# Construction Law Newsletter

From the Construction Section of the Oregon State Bar
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**In This Issue**



***Thanks to our authors!***

***Past Issues!***
***https://constructionlaw.osbar.org/newsletters/***

## MESSAGE FROM THE CHAIR

*Curtis (Curt) A. Welch*
*Sussman Shank LLP*

Certainly, the most rewarding part of being Chair of our section's executive committee for 2021 was working with the dedicated and hardworking people on the committee to carry on the operations of our section. Committee members volunteer a significant number of hours of their time throughout the year, including time spent writing articles for our section's newsletters, serving on subcommittees, and otherwise helping further the interests of our section and its members.

Curt

Our section's executive committee met every other month (remotely) in 2021, starting in January. Our minutes are posted on our section's website with the Bar and reflect the wide range of topics and planning covered in each meeting.

It was an added bonus that Bar President David Wade regularly attended our executive committee meetings this year. Bar liaisons Natalie Batiste and Angela Bennett also attended meetings and were very helpful throughout the year.

One of our subcommittees worked throughout the year planning for the section's annual CLE. Our annual CLE was held in October, remotely, entitled "Building Your Construction Project: Critical Concepts and Issues." This excellent CLE covered a wide range of topics of importance to Construction Law attorneys and was well attended.
Our annual CLE was followed two weeks later by a CLE that our section sponsored jointly with the Bar's Alternative Dispute Resolution section, entitled "Mediation and Arbitration in Construction-Related Disputes." This CLE, held remotely, also provided a wealth of information for Construction Law attorneys and was also well attended.

In addition, counting this current newsletter, our section will have published three newsletters this year. The previous newsletters were in June and September. The September newsletter provided a legislative update on the 2021 Oregon legislative session.

One of the stated goals in the Bar's bylaws for Bar sections is to "provide Bar members who share interests in particular substantive areas of law with a forum for improving legal skills and knowledge." Our section's continuing legal education programs and our newsletters help towards achieving that goal.

Also, section members are often a valuable resource to other members for information on a particular issue or to serve as a sounding board for another member. I have seen these valuable interactions happen time and again in my nine years on the section's executive committee.

Our section started a list serve this year as well, to help further facilitate the exchange of ideas and information among section members. The address for our section's list serve is construction@forums.osbar.org.
Our section's membership remained very steady—as of the end of October, our section had 361 members. We continued to have a strong financial balance sheet, in part because of revenues from CLE programs in prior years as well as in 2021, which freed up monies and allowed our section to approve contributions to several charitable organizations on the Bar's list of pre-approved organizations. These organizations improve access to justice and further educational opportunities.

It has been an honor to have served as Chair this year.

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## DON'T UNDERESTIMATE THE IMPACT OF COMMUNITY BENEFIT CONTRACTS

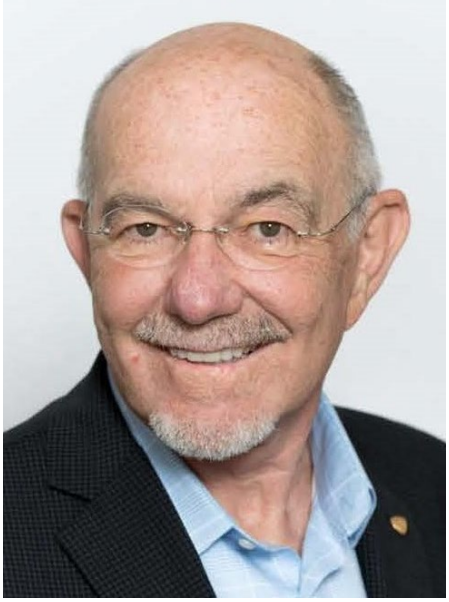
*James A. Chaney*
*Lane County*

For many years, Oregon law governing public improvement contracts (ORS Chapter 279C) has established a relatively even base for contractors bidding on public improvements contracts throughout Oregon. Consistent with the "least cost" public policy contained in ORS 279C.305(1), state and local agencies were granted little authority to set local wages, benefits, or preferences. Within the geographical districts established by Oregon's Prevailing Wage Rate law (ORS 279C.800 et seq.), contractor pay and administrative costs have been relatively uniform, regardless of what agency the contractor was under contract with. With the passage of Senate Bill 420 by the 2021 Oregon Legislature, that relatively uniform base is likely to get a little bumpier.

