parties in the context of a binding obligation to sell and purchase (i.e., because the Option was exercised).

B. Rights of First Refusal

- A Right of First Refusal is a contractual right between an owner of real property (the “Owner”) and a potential purchaser of real property (the “Right Holder”) pursuant to which if the Owner receives a third party offer to purchase the real property that the Owner wants to accept, the Owner must offer to sell the real property to the Right Holder on the same terms and conditions of the third party offer, and only if the Right Holder declines to purchase on the same terms and conditions of the third party offer can the Owner sell the real property to the third party offeror.

- Unlike the Option, the Right Holder cannot force the Owner to sell the real property. The Owner only becomes obligated to sell the real property to the Right Holder if and when the Owner decides to sell the real property and receives and presents to the Right Holder a third party offer which the Right Holder timely accepts.

- Unlike an Option (which is in the unilateral control of the Optionee to exercise), a Right of First Refusal often does not (but can) have a time frame attached to it. This is because the Owner is not required to sell the real property and, therefore, is in control of whether or not the real property will be sold, and if so, when.

- Like an Option, a Right of First Refusal should be supported by “consideration” (otherwise the Owner can revoke it) and is assignable (and, therefore, most agreements containing a Right of First Refusal will limit or prohibit assignment).
C. Rights of First Opportunity

- A Right of First Opportunity is a contractual right between an owner of real property (the “Owner”) and a potential purchaser of real property (the “Right Holder”) pursuant to which if the Owner desires to sell the real property, before the Owner can offer the real property for sale to a third party, the Owner must first offer to sell the real property to the Right Holder, and only if the parties fail to mutually agree on a purchase price and terms and conditions for a purchase transaction or if the Right Holder otherwise declines to purchase can the Owner offer for sale and sell the real property to a third party.

- In the case of a Right of First Refusal, the purchase price and terms are dictated by a third party offer. In the case of a Right of First Opportunity, the only obligations the Owner has are (i) to approach the Right Holder and advise the Right Holder of the Owner’s decision to sell and (ii) to negotiate in good faith with the Right Holder on the purchase price and terms and conditions for a purchase transaction. Typically, if the parties are unable to mutually agree on the purchase price and terms and conditions for a purchase transaction within a certain period of time (as designated in the right of first opportunity agreement), the Owner is then free to offer for sale and sell the property to a third party.

- Unlike the Option, the Right Holder cannot force the Owner to sell the real property. The Owner only becomes obligated to sell the real property to the Right Holder if and when the Owner triggers the Right of First Opportunity and the parties come to a mutual agreement on the purchase price and terms and conditions for a purchase transaction.

- Unlike an Option (which is in the unilateral control of the Optionee to exercise), a Right of First Opportunity often does not (but can) have a time frame attached to it. This is because the Owner is not required to sell the real property and, therefore, is in control of whether or not the real property will be sold, and if so, when.

- Like an Option, a Right of First Opportunity should be supported by “consideration” (otherwise the Owner can revoke it) and is assignable (and therefore most agreements containing a Right of First Opportunity will limit or prohibit assignment).

- From an Owner’s perspective, Owners do not like Rights of First Refusal, and much prefer Rights of First Opportunity over Rights of First Refusal. That is because a Right of First Refusal tends to stymie the interest of potential third party purchasers’ of the real property (i.e., a potential third party purchaser may not want to take the time, effort and expense to evaluate the real property and make an offer to purchase the real property knowing that a Right
Holder may decide to purchase the real property at the purchase price and on the terms and conditions offered by the third party purchaser).

- From a purchaser’s perspective, if the purchaser cannot get an Option on the desired real property (typically the purchaser’s first choice), the purchaser typically prefers to obtain a Right of First Refusal over a Right of First Opportunity on the desired real property. That is because a Right of First Refusal tends to reflect a fair market value purchase price and current market terms (i.e., the third party offer that the Right Holder has the right to accept would presumably reflect an arms length agreement as to a fair market value purchase price for the real property and current market terms). In the case of a Right of First Opportunity, there is no third party offer setting an current arms length benchmark for the purchase price and terms and conditions.

II. Lease Transactions

A. Options

- While Options to Lease Space can be used in leasing transactions, Landlords are loath to use them because they effectively require a Landlord to leave space available for lease off the market during the option term (so that the space is available in the event the Option to Lease Space is exercised).

- Note that sometimes leases will contain Options to Purchase (i.e., giving the Tenant the right to purchase the real property being leased by the Tenant).

B. Rights of First Refusal and Rights of First Opportunity

- Rights of First Refusal and Rights of First Opportunity are often used in leases to provide for a Tenant’s ability to expand the Tenant’s existing Premises.

- Like Owners in the case of Rights of First Refusal in purchase transactions, Landlords much prefer Rights of First Opportunity over Rights of First Refusal in lease transactions. That is because, in the case of a Right of First Refusal, potential new tenants may not want to take the time, effort and expense to evaluate space for lease and make an offer thereon knowing that an existing tenant could take the space away based on the terms offered by the potential new tenant.

- Like potential purchasers in the case of Rights of First Refusal in purchase transactions, Tenants much prefer Rights of First Refusal over Rights of First Opportunities in lease transactions. That is because a potential new tenant’s offer to lease space tends to set the current arms length
benchmark (e.g., current lease rate, amount of tenant improvement allowance) for the lease of the space.

- Note that sometimes leases will contain a Right of First Refusal to Purchase (i.e., giving the Tenant the opportunity to purchase the real property being leased by the Tenant if the Landlord decides to sell such real property and has received a third party offer to purchase it) or a Right of First Opportunity to Purchase (i.e., giving the Tenant the opportunity to purchase the real property being leased by the Tenant if the Landlord decides to sell such real property and the Landlord and Tenant can come to a mutual agreement on the purchase price and terms and conditions for a purchase transaction).

III. Miscellaneous Matters

A. Recording

- Typically, in the case of Options and Rights to purchase real property, Memorandums (memorializing the existence of an Option or a Right) are recorded against the real property to put the entire world on notice that the real property is subject to an Option or a Right.

- Why record a Memorandum? What if an Owner enters into an Option or a Right with a potential purchaser and then turns around and sells the real property subject to the Right or Option to a third party purchaser while the Option or Right is still in effect and without complying with the terms of the Option or Right? Does the third party purchaser take title to the real property subject to the Option or Right? If the third party purchaser has no knowledge of the existence of the Option or Right and pays fair value for the real property, the third party purchaser typically takes title to the real property without being subject to the Option or Right. This is because the third party purchaser had no knowledge of the fact that the real property was subject to an Option or Right and paid fair value for the real property. Presumably, if the third party purchaser was aware of the existence of an Option or Right and was willing to acquire the real property subject to the Option or Right, the third party purchaser would only have been willing to pay a discounted purchase price for the real property because it was subject to the Option or Right. By recording a Memorandum of the Option or Right against the real property, all potential third party purchasers will be deemed to have knowledge of the Option or Right and, therefore, will take title to the real property subject to the Option or Right.

- Why record a Memorandum of the agreement as opposed to the agreement itself? Recording the underlying agreement will disclose all of the terms and conditions of the Option or Right to the entire world, something neither party will want to do. It is only necessary to record a Memorandum against the real property disclosing the existence of the Option or Right in order to protect an Option or Right holder from a bona fide good faith purchaser claim if the real
property is sold to a third party while subject to the Option or Right. However, it is wise to include in the Memorandum the period of time in which the Option or Right is in effect. This can have the effect of automatically clearing title of the Option or Right if the Option or Right are not exercised by the end of the period of time in which the Option or Right is in effect.

- Owners do not like to record Memorandums because they place a cloud on title to the real property. However, Purchasers should make sure that Memorandums are recorded to protect themselves against third party purchasers who acquire the real property subject to the Right or Option while the Option or Right is still in effect and without the Owner/Seller complying with the terms of the Option or Right.

- Typically, in the case of Options and Rights to lease real property, Memorandums are not recorded. Landlords will typically refuse to cloud title of the real property with these Memorandums, and the kind of concerns with respect to bona fide good faith third party purchasers do not generally exist in the context of leasing arrangements.

B. Examples of Uses of Options and Rights with Real Property

1. Options

- Development of Contiguous Parcels: Often, in connection with development of land, an Optionee will use an Option in order to assemble several contiguous tracts of land owned by separate Owners for development. By using an Option, the Optionee creates flexibility to negotiate with separate Owners and to enter into multiple Options as negotiations succeed. The Optionee will only exercise the Options if the Optionee is able to assemble under separate option agreements the necessary contiguous tracts of land for the planned development.

- Seeking Entitlements for Development: Often, in connection with development of land, an Optionee will use an Option to tie up land while the Optionee seeks the necessary entitlements to build on and develop the land. The Optionee will only exercise the Option if the necessary entitlements are obtained.

- Land Banking for Future Development: Often, a party in the business of developing land (e.g., home builders) will use Options to tie up land for future development, allowing the developer to move from one project to the next with little interruption in development activity. Often, these developers will be developing one project while seeking entitlements to develop the next project while the land for the next project is under an Option.
● Expansion of Existing Development: Often, in connection expanding an existing development, an Optionee will use an Option in order to tie up adjacent land for expansion of an existing development. This allows the Optionee time to determine whether business growth or other factors justify expansion of the existing development.

● Environmental Due Diligence: If a developer thinks that land desired for development has environmental issues, sometimes the developer will enter into an Option with the Owner to tie up the land while the developer undertakes extensive environmental due diligence. While an earnest money purchase and sale agreement can contain an environmental inspection contingency to address this, often the time it takes to conduct an extensive assessment and to make a determination whether to proceed with the acquisition of the real property takes longer than the contingency period most sellers are willing to accept.

2. Rights of First Refusal and Rights of First Opportunity

● Expansion of Leased Premises: Often when a Tenant enters into a lease for space, adjacent space may already be leased to other tenants. However, the Tenant may want to expand into adjacent space when it becomes available for reletting. A Right of First Refusal or a Right of First Opportunity effectively gives the Tenant the first opportunity to lease the newly available adjacent space before it can be leased to another party.

● Controlling Development on Adjacent Property: Often, a property owner will want to control what is developed on adjacent property in order to protect the value of the development on the property owner’s existing property. Otherwise, the property owner could be subject to a new purchaser’s new development or new use on the adjacent property, which could have a significant adverse impact on the value of and/or other factors relating to the property owner’s existing property. By acquiring a Right of First Refusal or a Right of First Opportunity on the adjacent property from the existing owner of the adjacent property, the property owner would have the first right to purchase the adjacent property, thereby controlling what is developed on or how the adjacent property is used in the future (should the existing owner of the adjacent property decide to sell it).

● Expansion of Existing Development: Often, in connection expanding an existing development, an Optionee will use an Option in order to tie up adjacent land for expansion of an existing development. However, what if the adjacent land owner will not grant an Option (e.g., the adjacent land owner does not want to sell the land)? Perhaps the adjacent land owner would agree to grant a Right of First Refusal or a Right of First Opportunity on the adjacent land, which does not
obligate the adjacent land owner to sell the adjacent land, but should the adjacent land owner later decide to sell the adjacent property, the property owner would have the first right to purchase the adjacent property.

C. Uses Other Than Real Property

- While typically Options and Rights are used in the context of buy and selling or leasing real property, they can also be used for other types of assets (e.g., personal property; intellectual property). Examples include machinery and equipment; stock of a corporation or a membership interest in an LLC; copyrighted materials; patent rights.
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I. Premises/Project.

A. Definition.

1. Description of Premises.

2. Description of Project/Retail Center/Office Building.

B. Condition of Delivery.

1. Landlord’s objective.
   a. Premises delivered “as is, where is”, subject to Landlord’s Work, if any.
   b. No Landlord obligations regarding the condition of the project outside of the Premises.

2. Tenant’s objective.
   a. Premises must be suitable for Tenant’s intended use.
   b. Building systems serving the Premises must be in good working order.
   c. Premises is delivered in compliance with applicable laws, including ADA.
   d. Project sufficiently complete for conduct of Tenant’s business.

C. Construction Issues.

1. Landlord’s objectives.

One of Landlord’s principal motivations is to collect rent as soon as possible. Where Landlord is responsible for constructing the tenant improvements, Landlord can: (i) control the process, (ii) complete construction as soon as possible, and (iii) often earn a fee (which Landlord will argue is compensation for bearing the construction risk). Landlord’s goal in negotiating a build out provision is to:

   a. Fix the rent commencement date on the date the improvements are substantially complete, notwithstanding the requirement to correct punch list items.

   b. Include a definition of "Tenant Delay" to protect Landlord from delays in completing construction due to the failure of Tenant to timely perform.
2. Tenant’s objectives.

Tenant wants high quality improvement at low costs. Tenant does not want to pay rent before the tenant improvements are completed. Tenant’s goal in negotiating a build out provision is to:

a. Establish specific standards for the quality of Landlord's work.

b. Eliminate or limit Landlord's fee for construction administration.

c. Require competitive bids from subcontractors in each trade.

d. Require that Landlord present Tenant with a detailed estimated cost breakdown. To the extent Landlord is providing a tenant improvement allowance with respect to only a portion of the tenant improvements (with Tenant paying all amounts in excess of the allowance), the cost breakdown should be reviewed to determine if any already completed improvements are included.

e. Define "Tenant Delay" narrowly. Tenant must be sure the construction schedule is realistic, and that Tenant is given advance notice of a potential Tenant Delay and a period to cure such potential delay. Further, Tenant should only allow Landlord to exercise its remedies to the extent a Tenant Delay actually causes a delay in construction.

f. Obtain the right to enforce warranties and guaranties directly.

3. Description of Improvements.

Ideally, final plans and specifications will be attached to the lease. If this isn’t possible, the parties should attach some description of the improvements and establish a procedure for approval.


a. Landlord.

(1) Greater construction expertise.

(2) Multi-tenant building.
b. Tenant.
   (1) Minor work -- control costs.
   (2) Uniformity required for national chain.

c. Acceptance of work.
   (1) “substantial completion” -- minor punch list items which do not hinder tenant’s full use and operation of the premises.
   (2) Punch list -- preparation procedure.
   (3) Effect of failure to specify a defect.

d. Delivery.
   (1) “Pre-delivery” notice?
   (2) Tenant remedy for late delivery -- daily penalty fee or free rent/termination right if delay past drop dead date.
   (3) Landlord remedy for tenant delay -- accelerate obligation to pay rent one day for each day of tenant delay.

5. Payment Responsibility.

a. Typical improvement construction scenarios.
   (1) Turnkey -- Landlord constructs shell and all interior improvements required by tenant at Landlord’s sole cost.
   (2) Landlord builds shell, building standard improvements and tenant improvements, with tenant receiving a construction allowance and reimbursing landlord for the difference, if any.
   (3) Landlord builds shell and tenant, at its cost, constructs interior improvements.
   (4) Tenant constructs building and interior improvements at tenant’s sole cost and expense (typical ground lease).

b. TI Allowance Reimbursement procedures.
   (1) Lump sum payment or “construction” draws.
(2) Preconditions for disbursements.
   (a) Issuance of certificate of occupancy.
   (b) Receipt of all lien waivers.
   (c) Architect’s certificate that work completed in accordance with plans and specifications.
   (d) Tenant opened and paying rent.

II. Rent Commencement.
   A. Scheduled Rent Commencement Date.
   B. Rent Commencement Date.
      1. Landlord’s delivery of Premises.
      2. Landlord’s substantial completion of Landlord’s Work.
      3. Tenant opens for business.
      4. A specified number of days after Tenant obtains building permits.
   C. Expiration date.
      1. Tie to Rent Commencement Date.
      2. Extend expiration date to a convenient time of the year.
   D. Tenant’s due diligence termination rights.
      1. Building permit approval/sign permit approval.
      2. Title review.
      3. Environmental review.
   
   Landlord practice pointer – Tenant termination rights should have a “use it or lose it“ provision.
   
   E. Extension/Renewal Options.
      1. Exercise window – Landlord re-leasing time.
      2. Void if Tenant defaults/assigns/subleases.
3. Rental rate.
   a. Fixed at lease execution.
   b. Greater of fair market rent or rent charged prior to exercise.
   c. Discount for no transaction fees?
   d. Arbitration – baseball vs. split the baby.

III. Use Clauses – Allowed Uses/Prohibited Uses/Exclusive Uses.
   A. Permitted Uses.
   B. Exclusive Uses.
   C. Prohibited Uses.
   D. Hazardous Substances.
      1. Landlord’s objective -- Landlord only responsible for the presence of Hazardous Substances on the Premises prior to the date possession of the Premises is delivered to Tenant to extent remediation required by applicable laws.
      2. Tenant’s objective.
         a. Tenant only responsible for the presence of Hazardous Substances on the Premises as a result of an act of Tenant.
         b. Remedies, including abatement of rent and termination rights, for closure due to Hazardous Substance not caused by Tenant.

IV. Assignments and Subleases.
   A. Landlord’s perspective.

       Landlord wants to be able to control who occupies the Project and for what uses. Occupants must be creditworthy, not adversely affect the reputation of the building, not increase Landlord’s ownership risks or adversely affect other tenants of the building or project.

   B. Tenant’s perspective.

       Tenant’s obligations will continue even though Tenant’s circumstances change, such as the death of an individual, a downturn in Tenant’s business, a change in the retail tenant’s concept or a merger or consolidation of a corporate tenant resulting in the space becoming unnecessary. Tenant wants the flexibility to find other users to occupy all or a portion of the space and assume some or all of Tenant’s remaining obligations under the lease. In
addition, the other provisions of the lease (such as the lease’s use clause and its restrictions on alterations) must be flexible.

C. Distinction Between Assignment and Sublease.

D. Restrictions on Assignments and Subleases (sole discretion vs reasonable).

E. Circumstances in which it is reasonable for the landlord to withhold the landlord’s consent.

1. The transferee’s financial condition is inadequate.

2. The transferee’s proposed use is different than the tenant’s use.

3. The nature of the proposed use may result in: (i) an increase in insurance premiums, (ii) an increased risk with respect to the use or release of hazardous materials in the building or project, (iii) increased likelihood of damage or destruction, (iv) increased density or pedestrian traffic through the building or project, or (v) the installation of new tenant improvements which are incompatible with existing building system components.

4. The expected percentage rent for the transferee’s business is less than that of Tenant.

5. The transferee is a labor union, foreign or domestic governmental entity, public utility or tax-exempt organization.

6. The transferee is an existing occupant of the building or project, or a person or entity Landlord has dealt with previously with respect to leasing space in the building or project.