### *I. Unique Provisions of the New Community Benefit Contract Law.*

SB 420 (2021 Oregon Laws Ch. 488) grants authority to any contracting agency to designate a public improvement contract as a "community benefit contract." Once so designated, the agency

can establish its own requirements for apprenticeship and training, employer-paid health insurance, as well as "any other requirements" the agency sets forth. One effect of the law will be that, depending on whether a state or local agency has established a project as a community benefit contract, a contractor bidding on two public improvement contracts in the same area may have substantially different costs to comply with the different wages, benefits, and administrative requirements of the projects.


James

In Section 2 of the law, subsection (3)(a) provides that any contracting agency or local contract review board (LCRB) may designate a project as a community benefit contract by "ordinance, resolution, rule, regulation or other legislative or administrative measure" authorizing the designation. The law does not list criteria to be used to select or qualify a project for such designation. The definitions used to describe the authorization are constructed in a circular manner, as subsection (1) defines a "community benefit project" as one that is subject to a community benefit contract, and subsection (2) defines a "community benefit contract" as one that is subject to the community benefit requirements established by the agency, leaving full discretion to the agency to establish its own criteria. Once a project has been designated as a community benefit contract, the state or local agency has broad discretion under subsection (3) to: (a) require the contractor to be a training agent or provide apprenticeship training, (b) employ apprentices for a mandatory percentage of work hours, (c) provide employer-paid family health insurance, or (d) "[m]eet any other requirements that the contracting agency or local contract review board sets forth." However, the law contains no further language to suggest what "other requirements" might be included in this authorization (though subsection (4) does limit the scope, to an extent, by providing that, "Except as otherwise provided in this section, a solicitation and award of a community benefit contract is subject to all applicable provisions of the Public Contracting Code.")

### *II. Interpreting What Contract Requirements are Authorized.*

Even though the law on its face provides little guidance on what "other requirements" might consist of, the legislative history suggests that these include the elements that have been part of a 'community benefits bidding' ("CBB") program adopted by Lane County Board in 2020. Senate Bill 420 was introduced at the request of Joe Berney, the 2021 chair of the Lane County Board of Commissioners, and discussion in both the assigned committees, the Senate Committee on Labor and Business and the House Committee on Business and Labor, referenced the Lane County program. Much of the testimony as well included endorsement of the Lane County CBB requirements, including that of Senator James Manning, who sponsored the bill.

The Lane County CBB was created to carry out the direction given by Lane County's Board of Commissioners in its adopted 2018-2021 Strategic Plan, which included a strategic initiative to: Develop and implement a policy for community benefits starting with Capital Projects to ensure

projects maximize local impact, especially, with regard to promoting and prioritizing procurements by weighting the use of local businesses, contractors, subcontractors, and workers; that pay their employees living wages and provide them full family health benefits; prioritize diversity and equity in the workforce; prioritize minimal carbon emissions in new construction and retrofits with net neutral buildings as the ultimate goal; design and construction that dedicates at least one and one half percent (1½ %) of construction costs to renewable energy; require the utilization of state or federally approved training and apprenticeship opportunities for workers on construction projects, to the extent permitted by state and federal law. Lane County Board Order 19-12-17-04 (2019). Pursuant to the Board's guidance, Lane County staff created its community benefits bidding program, which was adopted in Lane County Board Order 20-10-20-06 (October 10, 2020), and included obligations for contractors and major subcontractors to prequalify and agree to:

- Pay a "living wage" to all employees performing work related to the project, whether subject to prevailing wage rate or not. (The amount determined at the time was $25.35 per hour.)
- Provide employer-paid, no cost-share, full-family health care to all trade employees on the project.
- Participate in at least one BOLI-approved apprenticeship program.

The CBB program requires that the County, when a community benefits project is advertised, identify major subcontract trades that are be subject to CBB requirements for their workers on that project in addition to the prime contractor, and requires that prime bidders may accept bids from only those subcontractors who have prequalified with the County and agreed to the requirements of the CBB program. Considering both the plain language of subsection (3) of the bill and the requirements of the then-existing Lane County CBB program, at a minimum a state or local agency may, for any project it selects to be a community benefit project, require that in order to submit a bid on such a project, the contractor and designated subcontractors must agree to:

- Be a training agent or provide apprenticeship training, and employ apprentices for a mandatory percentage of work hours,
- Provide employer-paid full-family no cost-share health insurance, and
- Pay employees working on the project, including management or administrative employees not subject to prevailing wage rates, a minimum amount of pay set by the agency.

In addition, as suggested by the community benefits policy contained in Lane County's Strategic Plan, it is possible that some agencies may want to consider other factors, such as requirements to maximize local impact, prioritize diversity and equity in the workforce, or reduce carbon emissions.

### *III. Conclusion: What Will Agencies Adopt and What Must Contractors Do?*

The provisions of SB 420 are only effective for projects advertised for bid after January 1, 2022, and at this time it is not possible to speculate on how many agencies may want to establish a community benefit contract program, or what elements an agency might elect to include, so the actual impact of the law is hard to judge at this time. There is interest, however: as of the date of this writing, a number of Oregon state and local agencies have requested information on the Lane County CBB program. In addition, the Oregon Department of Transportation ("ODOT") has created a Community Benefits Advisory Committee to consider possible application of community benefits contracting in ODOT projects.

Ultimately, the impact of the bill on contractors, subcontractors, their employees, and the industry,

will depend upon how many agencies decide to designate community benefit projects, what size projects are included in those programs, what the requirements are, and—perhaps most significantly—how uniform the requirements are that are adopted by the agencies. For contractors, managing payrolls, benefits, and subcontracts that differ significantly from one work site to another is one of the most significant and costly administrative challenges, especially given the precision required to account for such differences.

Historically, the main variation between the costs of labor and administration on public improvements contracts has been the difference in the established prevailing wage rates from one district to another. If, however, agencies embrace community benefit projects with enthusiasm, and with significant differences in their requirements, contractors' and subcontractors' costs of payroll, benefit, and subcontract management could become much more costly. Beginning in January of next year, the contractor or subcontractor that bids on a community benefit contract without a good understanding of what compliance and reporting will cost may be in for a surprise when it comes to actually complying with the requirements.

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**CCB LICENSING ISSUES CAN HURT IN MORE WAYS THAN ONE**

*Van M. White*
*Samuels Yoelin Kantor LLP*

One of the primary reasons to have a license with the Construction Contractors Board ("CCB") is to avoid the potentially severe ramifications of ORS 701.131(1). ORS 701.131(1) bars contractors from seeking compensation for their construction work if they weren't actively licensed with the CCB at the time they bid or entered into the contract and continuously while performing the work for which compensation is sought.

Most Oregon contractors and construction lawyers are generally aware of ORS 701.131(1). Said statute makes sense-- you need to have a CCB license in order to use the Oregon courts and judicial system for the collection of past due amounts. However, there are also some other statutes in Oregon relating to CCB licensure that could cause a contractor to lose their right to sue or file a construction lien in the event of nonpayment. In this article, I address ORS 701.131, as well a couple of lesser known provisions in ORS chapter 87, and the ramifications of performing construction work in Oregon without a CCB License. The article also touches upon performing residential construction work without a CCB license and contracting with another person who fails to follow the CCB license regulations.