7. In the case of a sublease, the monthly rental and other economic concessions result in the effective rent being less than the monthly rent Landlord is asking for similar space in the building or project.

8. In the case of a sublease, the proposed subletting would result in more than a specified number of subleases of portions of the premises being in effect at any one time or more than a specified number of subleases during the term of the lease.

F. Landlord Recapture Rights.

1. Landlord’s perspective -- Because of the importance of controlling the Project, Landlord will often include a “recapture” clause in the lease. If Tenant seeks Landlord’s consent to an assignment or sublease under a recapture clause, Landlord has the option to “recapture” the space, terminating the lease. By recapturing the space, Landlord will release Tenant from any further liability under the lease. Landlord will presumably exercise this option (and forego having Tenant remain
liable on the lease) if Landlord wants control of the space or if Landlord can relet the space at a higher rent.

2. Tenant’s perspective -- Tenant is in a difficult position of having to market the space subject to Landlord’s ability to kill the deal at the last minute. Tenant can minimize this problem by requiring Landlord to decide whether to exercise Landlord’s recapture option earlier in the process.

   a. Lease to have a clear (and short) time period within which Landlord must exercise its recapture option.

   b. Ability of Tenant to withdraw its request to assign or sublet if Landlord notifies Tenant that Landlord intends to terminate the lease.

   c. In the case of a proposed sublease, Landlord’s recapture right only applies to the sublet space and the lease will be amended to reflect the reduced size of the leased premises, with the rental rate and Tenant’s share of taxes and insurance adjusted accordingly.

G. Exceptions from Restrictions on Assignment or Subletting.

1. Transfers by an individual tenant to an entity controlled by tenant.

2. Transfers by Tenant to an affiliated entity.

3. Transfers by way of merger, consolidation or the acquisition of assets or capital stock (however, if the lease is a retail lease, landlord will want to condition the approval of such transfer on, among other things, the proposed transferee having sufficient retail experience and there being no change in the use of the Premises).

H. Bonus Rent.

1. A “bonus” rent clause entitles Landlord to receive some or all of the rent or other consideration payable by a transferee as a result of the lease transfer to the extent the new rent exceeds the existing rent.

2. This additional rent may be in the form of a lump sum payment in the case of a lease assignment or higher subrent in the case of a sublease.

3. Landlord will justify their “right” to bonus rent on the theory that Landlord, not Tenant, is in the real estate business, and only Landlord is entitled to increases in rents due to increases in the value of the real estate.

4. Tenant will want deducted from bonus rent all of Tenant’s leasing costs.
I. Continuing Liability of Tenant.

Where Tenant assigns its interest in the lease, Tenant will remain liable for all of the obligations of the lessee under the lease unless Landlord specifically releases Tenant from Tenant’s obligations under the lease.

V. Repairs and Maintenance.

A. Typical Landlord obligations, but varies with type of tenancy.
   1. Structure, foundations, roof and common areas.
   2. No Landlord obligation until given notice of need for repair.
   3. Can cost of Landlord’s repair and maintenance work be passed through to Tenant as Operating Expenses?

B. Typical Tenant obligations, but varies with type of tenancy.
   1. Maintain interior of Premises in good condition and repair (except for office, HVAC and building systems).
   2. Responsible for any of Landlord’s obligations to extent due to act or omission of Tenant or Tenant’s agents, employees or contractors.

C. Emergency repairs – can Tenant perform (and repair and deduct from rent)?

D. Janitorial services vs. maintenance – who performs?

E. Compliance with laws issues.
   1. Landlord’s perspective – Tenant responsible for complying with all laws applicable to the Premises.
   2. Tenant’s perspective – Tenant only responsible for complying with laws applicable to Tenant’s specific use of the Premises (as opposed to general office/retail use of the Premises. If Landlord accepts this approach, Tenant should also be responsible for any other alterations required due to any action of Tenant or Tenant’s agents, employees or contractors.
   3. Can cost of Landlord’s compliance with laws costs be passed through to Tenant as Operating Expenses?

VI. Damage and Destruction.

A. Landlord’s perspective.
   1. No Tenant termination right.
2. Maximum flexibility regarding Landlord termination rights (for example, damage to the Project but not the Premises).

3. Preserve lender’s right to take insurance proceeds to pay down debt.

4. Limit repair obligations to extent of available insurance proceeds.

5. No interruption of rental income stream (typically Tenant will be entitled to whole or partial rent abatement, but Landlord’s income stream will be protected by rental income insurance paid for by Tenant as part of Operating Expenses).

B. Tenant’s perspective.

1. Terminate lease if repairs are not expected to be completed within specified time.

2. Abatement of rent (and all other periodic charges).

3. No obligation to commence payment of rent until sufficient move in period.

4. Greater termination rights for damage at end of term of lease.

5. Require Landlord to exercise termination rights non-discriminatorily.

6. Termination rights if significant portions of Project (but not Premises) destroyed.

VII. Defaults.

A. Tenant Defaults.

1. Monetary Defaults.

   a. Landlord’s perspective -- Tenant should be in default if Tenant fails to pay rent when due or if Tenant fails to pay any other monetary obligation within five (5) or ten (10) days after receipt of written notice.

   b. Tenant’s perspective -- Notice required even for the failure to pay rent on time.

   c. Compromise -- The first two (2) times rent is not paid when due in a consecutive twelve (12) month period Tenant will not be in default if Tenant pays such overdue rent within ten (10) days of notice that rent is overdue. The one exception to this is if Tenant occupies a significant portion of the building since the failure of such a large tenant to pay rent when due may be the
difference between whether Landlord can pay the mortgage when due.

2. Non-Monetary Defaults.
   a. Landlord’s perspective -- Tenant will be in default if Tenant fails to cure a non-monetary breach within a specified period (usually thirty (30) days) after receipt of notice of such breach.
   b. Tenant’s perspective -- If the breach cannot be cured within the thirty (30) day period, the lease should provide that so long as Tenant has commenced the cure within the thirty (30) day period and thereafter diligently pursues the cure, Tenant should not be in default of the lease.

B. Landlord Defaults.
   1. Failure to deliver space when promised or failure to complete the tenant improvements or defects in Landlord’s Work.
   2. Failure to repair/maintain the building, the building systems or the common areas.
   3. Failure to timely reconstruct the Premises upon a casualty.
   4. Breach the covenant of quiet enjoyment.
   5. Failure to consent to a proposed assignment or sublease, or a proposed change of use or alteration of the premises.
   6. Failure to perform any other Landlord covenant (including, an expansion option, an extension option, an exclusive use clause or other similar rights).

VIII. Remedies.

A. Landlord Remedies.
   1. Keep lease in place and collect rent month.
   2. Terminate lease and accelerate rent (subject to Landlord’s mitigation obligations.
   3. Perform Tenant’s obligations at Tenant’s cost.
   4. Enter Premises by self-help means.
B. Tenant Remedies.

1. Self Help.

   a. Tenant’s perspective.

      (1) Tenant wants self-help remedies because Tenant fears that without such rights it may be difficult to force Landlord to perform Landlord's obligations under the lease.

      (2) Broad self-help rights enable Tenant to remedy a problem where Landlord does not believe a problem exists.

      (3) Self-help remedies are especially important with respect to repairs. For example, a roof leak may cause significant disruption to a tenant's business. By obtaining broad self-help remedies, Tenant will be able to quickly repair the roof on Landlord's behalf without incurring significant business losses.

      (4) A request for self-help remedies typically is accompanied with a request for rent offset rights. Tenant will seek offset rights to obtain a sure method of reimbursement for any self-help costs incurred by Tenant.

   b. Landlord’s perspective – Landlord will object due to:

      (1) By granting self-help remedies, Tenant will exercise Tenant's self-help remedy in circumstances where Landlord believes no Landlord obligation exists.

      (2) Landlord wants to control repairs.

      (3) Landlord wants an opportunity to cure any Landlord default.

      (4) Tenant will not pursue cost-effective remedies.

      (5) Landlord will not want to allow Tenant offset rights since it will adversely affect Landlord's cash flow and offset rights may also violate the terms of Landlord's financing documents.
Chapter 4

Jurisdictional Issues in Land Use Appeals

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I. Land Use Decisions: Jurisdiction based on the Statutory Definition

A. Final Decisions

The Land Use Board of Appeals (LUBA) has exclusive jurisdiction over “Land use decision[s],” as defined at ORS 197.015(10)(a)(A). ORS 197.825. “Land use decision” is defined as “[a] final decision or determination made by a local government or special district that concerns the adoption, amendment or application of statewide planning goals, a comprehensive plan provision or an existing or new land use regulation.” See also ORS 197.015(10)(a)(B)-(C).

B. Ministerial Exception

There are many exceptions to the definition of “Land use decision,” and the following will address some of the most frequent exceptions. For a complete list, see ORS 197.015(10)(b)-(e).

The so-called ministerial exception at ORS 197.015(10)(b)(A) excludes from LUBA’s jurisdiction a decision “[t]hat is made under land use standards that do not require interpretation or the exercise of policy or legal judgment[.]” See Tirumali v. City of Portland, 169 Or App 241, 246, 7 P3d 761 (2000), rev den, 331 Or 674 (2001), explaining that the relevant inquiry is:

“whether [the applicable land use regulations] can plausibly be interpreted in more than one way. If so, they are ambiguous, and it would follow that the relevant city provisions are not ‘clear and objective,’ ORS 197.015(10)(b)(B), and that they cannot be applied without interpretation, ORS 197.015(10)(b)(A)[.]”\(^1\)

\(^1\)There is a different standard for “clear and objective” as used in the needed housing context under ORS 197.307-309 and ORS 197.831. See Rogue Valley Assoc. of Realtors v. City of Ashland, 35 Or LUBA 139, 158 (1998), aff’d, 158 Or App 1, 970 P2d 685 (1999), rev den, 359 Or 594, (explaining that needed housing approval standards are not clear and objective if they impose "subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the community")
An example of a decision that would most likely fall within the ministerial exception would be the issuance of a permit extension that simply requires an inquiry of whether the existing permit is still valid. Similar to the ministerial exception is the exemption for decisions issuing or denying a building permit under clear and objective land use standards. ORS 197.015(10)(b)(B).

Decisions that are statutorily listed as within LUBA’s review authority are within its jurisdiction, even if they are non-discretionary decisions. E.g. ORS 227.160(2)(b) and ORS 227.175(11)(b) (providing that appropriate zoning classification decisions are to be reviewed as limited land use decisions). Mariposa Townhouses v. City of Medford, 68 Or LUBA 528 (2013).

A zoning classification decision described in ORS 227.160(2)(b) is not limited to “ministerial” decisions that do not require interpretation or the exercise of legal judgment; indeed, zoning classification decisions often involve interpretation and the exercise of legal judgment. Central Eastside Industrial Council v. City of Portland, 74 Or LUBA 221 (2016).

C. Land Use Compatibility Statement Exception (no second bite)

Sometimes local governments are required to review whether a state agency decision is compatible with local land use laws. This is typically done through a Land Use Compatibility Statement (LUCS). ORS 197.015(10)(b)(H) excludes from LUBA’s jurisdiction a local government LUCS decision if:

- The local government has already made a land use decision authorizing a use or activity that encompasses the proposed state agency action;

- The use or activity that would be authorized, funded or undertaken by the proposed state agency action is allowed without review under the acknowledged comprehensive plan and land use regulations implementing the plan; or

- The use or activity that would be authorized, funded or undertaken by the proposed state agency action requires a future land use review under the acknowledged comprehensive plan and land use regulations implementing the plan.
As ORS 197.015(10)(b)(H) is worded, LUBA’s jurisdiction over a local government compatibility determination turns on whether that determination is correct. *McPhillips Farm Inc. v. Yamhill County*, 66 Or LUBA 355 (2012).

D. **Certain State Agency Decisions Exception (no second bite again)**

LUBA has jurisdiction over a final decision or determination of a state agency other than LCDC with respect to which the agency is required to apply the goals under ORS 197.180(1).² ORS 197.015(10)(a)(B). But a state agency decision is excluded from LUBA jurisdiction under ORS 197.015(10)(e)(C) if:

- The local government with land use jurisdiction over a use or activity that would be authorized, funded or undertaken by the state agency as a result of the state agency action has already made a land use decision approving the use or activity; or
- A use or activity that would be authorized, funded or undertaken by the state agency as a result of the state agency action is allowed without review under the acknowledged comprehensive plan and land use regulations implementing the plan.

E. **Transportation Facility Exception:**

ORS 197.015(10)(b)(d) exempts decisions that determine final engineering design, construction, operation, maintenance, repair of a transportation facility that is otherwise authorized by and consistent with the comprehensive plan and land use regulations[.]

An example of this would be a decision that closes a street to vehicular traffic. *7th Street Station, LLC v. City of Corvallis*, 58 Or LUBA 93 (2008). The exception does not cover plan

² ORS 197.180(1) provides:

“Except as provided in ORS 197.277 or subsection (2) of this section or unless expressly exempted by another statute from any of the requirements of this section, state agencies shall carry out their planning duties, powers and responsibilities and take actions that are authorized by law with respect to programs affecting land use:

“(a) In compliance with the goals, rules implementing the goals and rules implementing this section; and

“(b) In a manner compatible with acknowledged comprehensive plans and land use regulations.”

II. **Is the Significant Impact Test Significant Anymore?**

The ability to establish LUBA jurisdiction based on the “Significant Impact Test” is a judicially created concept. The concept provides that a local government decision that does not qualify as a "Land use decision" as defined at ORS 197.015(10)(a) can, at least theoretically, be subject to LUBA's review, if the decision creates an "actual, qualitatively or quantitatively significant impact on present or future land uses." *McLoughlin Neighborhood Assoc v. City of Oregon City, __ Or LUBA__,* (LUBA No. 2015-098) (Feb 9, 2016), slip op 11, citing *Carlson v. City of Dunes City*, 28 Or LUBA 411, 414 (1994), *Peterson v. City of Klamath Falls*, 279 Or 249, 566 P2d 1193 (1977), *Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982), and *Billington v. Polk County*, 299 Or 471, 703 P2d 232 (1985). *McLoughlin Neighborhood Assoc* further explains that the concept has been practically superseded:

> “[T]he significant impacts test was first articulated prior to the creation of LUBA and adoption of ORS 197.015(10)(a) in 1979, and as a practical matter has been superseded by the statutory test.” *Id.* at 12.

The modern application of the test now requires that the party establishing jurisdiction:

- Identify the non-land use standards that the petitioner believes apply to the decision and that would be the subject of LUBA's review.

- Demonstrate that the identified non-land use standards have some bearing or relationship to the use of land.

- Explain what the significant impact is on present or future land uses, and how the decision changes the land use status quo

*See Northwest Trail Alliance v. City of Portland*, 71 Or LUBA 339 (2015). If practitioners are struggling to meet the modified version of the test, they should consider filing a writ of review under ORS Chapter 34.
III. **Procedural Issues that May Remove LUBA Jurisdiction**

The burden to establish LUBA’s jurisdiction is on the party seeking review. The following procedural issues may come up in a petitioner’s attempt to establish jurisdiction. LUBA can also *sua sponte* raise jurisdictional issues on its own. OAR 661-010-0075(10). Motions to dismiss for lack of jurisdiction may be filed at any time prior to the issuance of a final opinion and order. OAR 661-010-0065(2).

A. **Exhaustion of Local Remedies**

LUBA may not hear a case or address particular issues if a petitioner has failed to follow the proper procedure for a local appeal. Generally, LUBA will only address appeal issues for quasi-judicial decisions if they have been preserved at the local level.

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3 Exceptions to this requirement exist, such as when a local government fails to follow state law in its decision-making process. *See Housing Land Advocates v. Happy Valley*, 73 Or LUBA 405, 415 (2016) (LUBA denying motion to dismiss where petitioner did not follow local appeal process for appealing a planning commission decision because city council review was required under ORS 227.180(1)(b) to make a final decision on applications for comprehensive plan map amendments.)

*See also ORS 197.835(4) which provides:*

“A petitioner may raise new issues to the board if:

(a) The local government failed to list the applicable criteria for a decision under ORS 197.195 (3)(c) or 197.763 (3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, the board may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government; or

“(b) The local government made a land use decision or limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government’s final action.”

4 For the distinction between quasi-judicial and legislative decisions, see *Strawberry Hill 4-Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 601 P2d 769 (1979).
ORS 197.835(3) (referred to as “statutory waiver” or “raise it or waive it”). Where a local appeal process requires identification of issues in an appeal, a petitioner is required to specifically raise its issues in its written local appeal to preserve those issues for appeal to LUBA. Failure to do so deprives LUBA of jurisdiction over those issues and is commonly referred to as “Miles waiver.” Miles v. City of Florence, 190 Or App 500, 79 P3d 382 (2003), rev den, 336 Or 615, 90 P3d 626 (2004). "Statutory waiver" is distinct from "Miles waiver," as statutory waiver addresses a petitioner's initial statutory obligation to raise issues at the local level under ORS 197.763(1) and ORS 197.835(3), orally or in writing, prior to the close of the evidentiary record following the final evidentiary hearing. Miles waiver focuses on the content of the document that a petitioner files to initiate a local appeal. Rawson v. Hood River County, __ Or LUBA __, (LUBA No. 2016-099) (March 15, 2017).

B. Standing

Generally, any person may petition the board for review of a land use decision or limited land use decision if the person (1) files a timely notice of intent to appeal and (2) has appeared before the local government, special district or state agency orally or in writing. ORS 197.830(2).

To establish representational standing, an organization must show that (1) its members have standing to sue in their own right, (2) neither the claim asserted nor the relief sought requires the participation of individual members in the lawsuit, and (3) the interests the organization seeks to protect are germane to the organization's purpose. Tuality Lands Coalition v. Washington County, 21 Or LUBA 611 (1991).

If the local government makes errors in its decision-making process such as issuing incorrect notices or failing to hold necessary hearings, certain persons may be

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5 Typically, an issue is preserved if a person raises compliance with a particular law, rule or code provision by quoting the operative language of the law or citing it in written or oral testimony. In the simplest sense, issues are distinct from arguments, where raising an issue merely means raising the issue of compliance with a law, and arguments provide reasons why compliance has not occurred. Arguments need not be preserved.
able to appeal and do not have to meet the requirements of ORS 197.830(2). ORS 197.830(3)-(5).\(^6\)

C. Timely Filed Notice of Intent to Appeal

Filing of an untimely notice of intent to appeal a land use decision deprives LUBA of jurisdiction. *Wicks-Snodgrass v. City of Reedsport*, 148 Or App 217, 939 P2d 625, *rev den*, 326 Or 59, 148 Or App 217, 939 P2d 625 (1997). ORS 197.830 includes subsections that allow for filing after the 21-day period, based on failures in the notice or failures to hold necessary hearings. For example, see footnote 6.

Prior to 2011, arguably these provisions allowed a party to file an appeal significantly after the decision if there was a procedural error, as LUBA had determined that the general statute of ultimate repose at ORS 12.140 did not apply to proceedings before LUBA because such proceedings are not “actions” under ORS 12.140.\(^7\) *Jones v. Douglas County*, 63 Or LUBA 261 (2011). During the appeal of *Jones*, House Bill 3166

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\(^6\) For example, ORS 197.830(4) allows certain persons to file late if a local government makes a land use decision without a hearing pursuant to ORS 215.416 (11) or 227.175 (10) [statutory permits]:

“\(a\) A person who was not provided notice of the decision as required under ORS 215.416 (11)(c) or 227.175 (10)(c) may appeal the decision to the board under this section within 21 days of receiving actual notice of the decision.

“\(b\) A person who is not entitled to notice under ORS 215.416 (11)(c) or 227.175 (10)(c) but who is adversely affected or aggrieved by the decision may appeal the decision to the board under this section within 21 days after the expiration of the period for filing a local appeal of the decision established by the local government under ORS 215.416 (11)(a) or 227.175 (10)(a).

“\(c\) A person who receives notice of a decision made without a hearing under ORS 215.416 (11) or 227.175 (10) may appeal the decision to the board under this section within 21 days of receiving actual notice of the nature of the decision if the notice of the decision did not reasonably describe the nature of the decision.

“\(d\) Except as provided in paragraph (c) of this subsection, a person who receives notice of a decision made without a hearing under ORS 215.416 (11) or 227.175 (10) may not appeal the decision to the board under this section.”

\(^7\) ORS 12.140 provides, “[a]n action for any cause not otherwise provided for shall be commenced within 10 years.”

IV. Mootness

Whether a case is moot depends on whether a justiciable controversy exists. Brummet v. PSRB, 315 Or 402, 405, 848 P2d 1194 (1993). An appeal is moot where a decision on the merits of an appeal by LUBA will have no practical effect. Gettman v. City of Bay City, 28 Or LUBA 121 (1994) (appeal of decision authorizing tree removal became moot after trees were cut and removed).

A. Capable of Repetition

ORS 14.175 allows a court to issue a judgment when the case is moot but the challenged act is capable of repetition yet likely to evade judicial review and the other terms of the statute are met. LUBA generally follows principles of the court. LUBA has applied the ORS 14.175 principle of hearing moot cases where a decision is "capable of repetition yet evading review." Wetherell v. Douglas County, __ Or LUBA__ (Order, LUBA Nos. 2012-051, November 8, 2012) (appeal not moot where the underlying legal dispute regarding the legal propriety of a temporary use permit for an annual music festival would remain unresolved even after the festival is held); See also Davis v. City of Bandon, 19 Or LUBA 526, 527 (1990) (recurring controversy over passage of multiple moratoria is sufficient to allow for review of expired decision).

LUBA recently clarified the principle of jurisdiction over moot cases that are capable of repetition in Bishop v. Deschutes County, __ Or LUBA __, (LUBA Nos. 2017-002/003) (January 5, 2018). LUBA dismissed an appeal of a county’s land use compatibility statement and determination of a citizen’s right to appeal as moot, finding that a decision was not capable of repetition merely because the applicant can file a new application or possibly revive an invalidated prior decision.

“ORS 14.175 applies only to judicial proceedings, and LUBA is not a court. Nonetheless, we assume without deciding that ORS 14.175 is relevant to LUBA’s consideration of a mootness claim under ORS 197.805, which states the policy
that LUBA’s review be consistent with ‘sound principles governing judicial review.’” Slip op at 9.

“That an applicant can file a new application regarding the same use or attempt to revive an invalidated prior decision, is not sufficient to demonstrate that a decision is ‘capable of repetition’ for purposes of ORS 14.175.” Id. at 10.

Perhaps the most important consideration in this context is whether or not future decisions would evade review.

B. Authority to Withdraw Decision

An appeal to LUBA may be moot where some action subsequent to adoption of the challenged decision supplants, revokes or rescinds the decision. Heiller v. Josephine County, 25 Or LUBA 555, 556 (1993). See also Bishop v. Deschutes County, __ Or LUBA __, (LUBA Nos. 2017-002/003) (January 5, 2018), where LUBA determined that a planning manager’s declaration that a new compatibility statement withdrew, revoked, or otherwise superseded the county’s prior statement constituted substantial evidence that the county no longer considered prior statement to be valid, even though the prior statement was being appealed. LUBA’s recent decision in Bishop is arguably inconsistent with the statutory principle of limited voluntary withdrawal of a local decision. See ORS 197.830(13)(b):

“At any time subsequent to the filing of a notice of intent and prior to the date set for filing the record, or, on appeal of a decision under ORS 197.610 to 197.625 [comprehensive plan or land use regulation changes], prior to the filing of the respondent’s brief, the local government or state agency may withdraw its decision for purposes of reconsideration. If a local government or state agency withdraws an order for purposes of reconsideration, it shall, within such time as the board may allow, affirm, modify or reverse its decision.” (Emphasis added.)

See also Dexter Lost Valley Community Association v. Lane County, 255 Or App 701, 300 P3d 1243 (2013) (holding that ORS 197.830(13)(b) prohibits a state or local government from withdrawing a decision after the deadline in subsection (13)(b)).

Considerations going forward:

○ What is the authority of local government to rescind a prior decision?

○ What is the binding nature of the later-in-time-decision?
Chapter 4—Jurisdictional Issues in Land Use Appeals

- Are there permissive or prohibitive clauses in local code regarding amending prior decisions?
- What stage is the LUBA appeal at, and can the local government's action be limited under ORS 197.830(13)(b)?

V. Circuit Court Jurisdiction Relating to Land Use

The distinction between LUBA and the circuit courts has historically been confusing, but just recently, there has been clarification from the Oregon Court of Appeals and Supreme Court Justices on this byzantine system. As explained below, the principle is simple: circuit court hears cases that seek to enforce land use laws against existing unpermitted uses and LUBA hears appeals of decisions that approve or deny new applications for uses and the passage of new local land use laws. The principle may be simple, but its application is anything but.

A. Statutory Background

Circuit courts have jurisdiction over enforcement proceedings. ORS 197.825(3) provides that notwithstanding LUBA’s jurisdiction over land use decisions, the circuit courts have jurisdiction “[t]o grant declaratory, injunctive, or mandatory relief in * * * proceedings brought to enforce the provisions of an adopted comprehensive plan or land use regulations[.]” But a party may not ask a circuit court to disrupt the land use decisional process by asking the court to make a land use decision "under the guise of a circuit court enforcement proceeding." Campbell v. Bd. of County Commissioners, 107 Or App 611, 615, 813 P2d 1074 (1991).

Oregon’s Legislative Assembly has determined that enforcement of acknowledged comprehensive plans and land use regulations are matters of statewide concern. ORS 197.031. Although local governments claim that land use enforcement is a discretionary matter,⁸ separate causes of action exist for private citizens seeking to enforce land use laws. ORS 215.185 provides a remedy for any person whose interest in

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⁸ See Cordill v. City of Estacada, 67 Or App 481, 486, 678 P2d 1257 (1984) (recognizing that municipalities have a legal duty to enforce their ordinances).
real property in a county that may be affected by a violation of an ordinance or regulation implementing the comprehensive plan. The statute provides that the person has the right to institute an action for injunction, mandamus, abatement or other proceedings to prevent, enjoin, abate or remove the unlawful building or use.

B. Recent Case Law

The recent disputes in Oregon over the jurisdictional divide vary in their facts, with equitable considerations lurking in the background. An Oregon Supreme Court Concurrence supports uninhibited application of circuit court jurisdiction for ongoing land use violations in the non-conforming use context, whereas the Court of Appeals favors cutting off circuit court jurisdiction if a “land use issue” would be resolved in a future proceeding as a Land use decision subject to LUBA’s jurisdiction.

In Rogue Advocates v. Board of Commissioners of Jackson County, 362 Or 269, __ P3d __ (2017), two Oregon Supreme Court justices weighed in on the scope of circuit court jurisdiction relating to land use enforcement. The case dealt with the impact of ongoing LUBA appeals on the jurisdiction of the circuit court, in the context of determining the legality of a non-conforming use. After LUBA remanded the county’s verification of an asphalt batch plant’s legality, petitioner sought an enforcement action in circuit court to get an injunction prohibiting the ongoing unauthorized use. Although the enforcement action filed in circuit court was determined to be moot once the disputed land use of property was abandoned, Justice Walters’ concurrence, joined by Chief Justice Balmer, dispelled the notion that all an applicant needs to do is apply for a permit to escape from an enforcement action in circuit court:

“[W]hen a landowner uses land in violation of a local land use regulation or Land Use Board of Appeals (LUBA) order, a circuit court has jurisdiction to issue an injunction prohibiting that illegal use.” 362 Or at 273 (Walters, J. concurring)

“As I read ORS 197.825, a circuit court would have jurisdiction to declare that a landowner’s use of property is in violation of a land use regulation or a LUBA order and to enjoin that use, even if the landowner could, in the future, obtain a land use decision from a local government or LUBA that would permit that use.” Id. at 276.
This clear statement aligns with the jurisdictional split in ORS 197.825, but is in conflict with earlier decisions.

Prior to the issuance of the Oregon Supreme Court’s decision on Rogue, and in tandem with the Court of Appeals’ decision on Rogue, the Court of Appeals issued Flight Shop, Inc. v. Leading Edge Aviation, Inc., 277 Or App 638, 373 P3d 177 (2016). There, the court determined that the circuit court lacked jurisdiction over a land use enforcement proceeding that was filed prior to the county’s resolution of a LUBA remand of an approval for an aircraft refueling station (an outright permitted use). The remand was due to a hearings officer’s failure to determine consistency with the airport’s master plan. As explained below, language in Flight Shop is arguably inconsistent with the Rogue concurrence and the later-issued Thomas v. Wasco County. Nonetheless Flight Shop is relevant precedent but should be limited to its facts, and with an acknowledgement of the court’s equity considerations.

The Court of Appeals went a direction different than Flight Shop and its Rogue decision when it issued Thomas v. Wasco County, 284 Or App 17, 392 P3d 741 (2017), rev den, __ Or __ (March 22, 2018). There, petitioner appealed a circuit court decision that dismissed a complaint seeking a declaratory injunction against installation of unpermitted permanent improvements, among other issues raised. The proceedings related to a county-issued permit for an outdoor mass gathering (OMG), the scope of that permit, and related development activity that was not approved by the permit. The appellate court determined that the trial court improperly dismissed the petitioner’s declaratory action, which sought a determination that the festival operator had constructed unpermitted permanent improvements that were required as a condition of approval, but not authorized by the OMG permit, and related injunctions prohibiting the approval and use of the improvements.

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10 Review of outdoor mass gathering permits are excluded from LUBA’s jurisdiction. ORS 197.015(10)(d). The circuit courts have jurisdiction to review outdoor mass gathering permits. ORS 433.750(5).
The trial court dismissed the declaratory action on three bases, all of which the appellate court rejected. As relevant here, the court rejected the idea that LUBA retained jurisdiction over these issues, explaining that the trial court improperly depended on the county’s notice of non-violation (NNV) as the decision that should have been appealed to LUBA to address these issues. The court, based on Mar-Dene Corp v. City of Woodburn, 149 Or App 509, 944 P2d 976 (1997), determined that because the NNV was not issued in response to an application or a request for a determination of whether a use is permissible, and it did not directly interpret or apply land use regulations, but just determined whether improvements were properly allowed pursuant to existing uses on the property, the NNV was not a land use decision and was not within the jurisdiction of LUBA.\(^{11}\) Accordingly, LUBA was not the appropriate tribunal to review these issues.

The court also rejected the trial court’s determination that because petitioner had originally appealed the OMG permit to LUBA (albeit incorrectly), that under ORCP 21 (A)(3), petitioner was barred from filing another suit in the circuit court because there was “another action pending between the same parties for the same cause[.]” The court determined the trial court erred because the appeal of the OMG permit was not the same cause as a declaratory action that challenged development necessary to satisfy conditions of the permit, where that development was not authorized by the OMG permit. 284 Or App at 36.

The court then addressed whether the circuit court should not hear the declaratory action suit because it arguably requires the court to make a land use decision. The court rejected that position, and stated:

“Circuit courts do have jurisdiction to grant declaratory, injunctive, or mandatory relief in a proceeding arising from a decision described in ORS 197.015(10)(b) or in a proceeding brought to enforce land use regulations. ORS 197.825(3)(a). We said in Doughton v. Douglas County, 90 Or App 49, 750 P2d

\(^{11}\) The NNV determined that there had been no violation of land use laws because the parking and vehicle staging areas required by the permit were temporary, and that the proposed driveway and culvert were permitted in conjunction with an existing dwelling. 284 Or App at 35.
1174 (1988), that the purpose of ORS 197.825(3)(a) is ‘to enable local governments and members of the public to compel compliance with local land use legislation, under circumstances where the noncompliance is not embodied in a discrete land use decision.’ And more recently, we explained in Flight Shop, Inc. v. Leading Edge Aviation, Inc., [v. Leading Edge Aviation, Inc.,] 277 Or App 638, 644, 373 P3d 177 (2016), that a party ‘may bring an enforcement action in circuit court when a violator engages in an land use contrary to a zoning ordinance and that violator ‘has filed no application to allow that use or have it declared permissible through a land use decision. (quoting Clackamas County v. Marson, 128 Or App 18, 22, 874 P2d 110, rev den, 319 Or 572, 879 P2d 1286 (1994)).’

Although cited in Thomas, Flight Shop is arguably inconsistent with Thomas and Walters’ concurrence in Rogue Advocates v. Jackson County. Flight Shop appears to lean on case law that is not directly on point\(^\text{12}\) to make a broad determination that if an issue can be resolved in a land use decision context, then the circuit court lacks jurisdiction over a case that requires addressing that issue. Such a determination is arguably inconsistent with ORS 197.825 and ORS 215.185. There is an odd aspect to the quoting of Marson in both Thomas and Flight Shop for the proposition that if an issue is ‘“subject to the land use decision process or susceptible to resolution through a land use decision,’ that jurisdiction belongs to LUBA and not the circuit courts.” Flight Shop, 227 Or App at 644. Marson specifically withheld judgment on the affect the pursuit of a land use decision that is reviewable by LUBA has on a circuit court enforcement proceeding. Marson, 128 Or App at 24.

Relevant takeaways from Flight Shop, Rogue and Thomas and the arguably inconsistent principles in those cases are:

- If a land use decision has been issued, appealed, and remanded by LUBA, it is unlikely that the circuit court will find jurisdiction over an enforcement proceeding relating directly to the legal sufficiency of that land use decision and LUBA Order, where resolution would require further review of the land use issue (Flight Shop).

- If an enforcement proceeding relates to development that is necessary to fulfill conditions of approval, but not authorized by a permit, the circuit court would most likely find jurisdiction over that enforcement proceeding (Thomas).

\(^{12}\) Doughton v. Douglas County, 90 Or App 49, 55, 750 P2d 1174 (1988) is more easily categorized as a collateral attack on a land use decision case, rather than a true jurisdictional enforcement case.
Because the jurisdictional statutes do not even address jurisdiction based on the presence of a “land use issue,” perhaps having the same “land use issue” in a LUBA proceeding and a circuit court enforcement action does not remove jurisdiction from the circuit court, but rather creates a practical reason to suspend a circuit court proceeding until the LUBA proceedings are resolved in support of judicial efficiency.

VI. Motions to Transfer

Parties can get so caught up in jurisdictional arguments, that they sometimes forget the most important thing to do: file a conditional motion to transfer. Circuit courts and LUBA have different timelines for filing an appeal. A timely-filed notice of intent to appeal at LUBA that is actually appealing a non-land use decision will always be within the deadline for writ of review. Petition for Writ of review must be within 60 days from date of decision. ORS 34.030. A timely filed writ of review that is actually a land use decision, and transferred, may not be filed timely for purposes of LUBA. ORS 34.102; OAR 661-010-0015 (21-day filing window).

Motion must be initiated by filing no later than 14 days after a challenge to the board’s jurisdiction is filed; If LUBA raises jurisdiction on its own, the motion must be filed no later than 14 days after the date the moving party learns of the issue. OAR 661-010-0011(b). LUBA cannot transfer and must dismiss when it determines there is a land use decision but that it lacks jurisdiction for other reasons. For example, dismissal is appropriate where there is a failure to timely file or a failure to establish that petitioner is adversely affected by the decision under ORS 197.830(3). MGP X Properties, LLC v. Washington County, 74 Or LUBA 378 (2016).
Chapter 5
Persuading the Local Decision Maker

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Chapter 5—Persuading the Local Decision Maker

PERSUADING THE LOCAL DECISION MAKER
By Anne C. Davies and Laurie E Craghead

For the new lawyer, and lawyers coming from different fields, land use is informal and not hyper legalistic. That said, the legal traps are often not so obvious and the consequences frequently severe.

Preparing Applications

1. Client Intake
   - Experienced vs. inexperienced applicant
   - Review applicable code prior to meeting
   - Investigate zoning, size, and location of subject property
   - Is the client’s desired outcome consistent with what they are asking for assistance with?
   - Is it appropriate to consider other options?