*I. ORS 701.131(1) – CCB License Required to Perfect Lien or Obtain Judicial or Administrative Remedy.*

ORS 701.131(1) is the CCB's big hammer with regard to working without a CCB license. ORS 701.131(1) prohibits contractors from perfecting liens, filing CCB complaints, or commencing arbitration or court claims unless they had an active CCB license at the time they bid the job or entered into the contract and continuously while performing the work for which compensation is sought.

ORS 701.131 does include exceptions under subsection (2). These exceptions may give contractors some relief and avoid the bar against liens, CCB claims, arbitration, and court claims if they are able to prove that: (1) they weren't aware that they were required to be licensed, and they submitted a CCB application within 90 days of becoming aware that they should have had a CCB license; (2) they were properly licensed or endorsed when they perfected their lien or commenced their claim; and (3) enforcement of

the prohibition against filling a lien or a claim would result in substantial injustice to the contractor.

To avoid the severe ramifications of ORS 701.131(1), persons performing construction work in Oregon should confirm they have a proper CCB license and endorsement in place at the time of their bid/when the contract is signed and that their license remains in effect for the entire project.

### *II. ORS 701.131(3) – Providing False Information or Knowingly Working Contrary to CCB License Could Bar Collection Remedies on Residential Projects.*

Subsection (3) of ORS 701.131 is less known and utilized than the prohibition of claims for unlicensed contractors under subsection (1). There is no case law in Oregon where the courts have analyzed ORS 701.131(3). Regardless, section (3) could cause problems for those who run astray of it. Subsection (3) of ORS 701.131 only applies to work performed on residential structures.

ORS 701.131(3) holds that a contractor who: (1) falsely swears to information submitted to the CCB under 701.046 (i.e., their CCB License Application); or (2) knowingly violates the provisions of 656.029 (providing for workers compensation), 676.600 (definition of independent contractor) or 701.046 (CCB License Application), may not perfect a construction lien, file a complaint with the CCB, or commence an arbitration or a claim in a court of this state for compensation for the performance of any work on a residential structure or for the breach of any contract for work on a residential structure that is subject to this chapter.

Issues relating to ORS 701.131(3) could arise, for example, in the following situations: (1) a contractor licensed as "Exempt" with the CCB knowingly hires employees; (2) A contractor licensed as a residential specialty contractor performs more than 2 unrelated building trades on one project; (3) a residential limited contractor enters into a construction contract in excess of $5,000 or performs construction work exceeding $40,000 in gross annual volume; and (4) a residential contractor without a lead based paint license performs renovation work ("renovation" means modifying any structure or part of a structure that disturbs more than 6 square feet of painted surface per room for interior work or 20 square feet of painted surface for exterior work) on a house constructed prior to 1978.

Van

Violation of ORS 701.131(3) often comes to light after a residential property owner files a complaint against a contractor at the CCB. It is sometimes raised as a defense in court or arbitration to a contractor's claim for compensation. In addition to being barred from seeking compensation for their construction work in violation of 701.131(3), the CCB can penalize contractors for working in the wrong CCB license or endorsement category.

### *III. ORS 87.036 – Subcontractor's Perfection of Lien.*

This provision in Oregon's Construction Lien statutes could bar unknowing subcontractors (or material suppliers) from filing liens against residential structures if the contractor to whom the

subcontractor (or material supplier) was providing labor, materials, equipment, or services did not have a CCB license during the subject project.

ORS 87.036(1) specifies the following: a subcontractor or a person that provides labor, materials or equipment for a project to renovate, remodel, repair, or otherwise alter an existing owner-occupied residence may not perfect a claim of lien against the owner's property under ORS 87.035 (perfecting lien) if the subcontractor or person provided or contracted to provide services, labor, materials, or equipment to a contractor that was unlicensed at the earlier of the following times:

(a) The time the subcontractor or person first contracted with the contractor for the project; or
(b) The time the person first delivered labor, materials, or equipment to the project site.

Thus, it is very important that subcontractors (and material suppliers) on residential projects check the CCB website prior to signing a contract or commencing work or delivering materials to confirm that the contractor to whom they are providing labor, materials, equipment or services is actively licensed with the CCB. In my experience, particularly with residential construction, I often I see contractors that have CCB licensing issues.