2. Pre-App Investigation
   - Research history of property, if needed
   - Determine need for experts—noise expert; contractor; well consultant
   - Investigate likely level of opposition
     - Talk with staff about neighbors, including outcomes of recent cases, level of involvement and sophistication of neighborhood group, hot-button issues
   - Find out if there is a neighborhood or community plan; if yes, read it
   - Communicate with neighborhood—early and often
     - Required Neighborhood Meeting—Statewide Planning Goal 1
     - Portland—Neighborhood Contact Requirement—Portland Code 33.700.025
     - Eugene—Neighborhood meetings required for certain applications
   - Be honest about your plans
   - Be willing to compromise

3. Pre-App Meeting
   - Determine whether required; costs
   - Listen and learn
   - Get the staff on your side; make it easy for them to recommend approval
   - Portland—Interested parties can attend
   - Eugene—Staff and applicant

4. Drafting the Application
   - Format—Format it like the decision; get copies of similar decisions from the jurisdiction
Chapter 5—Persuading the Local Decision Maker

- List out criteria—match up evidence, findings
- Incorporating by reference findings from discussion of other criteria
- Anticipate issues/opposition
- When does an application become a new application; what are the implications/consequences?
  - Baker v. City of Garibaldi, 49 Or App 437, 446 (2005); if an application is significantly revised, even if in response to neighbor opposition, the opposition must have an opportunity to present evidence
  - Conte v. City of Eugene, ___ Or LUBA___ (LUBA No. 2012-039, October 11, 2012); policy considerations—ability to respond to comments as they are raised vs. ability to present evidence to a moving target
  - Procedural error—prejudice to substantial rights (ORS 197.835(9)(a)(B))

5. Know the process—read the code, read the code, read the code—Anne

- What is the local process for the subject application? Type I, II, III, IV? Hearings Official to governing body? Planning Director to Planning Commission?
- Each local code is different—standard quasi-judicial requirements. ORS 197.763
- Local appeal bodies—know the decision maker
- De novo; on the record; de novo on the record
- Standard of review
- Strategies around the 120-day rule; local government not allowed to require waiver of timeline. ORS 227.178(10); ORS 215.427(9)
- Know the deadlines
  - Appeal deadlines
  - Submittal of materials
  - Open record periods—assist the decision maker

Hearing procedures

1. Know the local procedures.

- Each jurisdiction has its own regulations as to what hearing process is applied to specific applications.
- Many jurisdictions have four types of decision making processes. Not all jurisdictions call them “Types.”
  - Type 1 (Type I) is a ministerial administrative procedure. Generally, no local appeal of these decisions is available.
  - Type 2 (Type II) is a quasi-judicial, administrative decision with notice of the decision to the surrounding property owners and includes the right to appeal to the next level hearings body.
Type 3 (Type III) is a quasi-judicial, public hearing before a hearings officer (appointed per ORS 215.406(1) and 227.165) or the planning commission (appointed per 215.406(2) and 227.020).

Type 4 (Type IV) is a purely legislative proposal first heard by the planning commission which makes a recommendation on the proposal to the governing body followed by a final decision on the adoption of the proposal.

2. Administrative procedure

- Ministerial administrative decisions (Type 1) are decisions that do not require discretion or land use regulation interpretation.
  - Ministerial decisions are not land use decisions. ORS 197.015(10).
  - Ministerial decisions do not require notice to surrounding property owners.
  - Some building, electrical, sewer, septic, water, etc., decisions are ministerial decisions.
  - Some building permit decisions are land use decisions and not merely ministerial decisions. *Kuhn v. Deschutes County*, Or LUBA 2010-020. The International Building Code says that building permits cannot be approved if the use does not have land use approval. Electrical, etc. permits do not have the same restriction.

3. Administrative land use decisions (Type 2)

- Decisions made without a public hearing are provided to surrounding property owners per ORS 215.416(11) (counties) and 227.175(10) (counties).
- Notice of the decision must be sent to properties within 100, 250 and 750 feet of the subject property, depending on the location of the property.
- Usually done for uses permitted outright and simple conditional uses with where there is little to no controversy.
- Administrative decisions are good reasons to be nice to the planning staff.
- Could be the difference between the staff deciding to make the decision themselves or making the applicant pay for a hearings officer.
- Also, the planner making the decision could have an unconscious bias against a badly behaving land use attorney or applicant. This unconscious bias could cause the planner interpret local code and the facts in such a way that the client’s application, although decided through an administrative decision with notice, is denied. The client will then be forced to appeal the decision, incurring more expense in time and money.
- Furthermore, being nice to the planners may make them more likely to make accommodations and provide helpful information regarding local procedures and personalities. They may also remain more neutral when presenting information on your application to the governing body that is hearing the application, either on appeal or as required by local code or for legislative matters.
Partly because Oregon is small in population and partly because Oregon land use planning is unique in the country, the community of planners is close-knit. Also, the planners have working relationships others in the land use bar. Thus, mistreating and/or not cooperating with the local planning staff could have ramifications around the state if the attorney represents clients outside the attorney’s home jurisdiction.

4. Hearings before a hearings body (Type 3)

- If the initial decision on the application was an administrative decision, the decision may be appealed to the next hearings body for only $250. ORS 215.416(11)(b). In many cities and counties, that is a hearings officer.
- If the application is complicated or controversial, many jurisdictions send the application to a hearings officer as the first hearings body to conduct the first evidentiary hearing.
- The local government must provide direct, mailed notice to property owners within 100, 250 or 500 feet of the subject property and must send it 20 days prior to the hearing. ORS 197.763(2) and (3).1
  - Check local code to see if a greater range for notice is required.
  - Someone who should have received notice but did not could appeal the decision beyond the normal deadlines. Thus, if the notice list is not online, ask planning staff for a copy and do a spot check to make sure the notice area was covered.
  - Review the notice to make sure it fully describes the proposal and a list of all the applicable criteria as well as the date, time and location of the hearing. ORS 197.763(3).
  - Better to catch such a procedural defect early than be delayed later. Also, the planners will appreciate it so it can be corrected without a lot of egg on their faces.

5. Preparation for the hearing

- Experts
  - Experts are advisable and often required when the application is highly technical.
    - Soils experts (nonfarm dwellings, nonfarm partitions, floodplain/wetland soils)
    - Water rights experts (rural lands and municipal water rights for rural uses)
    - Transportation engineers (traffic studies, traffic control alternatives, traffic flow options)
    - Other engineers (structural designs)

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1 ORS 197.763(3)(f)(B) allows for a 10-day notice if two evidentiary hearings are allowed. Most jurisdictions do not provide two hearings up front because of the 120/150-day deadline in ORS 227.178(1) and 215.427(1), respectively.
Chapter 5—Persuading the Local Decision Maker

- Wildlife (determine if proposed use will affect, determine protection alternatives, determine if wildlife exists)
- Surveyor (legal descriptions, site plans, tentative plans, final plats)
- Landscape architect (impact mitigation, vegetation preservation)
- Arborist (vegetation preservation)
- Architect (structural design)

  o If the case involves reports from experts, review the reports carefully and make sure you understand them.
  o If you’re representing the opposing party(ies), consider hiring an opposition expert. Expert reports/testimony submitted by the applicant are very difficult to overcome with merely anecdotal evidence.
  o If your client hired the expert, talk to the expert to make sure you understand the report and, if applicable, what testimony the expert will provide.
  o Consider having the experts testify either in-person or via the telephone, if the hearing site is capable of such.
  o Make sure the expert knows the criteria and the objective for the testimony and that the expert can relate her/his report to the criteria.
  o Determine if the expert knows how to listen and actually hear what the question is and can answer without too much jargon and can give short answers.
  o If nothing else, having the experts available for the decision maker to ask questions of may allow you to provide more information without being worrying about any time limits on speaking.
  o If the expert’s report is pretty straightforward and understandable, however, don’t waste time and money having the expert attend the hearing. For example, if it’s not likely anyone will argue about the soil types on the subject property, the soils expert’s report would be sufficient.

- Try to determine opposing view arguments.
  o If you’re unfamiliar with the region, ask planning staff if they know of any individual or group that regularly opposes similar applications.
  o Ask planning staff to see other similar applications. For larger jurisdictions, the documents may be online.
  o Check with other local land use lawyers, including the county counsel or city attorney, to find out who regularly opposes similar applications.
  o Don’t lose credibility by not addressing major issues that others will most certainly raise.

- PowerPoint presentations are good tools when used properly.
  o Include lots of pictures and pointers.
  o Don’t just include bullet points and then just read the bullet points.

6. Quasi-judicial hearing procedures

- Hearings body
  o For some jurisdictions, the planning commission hears quasi-judicial cases in addition to the commission’s legislative review responsibility.
For others, a hearings officer, usually a lawyer, is hired to hear quasi-judicial cases.

- If this is the first evidentiary hearing, the hearing is de novo.
  - Thus, all evidence comes in and anyone can participate in the hearing.
  - Rules of evidence are not applicable.
- For order of the hearing, including the opening statement, see ORS 197.763.
- Participants can challenge the ability of any member of a hearings body to hear the case because of ex-parte contact, bias (ORS 197.835(12) or conflict of interest (ORS 244.020(1), (13), 244.120-.130)).
  - Know the difference between bias and conflict of interest.
  - Determine whether you really want to make the challenge.
    - Making the challenge may delay the process.
    - You may not win and will have just ticked off the decision maker.
- The applicant has the burden of proof.
  - Been that way since Fasano v. Board of County Comm’rs, 264 Or 574, 586, 507 P2d 23 (1973), overruled on other grounds, 288 Or 585 (1980)
  - The applicant will be given the opportunity to make the first impression on the decision maker, in other words, be the first to testify, after the staff report, at the hearing.
- Local evidentiary standard is preponderance of the evidence.
  - On appeal, however, LUBA will look to see if a reasonable person could have relied on that evidence even if other evidence conflicts with it. See Land Use Bar Books Section IV. H.7.c.
  - LUBA does not reweigh the evidence.
- Raise it wave it (ORS 197.763(1), 197.796(3)(b))
  - This rule requires all parties to raise all issues or be precluded from appealing on that issue. Applicants are precluded from raising constitutional issues in court later if not raised in the local hearings procedures.
  - Leads to “spaghetti on the wall” arguments.
- Presentation to a hearings officer.
  - A detailed discussion of facts and legal theory in written materials and oral testimony is appropriate for the hearings officer.
  - Hearings officer is usually a lawyer.
  - If the presentation is detailed enough and the hearings officer is likely to draft a very detailed decision, the buck may stop there.
  - If, however, the case is pretty much assured of being appealed to the governing body, consider how much you want to present to the hearings officer.
  - Evaluate the strength of the case, how negative the hearings officer’s decision will be against your points and how much the other side will have to gather more evidence on appeal.
  - Less in the hearings officer’s decision may influence the governing body less.
o Hearings officers are less likely to make findings based on emotional/political bent.

- Presentation to the planning commission.
  o Determine the emotional/political bent of the commission.
  o Consider presenting more facts than legal theory.
  o Presenting generalities and fewer details may be appropriate given the larger number of people making the decision.

- Hearings before the governing body
  o Less is more, in other words, hit the highlights.
  o They have many other issues with which to deal.
  o Lots of material is already in the record.
  o They are politicians. Focus presentation towards the general political bent.

- Continued hearing/open record
  o Per ORS 197.763(6), at the initial evidentiary hearing, any party may request that the hearing be continued or the record be left open.
  o If the applicant requests the continuance or open record period, the 120/150-day clock is extended.
  o Can be granted at the local appeal hearing if the local code allows it.
  o Per ORS 197.763(6)(c), the open record period is usually a 7/7/7 time period.
  o A party will usually want the record left open to respond to documents submitted at or just before a hearing.
    ▪ Some documents, however, can be easily reviewed at the hearing and, if time is of the essence, the continuance/open record period waived.
    ▪ Because the applicant gets the final say, being able to take the time to provide the final written legal arguments is an advantage.

- 120/150-day rule (“No moving the goal post.”)
  o How much to present at the first evidentiary hearing may be influenced by how many days are left on the 120/150-day clock and the likelihood of an appeal.
  o While a local government cannot require an applicant to extend or waive this deadline, an applicant shouldn’t be too hard-headed about sticking to this rule and not granting extensions. Appearing like the applicant wants the right decision rather than trying to force the local jurisdiction into a procedural corner works better in attempting to keep the decision maker’s mind open.
  o If the application is bumping up against the deadline, the governing body will find a way to deny hearing the appeal using the local code criteria.

- Strategies for either side whether before a hearings officer or a planning commission.
  o Don’t come out of the gate swinging. Thank the decision maker for the opportunity to be heard. Calmly present case.
  o Hit the highlights first, then go back to fill in details. For applicants, that means give a brief overview of the property and the proposed use. For opponents, give the general nature of the opposition.
The nitty-gritty should be provided in the documents submitted before, during, or, when available, after the hearing.

Don’t read the written testimony into the record. You’ll bore the decision maker and the decision maker may tune out your most important points.

If it appears that the case will be appealed either way to the governing body, determine how much effort to put into the first evidentiary hearing and whether some evidence or legal arguments should be reserved for the hearing on appeal.

Intensity in the presentation is ok to express the importance of the issues, but don’t be hostile and don’t badmouth the other side, especially a group of neighbors, planning staff or the decision maker. That makes you look like a bully and close-minded. Decision makers are human and generally don’t like applicants who are bullies even if the decision makers are bullies themselves. Thus, the decision maker may be influenced to make interpretations against your arguments.

Provide cool, calm, reasonable responses to criticism about which you already know or questions you think the decision maker may ask.

Determine what weakness in your case it would be best to get out before the opposition does so that you can provide the reasonable response upfront.

Although getting the weaknesses out in the open upfront is a viable strategy, consider that this doesn’t work as well as it might in a trial.

Many more people may be testifying and could pick up the weakness ball and run with it, calling much more attention to it than it should have.

The number of people testifying for a particular side will make more of a difference if the decision maker is a planning commission or the governing body, especially, the governing body.

If, however, most of the testimony is not related to any of the criteria, it might not help.

If most of the testimony is bashing the decision makers with no relation to code or other criteria, whether that hurts or helps the case may depend on whether it is an election year for the majority of the final decision makers.

7. Appeals

- Deadlines
  - Know the local code for deadlines to file an appeal to the next local hearings body.
  - Although the local appeals hearing body will find other criteria for denying hearing the appeal, if appealing the case will not provide enough time to meet the 120/150-day deadline, the appeal will not likely be heard.
Chapter 5—Persuading the Local Decision Maker

- The applicant should consider whether agreeing to extend the deadline is best.
  - If the applicant is appealing and wants LUBA to be required to defer to the local government’s interpretation, then extending the deadline is to the applicant’s advantage.
  - Extending the deadline may also be to the applicant’s advantage when the opponents appeal the decision when the lower decision was not clear or an issue should be beefed up.

- If the hearing is not the first evidentiary hearing, the scope of review for the hearing is determined by the local code.
  - Could be limited to the issues raised in the notice of appeal.
  - Could be at the discretion of the hearings body.

8. Legislative Decisions (Type 4)

- Cities can authorize a planning commission to be the final decision maker on comprehensive plan map amendments. ORS 227.188(1). Parties, however, may appeal the decision to the city council. ORS 227.188(2)(a).
- For counties, the planning commission decisions are recommendations only because only the governing body can make the final decision on an ordinance. ORS 215.050(1).
- Determine whether the governing body is likely to affirm or reverse the planning commission’s decision on the legislative matter.
- The squeaky wheel gets the grease on legislative matters. In other words, the number of people speaking on a particular side often matters.

Value added by attorney representation

- Anytime there is a high likelihood that a decision will be appealed to LUBA, an attorney should at least be consulted.
- An attorney’s role and level of involvement can vary depending on financial and other resources of the client.
- An attorney can educate an applicant client about the local land use process and likely timeframes for appeal.
- An attorney can insure issues are raised at the local level so they will not be precluded on appeal. ORS 197.763(1); ORS 197.835(3).
- An attorney can and should work as a watchdog (overseeing the local government staff) of the local process.
Chapter 5—Persuading the Local Decision Maker

PERSUADING THE LOCAL DECISION MAKER

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THE PRESENTATION

- Focused on the Applicant’s Experience
- Organized Chronologically Through the Process
  - From Client Intake To Application Submittal
  - Importance of Procedures
  - Hearing Process
- Questions/Discussion
OREGON’S STATEWIDE LAND USE SYSTEM

Frought with Peril

PROCESS
PROCESS
PROCESS
PROCESS
- Level of Expertise of Client Impacts First Contact
- Consider Deadlines
- Clarify Next Steps
Chapter 5—Persuading the Local Decision Maker

PRE-APP INVESTIGATION

- Status of Property, Surroundings (Facts)
- The Criteria (Law)
- Staff
- Decision Maker (Politics)
- Opposition
Chapter 5—Persuading the Local Decision Maker

PRE-APP MEETING

- As a lawyer, don’t act like a lawyer
- Come with questions
- Listen

DRAFTING THE APPLICATION
APPLICATION

- Plagiarism is your friend
- Application = Draft Decision
- Financial Considerations

KNOW YOUR PROCESS
READ THE CODE!
Hearing Procedures

- Application Types of Review
- Local Appeal Route
- De Novo v. On the Record Appeals
- Standard of Review
- 120/150 day Rule—Mandamus Remedy
- Track the Timelines

TYPE 1 REVIEW

- Straightforward criteria
  - Septic soil analysis
  - Building plans review
  - Electrical permits
- Beware the land use decision in disguise
Type 2 Review

- Fairly straightforward, simple land use decisions.
- Used when no real controversy.
- An appeal costs only $250 to the parties but a lot to the local jurisdiction.

Type 3 Review

- Full-on public hearing
- Initial hearing before hearings officer or planning commission
- Not a trial, but prepare as if it is.
  - But rules of evidence don’t apply.
  - Spaghetti on the wall approach.
Chapter 5—Persuading the Local Decision Maker

*Important Points*

- Raise or waive it.
- Know your audience
- Know your opposition
- Consider the deadlines

*Appeals*

- Determine likelihood
- May affect initial presentation
- Know the deadlines
- Know the costs
- Know notice of appeal requirements


### Type 4 Review

- Legislative matters
- Planning Commission review
  - (Goal 1)
  - Understand makeup
- May sneak up on you

### Value of an attorney

- Any decision that might be going to LUBA will benefit by the early involvement of an experienced land use attorney
- Explain the process to client ahead of time
- Flag raise it or waive it issues
- Watchdog for local government procedures
Value of an attorney con’t

- Practical experience with decision makers
- Potential downsides:
  - Many decision makers don’t want to see lawyers
  - Experienced citizen groups know the system
  - Argumentative or overly legalistic lawyering can backfire

QUESTIONS?
DISCUSSION
Chapter 6
An Update on the Law of Unconstitutional Takings

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I. INTRODUCTION

Federal taking claims are based on the Fifth Amendment to the United States Constitution that provides:

"[N]or shall private property be taken for public use without just compensation."

The law of unconstitutional takings is confusing and in some cases admittedly unintelligible. This paper summaries the law relating to inverse or regulatory condemnation claims, but the reader should understand that there are few bright lines and
even fewer consistent guiding principles. Moreover, this paper is by its nature abbreviated and is not designed to supply individual legal advice. The law in this area is complex, seemingly inconsistent and driven by particular facts of each case. The necessity of careful consideration of facts and the thoughtful if not creative analysis of legal precedents is underscored by the United States Supreme Court’s recent decision in *Murr v. Wisconsin* 137 S. Ct 1933 (2017), which decides that even the identification of the “property” that is subject to the taking analysis, is based upon factual inquiry.

Unconstitutional taking are claims brought under the Fifth Amendment to the United States Constitution and assert that the government has unconstitutionally taken private property without providing just compensation, even though the government has not instituted eminent domain proceedings to do so. Keep in mind that the Fifth Amendment does not prohibit governmental interference with private property. Rather, in the words of the US Supreme Court in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536-37 (2005) (quoting *First English Evangelical Lutheran Church v. Cnty. of Los Angeles*, 482 U.S. 304, 314-15 (1987)):

“As its text makes plain, the Takings Clause ‘does not prohibit the taking of private property, but instead places a condition on the exercise of that power.’ In other words, it ‘is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.’”

The US Supreme Court, and hence the taking claim analysis, is interested in determining whether it is fair to force a property owner to pay for important and indisputably commendable public improvements and programs.

Under the terms of the Fifth Amendment and the quest for what is fair, four basic kinds of regulatory taking claims analyses have developed, with three being fairly straightforward and one, not so much. They are (1) per se physical occupation taking claims, where the government actually occupies private property, (2) categorical taking claims - where the deprivation of all economically beneficial use of property is alleged, (3) taking claims asserting that even though there remains some economically beneficial use of property, the application of regulations nonetheless unconstitutionally (and unfairly) take property (partial takings and the “hard” variety), and (4) unconstitutional conditions/exactions taking claims. It is the third – the “partial taking” doctrine that is unreasonably confusing, unpredictable and

2 For simplicity, this paper refers to these kinds of taking claims as “regulatory takings” claims.

3 In Oregon, the parallel state constitutional provision is Article 1 Section 18, which provides:

“Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered; provided, that the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use.
that is defined (such as it is) by the U.S. Supreme Court’s 2017 decision in *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017).

The first two (per se/categorical claims) are analytically similar. The third and fourth categories - partial taking claims and claims asserting the imposition of unconstitutional conditions - follow separate analyses with, as noted, partial takings being by far the most complicated. While analytical clarity is helpful to practitioners to apply to make sense of these types of claims, practitioners must understand that when courts actually apply taking rules to taking claims, the applicable legal concepts are often mixed by unfamiliar judges, producing the confusing body of law that characterizes this practice area.

It is important to recognize that for many years, there had been a fifth type of taking claim – the “facial” taking claim characterized by *Agins v. City of Tiburon*, 447 U.S. 255, 65 L. Ed 2d 106 (1980). The *Agins* test was a two part test to determine whether the adoption of a regulation effected a taking. The relevant questions under this test were (1) does the regulation substantially advance a legitimate governmental interest? (2) does the regulation deprive the owner of economically viable use of property? Almost no one had ever been successful in asserting an *Agins* style taking claim until Chevron USA - the oil company – against legislation adopted by the State of Hawaii restricting oil companies’ ability to own and lease gas stations. However, Chevron’s victory was short lived. The United States Supreme Court used the occasion of Chevron’s victory to strike down the *Agins* test under which Chevron had prevailed, rightfully pointing out *Agins* embodied a substantive due process test, that had no place in the analytically distinct matter of alleged 5th Amendment takings. *Lingle v. Chevron USA*, 544 U.S. 528 (2007).

**Summary - Per Se/Categorical Taking Claims**

The per se category is best illustrated by *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L. Ed. 2d 868 (1982) (*Loretto*). The categorical category is best illustrated by *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (*Lucas*). While different – for one, government actually occupies private property and for the other the government does not occupy private property, but nonetheless takes all value in the property by regulation, the analysis is similar. In per se and categorical cases, the application of a regulation to property deprives the landowner of an entire property interest.

For physical invasion (per se) claims, the government either occupies or has given itself the right to occupy private property - without paying for the privilege. The physical invasion generally is not the result of natural causes or conditions, but rather is a physical occupation or condition resulting from governmental action, even governmental action that forbids the removal of the invading material. *See Arkansas Fish and Game Com’n v. United States* 133 S.Ct. 511 (2012) (temporary flooding due to federal land management policies can constitute a temporary taking), *and see Beta Trust v. City of Cannon Beach*, 33 Or. LUBA 576 (1997) (while declining to decide the case on “ripeness” grounds, LUBA distinguished government actions that lead to physical occupation of private property and natural processes that occupy private property – *i.e.* windblown sand covering a seawall making it ineffective – and characterized the latter as not being subject to a “physical invasion” analysis); *see also Teegarden v. United States*, 42 Fed. Cl. 252 (1998) (failing to allocate firefighting resources to petitioner's property that was then
destroyed by a wildfire, is not a compensable taking under physical invasion or any other theory).

*Lucas* style categorical taking claims break into two essential elements:

1. the imposition of a regulation deprives a landowner of all or nearly all economically beneficial use of property (including to personal property), and
2. the property right deprived is recognized under state law, and the use at issue does not constitute a common law nuisance.

**Summary - Partial or “Ad Hoc” Taking Claim**

These claims include circumstances where the application of regulations to particular property, that leaves beneficial use, is nevertheless alleged to be an unconstitutional taking of property. These types of takings have long been called “*Penn Central*” style takings and have historically been analyzed (usually unsuccessfully) under the three *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 57 L.Ed.2d 631 (1978), factors: (1) the character of the invasion, (2) the economic impact of the regulation as applied to the particular property (loss in property value caused by the regulation), (3) the property owner's distinct investment backed expectations with respect to that property. No one factor is dispositive, rather each is considered by a court to determine the fairness of the regulation’s impact on a particular property owner. However, the Supreme Court’s decision in *Murr v. Wisconsin*, 137 S. Ct 1933 (2017), made these and other factors also applicable to the identification of the property that is taken. Somewhat prophetically, Professor Steven Eagle argued that the *Penn Central* test was really composed of four factors, one of which involves the “parcel as a whole” issue that *Murr* gets to.

Steven J. Eagle, *The Four Factor Penn Central Regulatory Takings Test*, Penn State Law Rev

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4 See *Horne v. Dep’t of Agriculture*, 135 S.Ct 2419 (2015) (raisin transfer requirement is a per se taking of raisins); *Andrus v. Allard*, 444 US 51 (1979) (prohibition on possessing or selling eagle feathers not an unconstitutional taking), and see the majority opinion dictum from *Lucas* stating:

"[I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [a property owner] ought to be aware of the possibility that the new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). ***." *Lucas, supra* 505 U.S. at 1027-28.


6 An example of a successful *Penn Central* style taking is *Florida Rock Industries v. United States*, 45 Fed. Cl. 21 (1999).
As Robert Thomas notes in his excellent article Thomas, Robert H., Restatement (SCOTUS) of Property: What Happened to Use in Murr v. Wisconsin? (July 22, 2017). Available at SSRN: https://ssrn.com/abstract=3007166, the partial taking analysis is very regulation friendly and most property owners will lose under its terms. Thus, property owners wish to categorize their claim as a Lucas style total take and government lawyers will try to characterize a taking claim as one analyzed under Penn Central and Murr.

Summary - Unconstitutional Conditions

Conditions of approval can be challenged as constituting unconstitutional takings of property requiring just compensation under the analysis articulated in Nollan v. California Coastal Comm’n, 483 U.S. 825 (1987) and Dolan v. City of Tigard, 512 U.S. 374 (1994). The combined tests from the Nollan and Dolan cases are:

1. Does the condition further a substantial/legitimate governmental interest? (Nollan)
2. Is the particular condition imposed related to the substantial legitimate governmental interest that is served? (Nollan)
3. Are the impacts of the development are roughly proportional to the condition imposed. (Dolan)

II. NOTICE RULE

It is generally not a defense to a taking claim that the property owner had notice of the restriction alleged to effect an unconstitutional taking when the property was purchased/acquired. In Palazzolo v. Rhode Island, 533 U.S. 606 (2001), the Supreme Court explained that post-enactment notice to a property owner of a restrictive regulation, does not absolve the government of the obligation to pay for a taking occasioned by the regulation. The Supreme Court recently affirmed this view in Murr, supra, 133 S. Ct at 1945, but modified it:

“A valid takings claim will not evaporate just because a purchaser took title after the law was enacted. See Palazzolo, * * * (some ‘enactments are unreasonable and do not become less so through passage of time or title’). A reasonable restriction that predates a landowner’s acquisition, however, can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property. See ibid. (‘[A] prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned’). In a similar manner,
a use restriction which is triggered only after, or because of, a change in ownership should also guide a court’s assessment of reasonable private expectations.”

The Palazzolo Court had stated:

"[A] state, by ipse dixit, may not transform private property into public property without compensation." (Citations omitted.) Palazzolo, supra, 533 U.S. at 628.

"* * *

"A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken. Palazzolo, supra, 533 U.S. at 628.

"* * *

“It suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title. This relative standard would be incompatible with our description of the concept in Lucas, which is explained in terms of those common, shared understandings permissible limitations derived from a State's legal tradition. * * *. A regulation or common law rule cannot be a background principle for some owners but not for others." Palazzolo, supra 533 U.S. 629-630.

In McQueen v. South Carolina Coastal Council, 530 S.E.2d 628 (2000), the United States Supreme Court granted certiorari and the state court decision was “vacated and the case is remanded to the Supreme Court of South Carolina for further consideration in light of Palazzolo v. Rhode Island, 533 U.S. ___ (2001)”. In McQueen, an intermediate state appellate court determined that the total denial of the right to construct a bulkhead on the beach and to fill behind it was the denial of all economically beneficial use of the property requiring the bulkhead and the South Carolina Supreme Court reversed. The state supreme court noted the similarities between the facts in McQueen and those in Lucas, but applied the notice rule to foreclose a finding of a taking and an award of just compensation. Specifically, the state supreme court stated that because McQueen acquired his property after the restrictive regulation was in place, he was not entitled to compensatory relief. Because the "notice rule" has been discredited in Palazzolo, the United States Supreme Court reversed and remanded in light of Palazzolo.

7 Thus, while the Supreme Court in Murr purported to affirm its Palazzolo holding in this regard, Murr makes prior notice of a restrictive regulation now potentially relevant to the “reasonable investment backed expectation” factor to be considered in determining not only whether property was unconstitutionally taken but also what property was taken. It seems that substantive due process principles will creep into this part of the analysis to decide whether the pre-acquisition regulation is “reasonable.”
The principle that notice of a restriction does not obviate a taking claim, was also articulated in the context of unconstitutional conditions, in \textit{Nollan}, 483 U.S. 825, 834 n 2 that:

"Nor are the Nollans’ rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot."

“So long as the [California Coastal Commission] could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot."

\section*{III. DEEPER DIVE - THE FOUR KINDS OF TAKING CLAIMS}

- \textbf{Per Se/Categorical Takings}

Per se cases are relatively easy to identify and analyze. These occur where the government either physically occupies property or demands the right to do so. Such constitutes an unconstitutional taking of the affected property, no matter how important the public interest served or how di minimus the impact may be. \textit{Loretto v. Teleprompter Manhattan CATV Corp.}, 458 U.S. 419 (1982). At issue in \textit{Loretto} was a state statute requiring landlords to allow cable TV equipment to be installed on their property for a onetime payment of one dollar. The United States Supreme Court characterized that requirement as a per se taking requiring just compensation. The Oregon Supreme Court has also had no trouble with these types of cases. In \textit{GTE Northwest, Inc. v. Public Utility Commission}, 321 Or 458 (1995), the Oregon Supreme Court applied the per se rule of \textit{Loretto} to a requirement that GTE allow other companies to "collocate" wires with GTE wires and decided the requirement that GTE allow third parties to place wires on GTE property was a compensable physical invasion taking. \textit{See also Tonquin Holdings LLC v. Clackamas County}, 64 Or LUBA 68, 87 (2011), \textit{aff’d} 247 Or App 719, \textit{rev. den.}, 352 Or 170 (2012) (condition requiring a conservation easement requires an exaction that is subject to the Dolan analysis).

Categorical cases are harder because drawing the line between a complete deprivation of all value in private property and a deprivation of some but not all economically beneficial use of private property, is often blurry. And this was the key issue in \textit{Lucas}. Categorical taking claim cases are where the property owner alleges that the imposition of a regulation or regulations has deprived him or her or all or substantially all beneficial use of property. Thus, in \textit{Lucas}, the court acknowledged the imposition of a regulation, the effect of which reduced 90 percent of the value of the subject property could be considered a "total taking."\textsuperscript{8} However, in \textit{Palazzolo v. Rhode Island}, 533 U.S. 606 (2001), the United States Supreme Court determined that a reduction

\footnote{In \textit{Lucas}, the Supreme Court observed “When, for example, a regulation on requires a developer to leave 90 percent of a rural tract in its natural state, it is unclear whether we should analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered mere diminution of value of the tract as a whole.” \textit{Lucas}, supra n 7.}
in value from more than 3.1 million dollars to a $200,000 value, or about a 94 percent diminution in value, caused the *Lucas* style taking analysis to be unwarranted. Rather, in such circumstances, the Supreme Court stated that the subject regulation permitting the landowner to construct a “substantial residence” on an 18 acre parcel, must be analyzed under *Penn Central*. *Palazzolo*, supra 533 U.S. 631-32.

There is a certain predictable line up of parties and takings claims. This is because claims that warrant consideration under *Lucas*, often are winners for property owners and so they try to peg their claims under the *Lucas* analysis. On the other hand, governmental defendants will try to peg an alleged taking claim under the partial taking analysis of *Penn Central* and *Murr*, because governmental defendants are likely to win those claims. Hence, in *Murr*, the property owners argued the fact that all economically beneficial use had been taken for a legally distinct parcel and that they were entitled to compensation under *Lucas*. Had they been able to convince the U.S. Supreme Court that *Lucas* supplied the correct analysis, then the *Murr* family would almost certainly have won their taking case. On the other hand, the governmental defendants argued that if one considers the *Murr’s* legally distinct, but adjoining parcel and the undevelopable one as a whole, then any alleged taking was partial and not a *Lucas* style “wipeout” and as such had to be analyzed under the regulation friendly *Penn Central* analysis.

Temporary deprivations of all economically beneficial use can also constitute a categorical taking. The seminal case concerning temporary takings is the United States Supreme Court's decision in *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). *First English* holds that temporary land use restrictions that deprive a property owner of all economically beneficial use of property require payment of just compensation, unless a state law background principle (nuisance) excuses the payment of just compensation. This history of the use of the parcel can be important to these claims.

In *First English*, the county banned construction of buildings in a flood plain, pending the adoption of permanent regulations. The U.S. Supreme Court held a temporary restriction on development that prohibited all use of property could be a taking and remanded the case to the county for a determination whether the temporary period of delay required by the regulation was a "normal delay" which should be expected by a landowner.

However, the United States Supreme Court took a dim view of temporary takings in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). In the *Tahoe* case, at issue was a moratoria from 1981-1984. The moratoria in fact had been much longer – more than 20 years – but the court only reviewed the moratoria between the years 1981-1984. The Court explained that moratoria are not per se takings. Rather, the Court explained that moratoria must be analyzed under the *Penn Central* factors. The Court also explained that the “parcel as a whole” rule prohibited breaking land ownership into temporal dimensions that considered only the period of the moratorium.

In *Arkansas Game and Fish Comm’n v. United States*, 133 S.Ct. 511 (2012), the United States Supreme Court affirmed that temporary takings – in that case flooding – can constitute a taking, explaining:
“Once the government's actions have worked a taking of property, ‘no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.’ First English, 482 U.S., at 321. See also Tahoe-Sierra, 535 U.S., at 337 (‘[W]e do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be “given exclusive significance one way or the other.”).

“Because government-induced flooding can constitute a taking of property, and because a taking need not be permanent to be compensable, our precedent indicates that government-induced flooding of limited duration may be compensable. No decision of this Court authorizes a blanket temporary-flooding exception to our Takings Clause jurisprudence, and we decline to create such an exception in this case.”

Defenses to categorical taking claims are (1) the alleged taking is not categorical in fact and must be analyzed under Penn Central and Murr, (2) redefining the “property” taken (Murr), (3) establishing that the disputed regulatory limitation inures in the title to the property, or (4) the uses of the property the owner is deprived of, constitutes a common law nuisance. Lucas, supra, 505 U.S. at 1027.

However, these defenses merit caution. In Lucas, the Supreme Court observed that a use of property is presumptively not a nuisance if other people are similarly and lawfully using their property. Lucas, supra 505 U.S at 1031. In this regard, the Supreme Court in Lucas was correct, as it turns out on the facts. After the litigation, and after So. Carolina was required to buy Lucas’ property, the state turned around and sold it to a developer:

“[South Carolina] promptly turned around and sold them to a developer who proceeded to build the very homes that Lucas had been forbidden to build. The state regulators' environmental zeal lasted only as long as they thought they could stick Lucas with the cost of the proverbial free lunch. But when faced with the tab themselves, preservation of Lucas' lots suddenly ceased being environmentally important.” Michael Berger and Gideon Kanner, The Need for Takings law Reform: A View from the Trenches - A Response to Taking Stock of the Takings Debate 877, 867; Gideon Kanner, Not with a Bang, But a Giggle: The Settlement of the Lucas Case.

Further, when Oregon’s public beach law was challenged on unconstitutional taking grounds, Justice Scalia wanted to take certiorari and, when cert was denied by a majority of the Court, he filed a dissent on the denial of cert in Stevens v. City of Cannon Beach, 505 U.S. 1207 (1994), in which Justice O'Connor joined, stating:

"[A] State may not deny rights protected under the Federal constitution *** by invoking nonexistent rules of state substantive law. Our opinion in Lucas *** would be a nullity if anything that a State court chooses to denominate a 'background law' * * * could eliminate property rights."
While both Justices O’Connor and Scalia are no longer on the bench, there are 4 justices on the court who could possibly adopt this view and the long standing swing vote supplied by Justice Kennedy is uncertain given the rumors of his retirement and his advanced age.

Moreover, even the majority in Murr, supra 137 S. Ct. at 1944-45, gave a similar warning to states viewed as using Murr to adopt laws on consolidating property in order to avoid taking claims:

“The Court explained [in Palazzolo] that States do not have the unfettered authority to ‘shape and define property rights and reasonable investment-backed expectations,’ leaving landowners without recourse against unreasonable regulations.

“By the same measure, defining the parcel by reference to state law could defeat a challenge even to a state enactment that alters permitted uses of property in ways inconsistent with reasonable investment-backed expectations. For example, a State might enact a law that consolidates nonadjacent property owned by a single person or entity in different parts of the State and then imposes development limits on the aggregate set. If a court defined the parcel according to the state law requiring consolidation, this improperly would fortify the state law against a takings claim, because the court would look to the retained value in the property as a whole rather than considering whether individual holdings had lost all value.”

And as governmental defendants consider defenses, it is wise to keep in mind a sentiment expressed by the Oregon Court of Appeals in Deupree v. State of Oregon, 173 Or App 623 (2001), holding that a restriction on highway access did not deprive property owner of all economically beneficial use, but also explaining:

"[W]here the estate defined by state law is both severable and of value in its own right, it is appropriate to consider the effect of regulation on that particular property interest."

- **“Partial” – Penn Central Style and “Murr” Takings**

Where the imposition of a regulation or regulations are alleged to deprive a property owner of his or her property, but the disputed regulation(s) leave some beneficial use, the taking is analyzed under Penn Central, as informed by Murr. Murr effectively merges the determination of what property is taken with the analysis of whether a taking has occurred at all. In Murr, the legal question boiled down to whether the entirety of an owner’s property ownerships composed of distinct lots, may be used to determine regulatory impact on a particular distinct legal lot.

It is important to understand the Murr facts. The Murr parents purchased Lot F in an old subdivision in 1960 and built a family vacation cabin on it. Later, in a separate entity name, they bought Lot E next door, as an investment. When they bought these legal lots, there were no restrictive land use regulations. In 1976, their parcels were zoned “rural residential” where on dwelling could be built on each lot, so long as each lot as “one acre of net project area.” While
both lots were each composed of more than an acre in size, environmental rule carve outs – like for steep slopes – meant that neither parcel had an acre of “net developable area.” A further restriction foreclose sale of lots composed of less than one acre of net developable area.

There was an exception to the rule which said that existing “lots of record” that in 1976 were recorded “in the records of the deeds office” that were in separate ownerships, could be developed with a single family residence and separately sold. Because the Murr parents and their separate legal entity separately owned Lot E and Lot F and that interest was duly recorded, they qualified for this exception and so their lots were both independently buildable and independently saleable. They paid taxes as if the two lots were buildable and separate.

But as a part of their estate planning as they got older, in 1994, they conveyed the vacant Lot F to their children. And then in 1995, they conveyed the other lot – Lot E – (the one with the cabin on it) to their children. A decade later, the children wanted to remodel the cabin to make it larger because the families had blossomed with children and grandchildren and needed to sell Lot F to fund the move. All of the other lots in the old subdivision around them had by this time developed with homes. But because of the fact the parents and distinct entity had conveyed both lots to their children, there was only one developable lot and Lot F and Lot E could not be separately sold. The Murr children sought a variance to these rules and were denied. So they filed a taking claim, which the state court’s denied and the Supreme Court accepted review. The Supreme Court held that the impact of the regulations on Lot F was not that it had lost all economically beneficial use (Lucas); but rather analyzed with Lot E, there was no taking under a new and greatly modified version of the Penn Central analysis.

While the new Murr version of the Penn Central analysis is confusing, the key is to keep in mind that the Supreme Court is seeking to find fairness: to avoid foisting public burdens on a property owner s/he should not be required to bear and to ensure that burdens placed on the development of property a proportional. Steven Eagle, supra Volume 118:3, p 614. The Murr analysis and its analytical underpinnings, follows:

1. First step – Identify the property that was taken.

This is the prong that Murr most affects and the one that Murr adds analytical steps to the evaluation of a taking claim. It has long been unclear how to identify the property that is taken. The “denominator” question has plagued unconstitutional taking jurisprudence for decades – beginning largely with the famous United States Supreme Court decision in Penn Central.9

9 Compare the Lucas, majority opinion at supra n7 with Justice Blackmun’s dissent at 505 U.S. 1054:

The threshold inquiry for imposition of the Court's new rule, ‘deprivation of all economically valuable use,’ itself cannot be determined objectively. As the Court admits, whether the owner has been deprived of all economic value of his property will depend on how ‘property’ is defined. The "composition of the denominator in our 'deprivation' fraction," ante, 505 U.S. at 1017, n.7, is the
There, the developer wanted to build additional stories for an office building in the airspace atop Penn Central station in New York City. The city denied the developer’s request. The United States Supreme Court in Penn Central affirmed that denial, explaining:

“‘Taking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole -- here, the city tax block designated as the "landmark site." Penn Central, supra, 438 U.S. at 130-31.

Murr, supra, 137 S. Ct. at 1952 (Roberts, C.J., dissenting), drives the point home:

“Because a regulation amounts to a taking if it completely destroys a property’s productive use, there is an incentive for owners to define the relevant "private property" narrowly. This incentive threatens the careful balance between property rights and government authority that our regulatory takings doctrine strikes: Put in terms of the familiar “bundle” analogy, each “strand” in the bundle of rights that comes along with owning real property is a distinct property interest. If owners could define the relevant “private property” at issue as the specific “strand” that the challenged regulation affects, they could convert nearly all regulations into per se takings.

“And so we do not allow it. * * *”

After Murr, identifying the relevant parcel for purposes of the taking analysis applies a three-factor test.

dispositive inquiry. Yet there is no "objective" way to define what that denominator should be. "We have long understood that any land-use regulation can be characterized as the 'total' deprivation of an aptly defined entitlement. . . . Alternatively, the same regulation can always be characterized as a mere 'partial' withdrawal from full, unencumbered ownership of the landholding affected by the regulation . . . .” Michelman, Takings, 1987, 88 Colum. L. Rev. 1600, 1614 (1988).

And Justice Blackmun’s continuing dissent at 505 U.S. 1066:

“In short, the categorical rule will likely have one of two effects: Either courts will alter the definition of the ‘denominator’ in the takings ‘fraction,’ rendering the Court's categorical rule meaningless, or investors will manipulate the relevant property interests, giving the Court's rule sweeping effect. To my mind, neither of these results is desirable or appropriate, and both are distortions of our takings jurisprudence.”
First, “courts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law.” “Second, courts must look to the physical characteristics of the landowner’s property. These include the physical relationship of any distinguishable tracts, the parcel’s topography, and the surrounding human and ecological environment. In particular, it may be relevant that the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation.” Third “courts should assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings. Though a use restriction may decrease the market value of the property, the effect may be tempered if the regulated land adds value to the remaining property, such as by increasing privacy, expanding recreational space, or preserving surrounding natural beauty. A law that limits use of a landowner’s small lot in one part of the city by reason of the landowner’s nonadjacent holdings elsewhere may decrease the market value of the small lot in an unmitigated fashion. The absence of a special relationship between the holdings may counsel against consideration of all the holdings as a single parcel, making the restrictive law susceptible to a takings challenge. On the other hand, if the landowner’s other property is adjacent to the small lot, the market value of the properties may well increase if their combination enables the expansion of a structure, or if development restraints for one part of the parcel protect the unobstructed skyline views of another part. That, in turn, may counsel in favor of treatment as a single parcel and may reveal the weakness of a regulatory takings challenge to the law.” *Murr,* supra 137 U.S. 1945-46.

Applying this three-factor test in *Murr,* the Court held that the Murrs’ property should be evaluated as a single parcel and the Wisconsin state court did not err in doing so. *But see Lost Tree Vill. Corp. v. United States,* 707 F.3d 1286 (Fed. Cir. 2013), *cert den* 137 S. Ct. 2325 (2017) (cert was denied four days after *Murr* was decided). *Lost Tree* decides the opposite of *Murr* – that scattered landholdings should not have been aggregated to determine the relevant parcel for the takings analysis. *Lost Tree* is an important case in its own right that bears discussion. In *Lost Tree,* a landowner owned 2,750 acres of land in Florida. It developed 1,300 acres into a gated residential community (“John’s Island”), with golf courses and a beach club. It later sought a wetland fill and removal permit from the Corps of Engineers to fill about 2.13 acres of land, in a 4.99 acre parcel (consisting of 1.41 acres of submerged lands and 3.58 acres of wetlands and some uplands) in order to develop one residence. The 5 acres was undeveloped land within the gated community. The COE denied the permit. The COE explained the basis for the permit denial that:

“less environmentally damaging alternatives were available to [Lost Tree] and the project purpose ha[d] already been realized through the development of home-sites within the subdivision.”

The owner filed a taking claim in the Court of Federal Claims, arguing a total deprivation of all economically beneficial use of the 5 acres. The government argued the relevant parcel for the taking analysis was the entire 1,300 acre gated community. The Court of Federal claims did not agree with the property owner or the government, but nevertheless denied the taking claim on the basis that the relevant parcel for the taking analysis was not the 5 acres that had been denied a fill permit. Rather, the Court of Claims decided that the relevant parcel for the takings analysis was the 5 acres plus another “contiguous” parcel and scattered wetlands. While the “contiguous” parcel was separated by a 323 ft. wide strip of land, the owner owned the strip as well, enabling
the court to find contiguity. The DC Circuit Court of Appeals reversed, holding that Lost Tree had treated the 5 acre parcel differently than the contiguous lot and scattered wetlands and should be considered its own parcel for purposes of the taking analysis. The court explained:

“The Court of Federal Claims erred by aggregating Plat 57, Plat 55, and the scattered wetlands as the relevant parcel. The only links between the two plats identified by the trial court are: 1) they are connected by the 323 foot strip of land owned by Lost Tree and therefore "undoubtedly contiguous," and 2) both currently are held with the "usage objective[]... to sell for profit the lots" on each plat. Id. at 434. Similarly, the scattered wetlands are only linked to Plat 57 by their geographic location within the gated community of John's Island. Here, the mere fact that the properties are commonly owned and located in the same vicinity is an insufficient basis on which to find they constitute a single parcel for purposes of the takings analysis. Lucas, 505 U.S. 1003, 1017 n. 7, 112 S.Ct. 2886; Loveladies, 28 F.3d at 1180 (holding relevant parcel excludes 6.4 acres of previously-developed uplands purchased in same transaction as regulated parcel and owned by claimant when § 404 permit was denied).

“After a careful review of the entire record, this court determines that the relevant parcel is Plat 57 alone. The trial court's factual findings support the conclusion that Lost Tree had distinct economic expectations for each of Plat 57, Plat 55, and its scattered wetland holdings in the vicinity. Because the Court of Federal Claims erred in its determination of the relevant parcel, this court reverses the judgment and remands for further proceedings.”

The fact that the United States Supreme Court denied cert in Lost Tree 4 days after deciding Murr, rather than remanding in light of Murr is curious. That outcome underscores that taking claims are extremely fact dependent.

2. Second Step: Evaluate Identified Factors for Determining Whether a Taking Has Occurred—in an Ad Hoc Balancing Test

Here, Murr teaches one applies the balance of the traditional Penn Central factors to determine when an unconstitutional taking occurred, as explained next.

A. Character of the Invasion

This prong asks about the nature of the property interest that is interfered with. In Penn Central, the Supreme Court explained:

A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.” Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (citing United States v. Causby, 328 U.S. 256 (1946), as an example of a case involving a physical invasion).
B. Economic Impact of the Regulation

This prong seeks to compare the value of the property before and after the regulatory interference (i.e. is there a severe diminution in value?)

C. What Are the Owner’s Distinct Investment-Backed Expectations?

This prong asks whether the owner has pursued a property right in the investment, and whether he or she as the property owner done so without knowledge that the disputed regulation would deny the fruits of the investment? In Murr, the inquiry was recast as the owners “reasonable investment backed expectations.

Note that this prong is not an inquiry into the needs of the city or county or other government, rather the focus is on the impacts of the proposed development to determine the severity of the impact on the distinct investment backed expectations.

- "Unconstitutional Conditions"

There was a period of time when governmental actors successfully argued that the unconstitutional conditions analysis applied only to exactions of real property. See West Linn Corp Park v. City of West Linn, 349 Or 58 (2010); and see Dudek v. Umatilla County, 187 Or App 504, 514-15. However, in Koonze v. St. Johns River Water Dist., 133 S. Ct. 2586 (2013), the United States Supreme Court laid that dispute to rest and held that the unconstitutional conditions analysis applies to monetary as well as real property exactions. And see Ehrlich v. Culver City, 19 Cal. Rptr. 2d 468 (Cal. Ct. App. 1993), cert. granted, judgment vacated and remanded in light of Dolan, 114 S. Ct. 2731 (1994) (conditions requiring the payment of fees as a prerequisite to development. The U.S. Supreme Court remanded the city’s decision in Ehrlich to the California courts in light of Dolan. In turn, the California Supreme Court after remand decided the disputed impact fees are subject to Dolan analysis); and see Clark v. City of Albany, 137 Or. App. 293 (1995) (determining findings were insufficient to establish the requisite Dolan relationship between traffic generated by the development proposal and the need for the locally required street improvements deciding: "The findings must compare the traffic and other effects of the proposed fast food restaurant to the street and frontage improvements." The court further explained: "[t]he fact that Dolan itself involved conditions that required a dedication of property interests does not mean that it applies only to conditions of that kind." See also Altimus v. State of Oregon, 513 U.S. 801, 115 S. Cl. 44 (1994). But see West Linn Corp Park v. City of West Linn, 349 Or 58 (2010).

Similarly, there was a period of time after Dolan, when commentators and some courts argued that the way government could avoid liability for unconstitutional conditions was to propose them, and threaten or actually deny the development application if the property owner objected. However, in Koontz v. St. Johns Water Magmt Dist, 133 S. Ct 2586 (2013), the United States Supreme Court established that taking liability attaches in this situation explaining:

“[L]and use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than the property it would
like to take * * * So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government’s demand, no matter how unreasonable.” Koontz, supra 133 S. Ct. at 2594.

“The principles that undergird our decisions in Nollan and Dolan do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so. We have often concluded that denials of governmental benefits were impermissible under the unconstitutional conditions doctrine. See, e.g., Perry, 408 U.S., at 597 (explaining that the government ‘may not deny a benefit to a person on a basis that infringes his constitutionally protected interests’ * * *); Memorial Hospital, 415 U.S. 250 (finding unconstitutional condition where government denied healthcare benefits). In so holding, we have recognized that regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution’s enumerated rights by coercively withholding benefits from those who exercise them.”

“A contrary rule would be especially untenable in this case because it would enable the government to evade the limitations of Nollan and Dolan simply by phrasing its demands for property as conditions precedent to permit approval. Under the Florida Supreme Court’s approach, a government order stating that a permit is “approved if” the owner turns over property would be subject to Nollan and Dolan, but an identical order that uses the words “denied until” would not. Our unconstitutional conditions cases have long refused to attach significance to the distinction between conditions precedent and conditions subsequent. * * *.” Koontz, supra 133 S. Ct. at 2595.

Local governments must undertake the “rough proportionality” analysis required by Dolan regardless of whether a local ordinance requires it. Kingsley v. City of Portland, 55 Or LUBA 256 (2007), aff’d 218 Or App 229 (2008). Moreover, where local government standards would otherwise require an exaction that would violate Dolan or Nollan, local government may either not apply such standard to demand the exaction or it may compensate the landowner for the exaction the standard requires. Columbia Riverkeeper v. Clatsop County, 58 Or LUBA 235 (2009) (where road standard requires dedication of property interest that is not “roughly proportional” to the impacts of the proposed development, County is free not to impose such requirement for road dedication and allow a developer to improve a substandard local street to less than full collector standards); accord Dudek v. Umatilla County, 187 Or App 504 (2003).

Nollan asks: is there a legitimate governmental purpose to support the imposition of the condition? And if so then (2) Is there an essential nexus between the legitimate governmental purpose and the condition imposed? Thus in Barnes v. City of Hillsboro, 61 Or LUBA 375 (2010), aff’d 239 Or App 73 (2010), citing Nollan and Dolan, LUBA reversed a city ordinance requiring as a condition of approval for all residential developments near Hillsboro airport the granting of an “avigation easement” for noise, vibration, fumes, dust and fuel particle emissions,
in service of an objective to reduce land use conflicts. LUBA held that the requirement for the condition did not reduce land use conflicts but rather simply made it more difficult for a property owner to bring a taking claim, failing both *Nollan* and *Dolan*. In *Hallmark Inns v. City of Lake Oswego*, 43 Or LUBA 62, 76 (2002), rev’d on other grounds, 186 Or App 710 (2003), LUBA decided that a condition of approval requiring an easement for pedestrian access provided an adequate nexus between the purpose of the standard and the condition, meeting the *Nollan* test.

*Dolan* adds to the *Nollan* analysis by asking: is there rough proportionality between the condition imposed and the impacts of the development, both in nature and extent? Thus, in *McClure v. City of Springfield*, 37 Or LUBA 759 (2000) and after remand 39 Or LUBA 329 (2001), aff’d, 175 Or App 425 (2001), rev den 334 Or 327 (2002), LUBA decided that the city’s condition of approval on a partition proposal for land dedications for street right of way, sidewalk and “clipped corner” failed the “rough proportionality” test of *Dolan*. In the court of appeals decision in *McClure*, the court explained, among other things:

“The city explained the need for the M Street dedication, utilizing a detailed calculation to demonstrate that the exaction represented a proportional response to the increase in traffic--19 vehicle trips per day -- that the proposed development was expected to generate. The city did not, however, explain how the 8th Street sidewalk and clipped corner dedication requirements were relevant or proportional to the expected impacts. Rather, the city’s findings appear either to omit consideration of those exactions or to assume implicitly that they are part of the total required dedication. We have no difficulty accepting that sidewalks and clipped corners can advance a community’s interest in safe streets, but in the absence of findings explaining how the proposed exactions further that aim--and do so proportionally to the effects of the proposed partitioning--the justification required by *Dolan* is missing. We therefore agree with LUBA that the city has not adequately justified the proposed 8th Street sidewalk and clipped corner exactions of property. We therefore affirm LUBA’s decision in those respects.”

However, the court of appeals also rejected the developer’s argument explaining the fact that the street to which a dedication condition related was not yet improved did not mean that the dedication requirement lacked rough proportionality as a matter of law.

Moreover, in *Carver v. City of Salem*, 42 Or LUBA 305, aff’d 184 Or App 503 (2002), LUBA held that a city must apply the *Dolan* analysis to conditions of approval requiring dedication of land (there, the requirement was to dedicate one (1) acre for a park), regardless of whether the developer chooses to develop in an underserved area. LUBA held that the choice to develop in an underserved part of the city is not the equivalent of a waiver of the developer’s constitutional rights under *Dolan*. Further, LUBA decided that SDC credits are not adequate “just compensation” because the amount of the SDC credits (1) do not relate to fair market value of the property taken, (2) does not include any severance damages to the remainder of the parcel and (3) does not ensure the owner will receive compensation in fact.

The burden is on government to establish that the conditions are not a taking under above analysis. *But see Lincoln City Ch. of Comm. v. City of Lincoln City*, 36 Or LUBA 399 (1999)
(local government has the burden of demonstrating rough proportionality but not the burden of producing the evidence on which the rough proportionality determination is based.

Particularized findings are required to establish Dolan compliance, but Dolan makes it clear that such findings need not have mathematical precision:

"No precise mathematical inquiry is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated."

The requirement for detailed findings is clear from the McClure v. City of Springfield, supra, cases. Further, in J.C. Reeves Corp. v. Clackamas County, 131 Or App 615 (1994), the Oregon Court of Appeals observed that Dolan requires detailed findings of traffic and "other related phenomena and the relationship of a proposed development to them ***." Regarding off-site improvements required by the county in its decision, the court stated the inquiry is not on off-site versus on-site improvements. The comparison is instead:

"[B]etween the traffic and other effects of the subdivision and the subdivision frontage improvement that the county has required." 131 Or. App. 622.

The court of appeals further explained the findings deficit in the J.C. Reeves case:

"The difficulty is that the county's findings do not make the comparison at all, or at least not with the specificity that Dolan requires. They simply posit the relationship between subdivision-generated traffic and the need for the improvements. Also, the county relies on the fact that some of the improvements are required by its zoning ordinance. As we said in Schultz v. City of Grants Pass *** the character of the condition remains the type that is subject to the analysis in Dolan' *** whether it is legislatively required or a case-specific formulation. The nature, not the source of the imposition is what matters." 131 Or App 622-23.

In Schultz v. City of Grants Pass, 131 Or. App. 220 (1994), the Oregon Court of Appeals held that in the context of an application to partition property, there are no impacts to mitigate with conditions of approval. Moreover, it is improper for local government to assume any particular level of development beyond that proposed.

**PARTICULAR ISSUES**

- **Requiring Property Owner to Set Aside Private Property for Eventual Public Use**

There are cases in other states that are getting a lot of attention. Those cases essentially say a condition of approval with a local government’s purpose to restrict an owner’s right to develop or improve property so that future acquisition costs are lower, violates the federal constitutional requirement that no property may be taken without just compensation. Those cases are Kirby v. North Carolina Department of Transportation, 786 SE2d 919 (2016); Jefferson Street Ventures, LLC v. City of Indio, 236 Cal.App.4th 1175 (2015); and see Lincoln Loan Co. v. State Hwy. Comm., 274 Or 49, 545 P2d 105 (1976).
A recent court of appeals case, *Courter v. City of Portland*, 280 Or App 39 (2017) says that if government seeks to occupy any part of property, it must pay for that privilege. This leaves open the possibility that Oregon courts would hold similarly on a *Kirby* question if it were directly posed.

- **Nonconforming Uses**

IV. RIPENESS

The ripeness requirement says that taking claims regarding the application of highly discretionary local regulations to particular property, will not be reviewed on the merits until it is clear to the judiciary how far the regulating government will go to limit the use of the privately held property. The ripeness rule in the unconstitutional takings context began with the seminal cases of *Williamson County Regional Planning Commission v. Hamilton Bank of Williamson County*, 473 U.S. 176 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1987). The ripeness rule is not a jurisdictional requirement, but rather a prudential requirement to apply in appropriate circumstances to avoid sticking judicial noses into local affairs. *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 117 S. Ct. 1659, 1664-65 (1997). The ripeness rule has made it very difficult to bring many types of taking claims. The United States Supreme Court has accepted cert to explore the ripeness rule. From the SCOTUS website:

**Knick v. Township of Scott**

Date Filed: March 5, 2018  
Case #: 17-647  
Knick v. Township of Scott, 862 F.3d 310 (3d Cir. 2017)  

PROPERTY LAW: Whether the Supreme Court should reassess the rule set forth in *Williamson County Regional Planning Commission v. Hamilton Bank* which requires property owners to exhaust all state court remedies for land takings claims prior to bringing these claims in federal court.

Petitioner challenges a Township ordinance mandating that all cemeteries be open to the public during daylight hours. The ordinance grants enforcement officers the authority to enter private property to assess the existence and location of cemeteries. Petitioner, the owner of 90 acres of private property, received a citation for violating the ordinance when Respondent identified grave markers on Petitioner’s property. Petitioner first initiated suit in the Lackawanna County Court of Common Pleas where the case was dismissed for procedural issues. Petitioner then filed her takings claim with the United States District Court for the Middle District of Pennsylvania. The district court dismissed the claim, holding that the claim was not ripe for consideration under federal courts, and directing Petitioner to exhaust all state remedies pursuant to the “state litigation” doctrine established in *Williamson County Regional Planning Commission v. Hamilton Bank*. Petitioner appealed and the Third Circuit affirmed the district court’s holding. On petition for writ of certiorari, Petitioner argues that the Supreme Court should reconsider the “state litigation” doctrine because it hinders a claimant’s access to judicial relief for a takings claim, creates inefficiencies in the judicial process, wastes the resources of all parties, and results in inconsistent application of the rule.

This case may bring some clarity to the ripeness rule in 2018.
Chapter 6—An Update on the Law of Unconstitutional Takings

The ripeness rule usually does not make sense to apply in per se physical occupation cases because it is clear from a government’s physical occupation of private property, how far the disputed regulation goes. Similarly, ripeness is not typically required when a property owner claims a “facial” taking has occurred. See Nike Inc. v. City of Beaverton, 35 Or LUBA 57, aff’d 157 Or App 397 (1998).

However, for all other types of taking claims, ripeness must be established. In the Oregon context, this means seeking approval from the highest local decision maker. It does not mean one must appeal to LUBA to ripen a takings claim. West Linn Corp Park v. City of West Linn, 349 Or 58, 77 (2010). Nevertheless, ORS 197.796 provides that to accept the benefits of an approval with alleged unconstitutional conditions, the land use applicant must raise the taking claim in the local permit proceedings and then either challenged the allegedly unconstitutional condition at LUBA within the 21-day deadline for filing local land use appeals or must file a complaint for just compensation within six months of the imposition of the disputed condition. ORS 197.796 specifically provides that such an applicant need not seek a variance (ORS 197.796(3)).

In Oregon, the ripeness rule has played out to require that where a party claims the application of the Endangered Species Act (ESA) deprives him of all economically viable use, that party must apply for an incidental take permit from the federal government before a taking claim is ripe. Boise Cascade v. State, 164 Or. App. 114 (1999), rev den 331 Or 244, cert den 532 U.S. 923 (2001).

Ripeness has three prongs: (1) there must be a final local decision, (2) administrative remedies must be exhausted, including pursuit of variances as well as alternative development options, and (3) as a prerequisite for bringing a federal claim, avenues for achieving state compensation must be exhausted. However, note that while it is the generally held view that adequate state procedures must be exhausted in state court, this was not required in City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997) (federal court can exercise supplemental jurisdiction to satisfy this prong). To the extent a state's procedures deprive claimants of their right to a jury trial on the issue of whether a taking occurred, there may be an argument that the state procedures are inadequate. See City of Monterey v. Del Monte Dunes, Ltd, 119 S. Ct. 1624 (1999) (Seventh Amendment to the United States Constitution protects right to jury trial in a federal taking claim); see also Lakin v. Senco Prods., Inc., 329 Or. 369, 987 P.2d 476 (1999) (right to jury trial in Oregon state court proceedings).

Generally, a developer must submit "at least one" development application for beneficial uses of property to occur. Williamson County Planning Comm’n v. Hamilton Bank, 473 U.S. 172, 192 (1985). Futility may excuse compliance with the second prong of the ripeness test (applying for development approval), if under state or local law, there is no possibility that agency can grant relief. Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 734 n 8 (1997). In Palazzolo, supra 533 U.S. 626, the United States Supreme Court also noted that futile land use applications need not be submitted simply for the sake of submitting them and provided guidance on what must be done to ripen a takings claim:

"Thus, the reasoning goes, we cannot know for sure the extent of permitted development on Petitioner's wetlands. This is belied by the unequivocal nature of
the wetlands regulations at issue under the Council's application of the regulations to the subject property.” *Palazzolo, supra 533 U.S. at 619.*

“** * * * *

“While a landowner must give a land-use authority an appropriate opportunity to exercise its discretion once it becomes clear that the agency lacks discretion to permit any development, or it is clear the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened.” *Palazzolo, supra 533 U.S. at 620.*

"Ripeness doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted use. ** * * Palazzolo, supra 533 U.S. at 622.*

Caution is warranted, however, before arguing futility. For example, in *Curran v. State by & Through ODOT*, 151 Or. App. 781, 788 n.10 (1997), the Oregon Court of Appeals determined it was not futile to apply for an ODOT access permit even though plaintiffs' engineering report establishes the alternative access that ODOT stated it will require is unreasonable. Specifically the court stated:

"The engineer's report states that the location suggested by ODOT for an alternative access route is not reasonable. The report does not assess, however, the feasibility of constructing a road at any other location on the property."

Further, LUBA has explained that it will not presume it would be futile for an owner to apply for a comprehensive plan amendment or zone change, to ripen a taking claim. *Young v. Clackamas County*, 24 Or LUBA 526; aff’d 120 Or App 248 (1993), rev. den. 317 Or 485; *Larson v. Multnomah County*, 24 Or LUBA 591 (1992), aff’d 121 Or App 119 (1993). However, on review of the LUBA decision in *Larson*, the court of appeals affirmed LUBA, but suggested that plan amendments weren’t necessarily required in all cases to ripen a takings claim:

“Although we do not now decide whether a plan or zoning amendment must invariably be sought to achieve ripeness, we do hold that at least one application must be made after the initial denial, if any is available, and that a plan or zone change must be sought if only it is available”. *Larson v. Multnomah County*, 121 Or App at 123.

It appears that LUBA will not allow evidentiary hearings for the purpose of ripening a taking claim. *Larson v. Multnomah County*, 24 Or LUBA 591 (1992), aff’d 121 Or App 119 (1993).

In any case, *Palazzolo* provided welcome clarification for the development community where before *Palazzolo* local governments had argued that as many as five (5) different development applications would not be enough to ripen a takings claim. *See City of Monterey v.*
*Del Monte Dunes, Ltd.*, 119 S. Ct. 1624 (1999); and see Kanner Hunting the Snark, not the Quark: Has the United States Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law? The Urban Lawyer (Spring 1999). Property owners could spend years trying to determine what uses government will let them make of their property, only to have the statute of limitations for takings claim expired before the claim even ripened.
Chapter 6—An Update on the Law of Unconstitutional Takings

Real Estate and Land Use Fundamentals

Basics of Unconstitutional Takings Analyses

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Setting the Analytical Table

Types of Taking Claims

• Per se/categorical – Loretto/Lucas
• Partial or “ad hoc” – Penn Central
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Per Se Taking Claims

• *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L. Ed. 2d 868 (1982)

Landlords were required by statute to allow cable company to install cable boxes in apartments and had to pay to the cable company a $1 one time fee for the installation.

Supreme Court determined that statute required a physical occupation of private property and constituted an unconstitutional taking.

When the character of the governmental action is permanent physical occupation of private property, it is a taking regardless of the fact that the action achieves an important public benefit or has only minimal economic impact on the owner.

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Per Se Analysis Applied to Personal Property

• *Horne v. Dep’t of Agriculture*, 135 S.Ct. 2419 (2015) - raisin transfer requirement is a per se taking of raisins

• US Dept of Ag required a percentage of raisin crop be set aside for the government for free.

• Government then sells or disposes of raisins as it sees fit to maintain an orderly market.

• In 2002, the Hornes refused to set aside a percentage of their raisins for the government, claiming it was unconstitutional that they be required to do so.
Horne – personal property entitled to equivalent protection as real property

“Whatever Lucas had to say about reasonable expectations with regard to regulations, people still do not expect their property, real or personal, to be actually occupied or taken away.”

“The reserve requirement imposed by the Raisin Committee is a clear physical taking. Actual raisins are transferred from the growers to the Government. Title to the raisins passes to the Raisin Committee.”

“Raisin growers subject to the reserve requirement thus lose the entire ‘bundle’ of property rights in the appropriated raisins—‘the rights to possess, use and dispose of them[].’”

Categorical Taking Claims – Rendering Property Essentially Valueless


Lucas bought two beachfront residential lots. A year later state enacted Beachfront Management Act prohibiting any permanent habitable structures on the two parcels.

Lower court held that the statute was designed to prevent “harmful or noxious uses” and citing Mugler v. Kansas line of cases that no compensation is owed under the takings clause.

Supreme court reversed: (1) regulations that deprive owner of all “economically viable use of his land” require compensation regardless of the noble public purposes advanced, (2) unless the use is a common law nuisance; but a use can’t be a nuisance if people around you are “grandfathered” or otherwise doing the thing claimed to be a common law nuisance.
Precise Line Between Categorical and Partial Taking Claims Unclear

- In *Lucas*, Supreme Court observed “When, for example, a regulation on requires a developer to leave 90 percent of a rural tract in its natural state, it is unclear whether we should analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered mere diminution of value of the tract as a whole.” *Lucas, supra* n 7.

*Lucas* – Kennedy Concurrence

- Kennedy’s concurring opinion in *Lucas*, hints of the future (which is the present now);
- Kennedy accepted the finding below that the property had no economically beneficial use, but noted that he had reservations about whether that was truly so.
- Kennedy said that to determine whether all economically beneficial use has been taken “the test must be whether the deprivation is contrary to reasonable, investment-backed expectations.”
Identifying the property taken

• Total taking ala *Lucas* OR
• Partial Taking ala *Penn Central*?
• *Murr* provides the analytical framework for the answer

Rest of the *Lucas* Story....

• After the litigation, and after So. Carolina was required to buy Lucas’ property, the state sold it to a developer:

• “[South Carolina] promptly turned around and sold them to a developer who proceeded to build the very homes that Lucas had been forbidden to build. The state regulators’ environmental zeal lasted only as long as they thought they could stick Lucas with the cost of the proverbial free lunch. But when faced with the tab themselves, preservation of Lucas' lots suddenly ceased being environmentally important.” Michael Berger and Gideon Kanner, The Need for Takings law Reform: A View from the Trenches - A Response to Taking Stock of the Takings Debate 877, 867; Gideon Kanner, Not with a Bang, But a Giggle: The Settlement of the Lucas Case.
Stevens v. City of Cannon Beach, 317 Or 131 (1993)

- Plaintiffs argued under Lucas, the denial of a permit for rip rap on the beach and an overlay zone that made their property undevelopable meant their beachfront property rights in two vacant lots had been unconstitutionally taken without compensation.

- Or Supreme Court denied taking liability relying on Thornton v. Hay 254 Or 584 (1969) which first announced the principle that in Oregon the dry sand area of beaches were customarily public, not private land, throughout Oregon’s history. Explained Thornton did not announce new law, but rather explained existing Oregon law.

Stevens Affirmed the Thornton Doctrine of Custom as a Background Principal of Oregon Property Law

“As defined in Thornton, the common-law doctrine of custom may be paraphrased as follows:
(1) The land has been used in this manner so long ‘that the memory of man runneth not to the contrary’; (2) without interruption; (3) peaceably; (4) the public use has been appropriate to the land and the usages of the community; (5) the boundary is certain; (6) the custom is obligatory, i.e., it is not left up to individual landowners as to whether they will recognize the public's right to access; and (7) the custom is not repugnant or inconsistent with other customs or laws. Thornton, supra, 254 Or. at 595-97, 462 P.2d 671, (citing Blackstone's Commentaries)"
Chapter 6—An Update on the Law of Unconstitutional Takings

Stevens v. City of Cannon Beach Holding

“Because the administrative rules and ordinances here do not deny to dry sand area owners all economically viable use of their land and because ‘the proscribed use interests’ asserted by plaintiffs were not part of plaintiffs' title to begin with, they withstand plaintiffs' facial challenge to their validity under the takings clause of the Fifth Amendment. Lucas, supra, ___ U.S. at ___, 112 S. Ct. at 2899, 120 L. Ed. 2d at 820. Moreover, because it is clear that, under the challenged ordinances and regulations, a seawall could be built on plaintiffs' land if the other criteria, not challenged in this case, were met, those sources of law withstand an ‘as applied’ challenge in the present case. We hold that there was no taking of plaintiffs' property within the meaning of the Fifth Amendment. Lucas, supra.”


- (Scalia and O’Connor) dissent in denial of cert in Stevens v. City of Cannon Beach:
- “As I have described, petitioners' takings claim rests upon the assertion both that the new found "doctrine of custom" is a fiction, and that if it exists the facts do not support its application to their property. The validity of both those assertions turns upon the facts regarding public entry—but that is no obstacle to our review. ‘In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded.’ Niemotko v. Maryland, 340 U.S. 268, 271 (1951); see also Broad River Power Co. v. South Carolina ex rel. Daniel, 281 U.S. 537, 540 (1930); Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 41-43 (1944). What is an obstacle to our review, however, is the fact that neither in the present case (because it was decided on motion to dismiss) nor even in Thornton itself (because the doctrine of custom was first injected into the case at the Supreme Court level) was any record concerning the facts compiled. It is beyond our power--unless we take the extraordinary step of appointing a master to conduct factual inquiries--to evaluate petitioners' takings claim.”
Partial or “Ad Hoc” Taking Claim

*Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978)* – owner of Grand Central Station (GSC) foreclosed from placing 50 office building stories in the airspace above GCS, leaving open the potential for a smaller number of stories and the transfer of airspace development rights to other parcels. Held no compensable taking.

Whether a taking has occurred is based on consideration of three factors:

• Character of the governmental action
• Economic impact of the regulation
• and the extent to which the governmental action interferes with the owners’ distinct investment backed expectations

The First of the Three *Penn Central* Factors

• Character of the invasion – what is the nature of the property interest that is interfered with? In *Penn Central*, the Supreme Court explained:
  “A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.” *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (citing *United States v. Causby*, 328 U.S. 256 (1946), as an example of a case involving a physical invasion).
Second of the *Penn Central* Factors

*What is the economic impact of the regulation?*

This prong seeks to compare the value of the property before and after the regulatory interference (i.e. is there a severe diminution in value?)

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Third of the *Penn Central* Factors

*What Are the Owner's Distinct Investment-Backed Expectations?*

- This prong asks whether the owner has pursued a property right in the investment, and whether he or she as the property owner done so without knowledge that the disputed regulation would deny the fruits of the investment? In *Murr*, the inquiry was recast as the owners “reasonable investment backed expectations”.
- Note that this prong is not an inquiry into the needs of the city or county or other government, rather the focus is on the impacts of the proposed development to determine the severity of the impact on the distinct investment backed expectations.
Chapter 6—An Update on the Law of Unconstitutional Takings

**Penn Central — Genesis of the “Parcel as a Whole” rule**

“‘Taking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole -- here, the city tax block designated as the ‘landmark site.’"

**Palazzolo v. Rhode Island**

Palazzolo owned 20 waterfront acres, 18 of which were wetlands. Palazzolo wanted to fill 18 acres of wetlands to develop a beach club and also sought other types of development approval. All were rejected.

Palazzolo claimed his was a *Lucas* style taking.

Government argued there could be no taking and state courts agreed with government on the idea that because the owner took with notice that the property was subject to the severe restrictions.

This is the so called “notice rule.”

Supreme Court – rejected notice rule/ rejected that this is a *Lucas* take and remanded for *Penn Central* analysis.
Palazzolo on the Notice Rule

"[A] state, by ipse dixit, may not transform private property into public property without compensation." Palazzolo, 533 U.S. at 628.

"A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken. Palazzolo, 533 U.S. at 628.

"[A] regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title. This relative standard would be incompatible with our description of the concept in Lucas, which is explained in terms of those common, shared understandings of permissible limitations derived from a State's legal tradition... [A] regulation or common law rule cannot be a background principle for some owners but not for others." Palazzolo, 533 U.S. 629-630.

Nollan on the Notice Rule

The principle that notice of a restriction does not obviate a taking claim, was also articulated in Nollan, 483 U.S. 825, 834 n 2 that:

"Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot."
**Palazzolo** Rejection that Case Presented a *Lucas* Situation

- Takings argument at lower courts and Supremes Pet for Cert and briefing was not limited to just the uplands portion, rather asked whether the entire 20 acre parcel had been taken because of the restrictions on development of the 18 acres of wetlands.
- Supreme Court noted a “substantial residence” could be built on the parcel, so it did not present a *Lucas* situation.

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**Murr v. Wisconsin**

- Two adjacent lots joined under state law “merger” provision – only one dwelling allowed on both lots
- Murrs – the lot required to remain vacant is a *Lucas* style taking
- Government – the two lots together analyzed under *Penn Central* mean no taking
- Supreme Court analyzed as a *Penn Central* type of take
- Added *Penn Central* like factors to decide what property was taken
- Affirmed state that the situation presented no taking
- State legislature adopted legislation allowing the property sale and the Murrs are now in the process of selling the second parcel.
**Murr Facts**

- Decades ago, the Murr parents bought a lot on St. Croix River in Wisconsin. They developed it with a family retreat cabin.
- A year later, they bought the lot next door, taking title in a different name.
- Many years later, the parents gave the lots to their children, in different transactions.
- When the second lot went to the children, the lots ended up in one name.
- The Murr children wanted to sell one of the lots to improve the now aging cabin their parents had built. The county said no.
- Lots in common ownership that were less than an acre in size after carve outs for topography, wetlands etc., were “merged” into one developable lot.
- Each lot was more than an acre in size, but with the carve outs, the second lot didn’t have an acre of buildable space.
- After seeking a variance, which was denied, the Murrs’ sued, claiming that the government had taken one of their lots in violation of the Fifth Amendment.

**Supreme Court Murr Decision**

- 5-3 (before Gorsuch took the bench)
- The court framed the partial takings analysis as a flexible one that balances interests:

> “A central dynamic of the Court's regulatory takings jurisprudence thus is its flexibility. This is a means to reconcile two competing objectives central to regulatory takings doctrine: the individual's right to retain the interests and exercise the freedoms at the core of private property ownership, * * * and the government's power to “adjus[t] rights for the public good.” Murr v. Wisconsin, 137 S. Ct 1933 (2017).”
**Murr – What is the Property that is Taken?**

1. “[F]irst courts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law.”

2. “Second, courts must look to the physical characteristics of the landowner’s property. These include the physical relationship of any distinguishable tracts, the parcel’s topography, and the surrounding human and ecological environment. In particular, it may be relevant that the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation.”

3. Third “courts should assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings.

   a. Does the regulation increase privacy, expand recreational space, or preserve surrounding natural beauty.

   b. Are the lots adjacent or separate?

   c. If the landowner’s other property is adjacent to the small lot, the market value of the properties may well increase if their combination enables the expansion of a structure, or if development restraints for one part of the parcel protect the unobstructed skyline views of another part. That, in turn, may counsel in favor of treatment as a single parcel and may reveal the weakness of a regulatory takings challenge to the law.”

**Few Examples of Successful Penn Central Taking Claims**

- 1500 acres wetlands before enactment of Clean Water Act.
- Corps denied permits for any mining on the parcel.
- FRI conceded the correctness of the government’s denial under the CWA. FRI then filed a taking claim.
- Held a taking occurred under the Penn Central factors. “The notion that the government can take two thirds of your property and not compensate you but must compensate you if it takes 100% has a ring of irrationality, if not unfairness, about it. If the law said that those injured by tortious conduct could only have their estates compensated if they were killed, but not themselves if they could still breathe, no matter how seriously injured, we would certainly think it odd, if not barbaric. Yet in takings trials, we have the government trying to prove that the patient has a few breaths left, while the plaintiffs seek to prove, often at great expense, that the patient is dead. This all-or-nothing approach seems to ignore the point of the Takings Clause.”

• 5 acre tract in 1,300 acre gated community, denied fill and removal permit. DC Circuit held the relevant parcel was the 5 acres, not adjacent holdings of the owner.

• Lost Tree decides the opposite of Murr

• An adjacent parcel and scattered landholdings should not have been aggregated to determine the relevant parcel for the takings analysis, because the facts showed the 5 acre parcel had always been treated differently than other holdings

• Cert was denied by SCOTUS four days after Murr was decided.

• Leaving intact the finding that that the relevant parcel was the 5 acres, which had lost 99% of its value due to the denial of the fill and removal permit.

Temporary Takings

• First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. 304, 96 L.Ed.2d 250 (1987)

• Flooding prompted the county to adopt an interim ordinance prohibiting construction or reconstruction of buildings in a flood protection area. A state court dismissed a regulatory taking claim as “irrelevant,” holding that a regulatory taking could not occur until after the ordinance had been held excessive in an action for declaratory relief or a writ of mandamus, and that the property owner could not recover monetary relief for the period before that. The court was concerned with “the need for preserving a degree of freedom in the land-use planning function and the inhibiting financial force which inheres in the inverse condemnation remedy.”
First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. 304, 96 L.Ed.2d 250 (1987)

- The Supreme Court disagreed, holding that the Fifth and Fourteenth Amendments require a monetary remedy for “temporary” regulatory takings during the period prior to the date when a court invalidates the ordinance as prospectively effecting a taking.

Temporary Takings


After Council imposed two moratoria totaling 32 months on development in the Lake Tahoe Basin while formulating a comprehensive land-use plan for the area, petitioners contended, relying on First English and Lucas, that whenever the government imposes a deprivation of all economically viable use of property, no matter how briefly, it effects a taking.
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The Supreme Court disagreed, noting that First English addressed how compensation is calculated once a regulatory taking is established and that Lucas required a permanent deprivation of all economically viable use of property. The Court relied on the Penn Central admonition to focus “on the parcel as a whole” – both the geographic dimensions and the term of years describing its temporal aspect. The Court quoted Justice O’Connor’s concurrence in Palazzolo: a takings claim “requires careful examination and weighing of all the relevant circumstances,” including temporal relationships.

Unconstitutional Conditions

• Nollan v. California Coastal Comm’n, 483 U.S. 825 (1987)
• Dolan v. City of Tigard, 512 U.S. 374 (1994)
• Does the condition further a substantial/legitimate governmental interest? (Nollan)
• Is the particular condition imposed related to the substantial legitimate governmental interest that is served? (Nollan)
• Are the impacts of the development roughly proportional to the condition imposed? (Dolan)
Unconstitutional Conditions Doctrine Applies to Exactions of Land or Money

• *Koonze v. St. Johns River Water Dist.*, 133 S. Ct. 2586 (2013) held that the unconstitutional conditions analysis applies to monetary as well as real property exactions.


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**Koontz**

• Involves a denial resulting from the owner refusing to accede to unconstitutional conditions of approval

• “[L]and use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than the property it would like to take **[1]**. So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government’s demand, no matter how unreasonable.” *Koontz, supra* 133 S. Ct. at 2594
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Koontz

• “The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so. We have often concluded that denials of governmental benefits were impermissible under the unconstitutional conditions doctrine. **In so holding, we have recognized that regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution’s enumerated rights by coercively withholding benefits from those who exercise them.”

Obligations of Local Government under *Nollan/Dolan*

• Local governments must undertake the “rough proportionality” analysis required by *Dolan* regardless of whether a local ordinance requires it. *Kingsley v. City of Portland*, 55 Or LUBA 256 (2007), aff’d 218 Or App 229 (2008).

• Moreover, where local government standards would otherwise require an exaction that would violate *Dolan* or *Nollan*, local government may either not apply such standard to demand the exaction or it may compensate the landowner for the exaction the standard requires. *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 235 (2009) (where road standard requires dedication of property interest that is not “roughly proportional” to the impacts of the proposed development, County is free not to impose such requirement for road dedication and allow a developer to improve a substandard local street to less than full collector standards); accord *Dudek v. Umatilla County*, 187 Or App 504 (2003).
Local Government Obligations

• The burden is on government to establish that the conditions are not a taking.

• *Lincoln City Ch. Of Comm. v. City of Lincoln City*, 36 Or LUBA 399 (1999) decides that local government has the burden of demonstrating rough proportionality, but not the burden of producing the evidence on which the rough proportionality determination is based.

Local Government Obligations

• Adequate findings:

• Particularized findings are required to establish *Dolan* compliance, but *Dolan* makes it clear that such findings need not have mathematical precision:

"No precise mathematical inquiry is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated."
Local Government Obligations

• The rough proportionality analysis focuses on the needs of the development and not the general public needs. *J.C. Reeves Corp., v. Clackamas County*, 131 Or App 615, 618 (1994).

• But “To the extent a local government identifies an impact and demonstrates that the exaction is roughly proportional to that impact, incremental impacts attributable to a development may give rise to an exaction, even if the impacts will not cause a facility to fail or drop to a lower level of service.” *McClure v. City of Springfield*, 39 Or LUBA 329, 341 (2001), aff’d 175 Or App 425 (2001).

Lessons Learned

• Defensible nexus between impact of the proposed development and the conditions imposed.

• Condition must be roughly proportional to the impacts of the proposed development

• Can be mathematically expressed – for example what is the existing traffic on a street, what is the percentage increase in traffic from a proposal and how does that percentage relate to a proposed ROW dedication?
Local Government Obligations

• Carver v. City of Salem, 42 Or LUBA 305, aff’d 184 Or App 503 (2002), LUBA held that a city must apply the Dolan analysis to conditions of approval requiring dedication of land (there, the requirement was to dedicate one (1) acre for a park), regardless of whether the developer chooses to develop in an underserved area. LUBA held that the choice to develop in an underserved part of the city is not the equivalent of a waiver of the developer’s constitutional rights under Dolan. Further, LUBA decided that SDC credits are not adequate “just compensation” because the amount of the SDC credits (1) do not relate to fair market value of the property taken, (2) does not include any severance damages to the remainder of the parcel and (3) does not ensure the owner will receive compensation in fact.

Case Examples in Oregon

• Barnes v. City of Hillsboro, 61 Or LUBA 375 (2010), aff’d 239 Or App 73 (2010), citing Nollan and Dolan, LUBA reversed a city ordinance requiring as a condition of approval for all residential developments near Hillsboro Airport to grant an “avigation easement” for noise, vibration, fumes, dust and fuel particle emissions, in service of an objective to reduce land use conflicts. LUBA held that the requirement for the condition did not reduce land use conflicts but rather simply made it more difficult for a property owner to bring a taking claim, failing both Nollan and Dolan.

- 25,700 sq., ft. parcel proposed to be partitioned into three parcels.
- 2nd appeal after remand, LUBA struggled with whether the exaction was too much – the *Dolan* roughly proportional in extent problem.

**HELD**

- Cannot use exaction formulas in the city code as a substitute for particularized *Dolan/Nollan* findings.
- Exaction for ROW was affirmed as a “close question” – was less than in *Schultz* in order of magnitude:

> “The proposed development has approximately twice the vehicular impacts of that at issue in *Schultz*, and the proposed M Street exaction is approximately five times smaller.”

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**McClure v. Springfield**

- City argument that “it is not necessary to establish rough proportionality between each and every exaction and the impacts that justify those exactions”, is rejected.
- Held: city is required to “establish a relationship between the vehicular and non-vehicular impacts of the proposed development and the required dedication of land for sidewalks * * *”
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**Schultz v. City of Grants Pass**

- Oregon Court of Appeals held that in the context of an application to partition property, there are no impacts to mitigate with conditions of approval.
- Moreover, that it is improper for local government to assume any particular level of development beyond that proposed. But, NOTE if there is no further public process to evaluate impacts, then roughly proportional exactions may be imposed on the “impacts of the two dwellings that may be sited on the two new lots by virtue of the challenged partition decision.” *McClure v. City of Springfield*, 37 Or LUBA 759, 764 (2000).
- A ratio of 8 new trips to an exaction of 20,000 sq ft of road exaction not supportable under *Dolan*.

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**Agins v. City of Tiberon, 447 U.S. 255, (1980).**

- The *Agins* test was a two part test to determine whether the adoption of a regulation effected a taking. The relevant questions under this test were (1) does the regulation substantially advance a legitimate governmental interest? (2) does the regulation deprive the owner of economically viable use of property?
- Almost no one had ever been successful in asserting an *Agins* style taking claim until Chevron—against legislation adopted by the State of Hawaii restricting oil companies’ ability to own and lease gas stations.
- The United States Supreme Court used the occasion of Chevron’s victory to strike down the *Agins* test under which Chevron had prevailed, rightfully pointing out *Agins* embodied a substantive due process test, that had no place in the analytically distinct matter of alleged 5th Amendment takings. *Lingle v. Chevron USA*, 544 U.S. 528 (2007).
Ripeness

• Ripeness has three prongs:
  • (1) there must be a final local decision,
  • (2) administrative remedies must be exhausted, including pursuit of variances as well as alternative development options, and
  • (3) as a prerequisite for bringing a federal claim, avenues for achieving state compensation must be exhausted.

At Least One Application for Development

• Generally, a developer must submit "at least one" development application for beneficial uses of property to occur per Williamson County v. Hamilton Bank.

• Futility may excuse the ripeness test if under state or local law, there is no possibility that agency can grant relief. Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 734 n 8 (1997).

• In Palazzolo, supra 533 U.S. 626, the Court noted that futile land use applications need not be submitted simply for the sake of submitting them and provided guidance on what must be done to ripen a takings claim:
  • "Thus, the reasoning goes, we cannot know for sure the extent of permitted development on Petitioner's wetlands. This is belied by the unequivocal nature of the wetlands regulations at issue under the Council's application of the regulations to the subject property." Palazzolo, supra 533 U.S. at 619.
Ripeness Requisites in Oregon

- Ripeness doctrine does not require an appeal to LUBA to ripen takings claim. West Linn Corp Park v. City of West Linn, 349 Or 58, 77 (2010).

- Nevertheless, ORS 197.796 provides that to accept the benefits of an approval with alleged unconstitutional conditions, the land use applicant must raise the taking claim in the local permit proceedings and then either challenged the allegedly unconstitutional condition at LUBA within the 21-day deadline for filing local land use appeals or must file a complaint for just compensation within six months of the imposition of the disputed condition.

- ORS 197.796 specifically provides that such an applicant need not seek a variance (ORS 197.796(3)).

Ripeness

- LUBA will not presume futility for owner to apply for a comprehensive plan amendment or zone change to ripen a taking claim. Young v. Clackamas County, 24 Or LUBA 526; aff’d 120 Or App 248 (1993), rev. den. 317 Or 485; Larson v. Multnomah County, 24 Or LUBA 591 (1992), aff’d 121 Or App 119 (1993).

- However, on review of the LUBA decision in Larson, the court of appeals affirmed LUBA, but suggested that plan amendments weren’t necessarily required in all cases to ripen a takings claim:

  “Although we do not now decide whether a plan or zoning amendment must invariably be sought to achieve ripeness, we do hold that at least one application must be made after the initial denial, if any is available, and that a plan or zone change must be sought if only it is available. Larson v. Multnomah County, 121 Or App at 123.

- LUBA will not allow evidentiary hearings for the purpose of ripening a taking claim. Larson v. Multnomah County, 24 Or LUBA 591 (1992), aff’d 121 Or App 119 (1993).
Ripeness

• SCOTUS will decide a ripeness case in 2018-2019 - *Knick v. Township of Scott*

Plaintiff owns 90 acres in rural Pennsylvania and town thought there may be an old burial ground on her property, meaning the owner was required to allow officials to access her property as well as unrestricted daytime public access onto her property.

Plaintiff brought a taking claim against the town.

Plaintiff was denied access to state courts claiming her claim was brought in the incorrect venue. She sued in federal court which declined to hear the case because it had to be resolved in state court, under the ripeness doctrine.

Summary

• Three distinct types of taking claims
  • Per se/categorical
  • Partial/Ad hoc
  • Deciding which if not obvious refer to *Murr* to determine “property”
• Unconstitutional Conditions
  • *Agins* analysis is a substantive due process 14th Amendment (not 5th Amendment) one – whether a person was deprived of liberty or property without due process of law.
Questions?