As per subsection (3) of ORS 87.036, the CCB has a service called E-Watch whereby licensed contractors who have set up an account with the CCB and signed-up for E-Watch receive an email from the CCB when the status of a CCB licensee changes. This is particularly helpful for contractors who regularly work with the same contractors on various projects. Otherwise, it is quick and easy to check a contractor's license status on the CCB website.

### *IV. ORS 87.037 – Prohibition Against Claim of Lien.*

This statute prohibits original contractors on residential projects from filing construction liens if they did not have a written contract with the property owner. ORS 87.037 specifies the following:

> An original contractor may not claim a lien arising from the improvement of real property if a written contract for the work is required by ORS 701.305 [requirement for written contract with residential property owner] and the contractor does not have a written contract.

Original Contractor is defined in ORS 87.005(7) as "a contractor that has a contractual ownership with the owner."

ORS 701.305 holds that a contractor may not perform work to construct, improve, or repair a residential structure or a zero-lot-line dwelling for a property owner without a written contract if the aggregate contract price exceeds $2,000. OAR 812-012-0110 specifies the information which must be included in a written contract with a residential property owner.

While common sense dictates that contractors put their agreements in writing, that does not always occur (for a variety of reasons). In addition to potentially losing their lien rights for failure to have a written contract, the CCB can also penalize contractors who fail to memorialize their contracts with residential property owners in writing as required by ORS 701.305 and OAR 812-012-0110. As such, residential contractors should always memorialize their contracts in writing. Failure to do so could cause them to lose their lien rights and be penalized by the CCB.

### *V. Summary.*

It is important for persons performing work as a contractor in Oregon to ensure that they are

actively licensed with the CCB at the time they bid the job or entered into the contract and continuously while performing the work for which compensation is sought. It is also important, especially for residential contractors, that their contracts are in writing. For those persons who perform construction work or provide materials to residential projects, it is also important they make sure that the contractor to whom they provided labor or materials was licensed with the CCB. Failure to do so could cause them to lose their right to sue for compensation or file a construction lien in the event of non-payment.

A bit of due diligence prior to commencing work or providing materials is well worth the time. Failure to ensure that a proper CCB license is in place could lead to potentially severe ramifications under ORS 701.131, ORS 87.036 and 87.037, as well as civil penalties from the CCB.

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## CASE LAW UPDATE

*D. Gary Christensen and Ryan Hall*
*Miller Nash LLP*

*I. Contractor Licensing.*

IMPOSITION OF CIVIL FINES: Construction Contractors Board (CCB) lacked statutory authority to impose civil fine on contractor deemed unfit for licensure. *Allied Structural v. Construction Contractors Board*, 311 Or App 40, 63-64, 492 P3d 642 (2021).

After a parole officer notified the CCB that Contractor's Owner was attempting to use Contractor's license to violate the conditions of his parole, the CCB initiated proceedings to revoke Contractor's license. The administrative law judge (ALJ) determined that Contractor was unfit for licensure due to its Owner's prior conviction for sexual assault, and that Contractor violated statutory lien notice requirements. The ALJ imposed a $5,000 civil penalty for Contractor's statutory violations but concluded that Oregon law did not authorize the imposition of a civil penalty based solely on a determination that Contractor was unfit for licensure.


Gary

Tasked with determining whether the CCB had the statutory authority to impose a monetary penalty on account of a contractor's prior criminal conviction, the Court interpreted ORS 701.098, which permits the CCB to revoke, suspend, or refuse to issue a license for certain prior convictions. In particular, the Court focused on the statute's reference to ORS 701.992, which allows the CCB to impose a $5,000 civil fine on a contractor who violates ORS Chapter 701 or a CCB rule.

The Court determined that the legislature's reference to ORS 701.992 in ORS 701.098 functioned to allow the CCB to revoke, suspend, or refuse to issue a license based on a contractor's prior criminal conviction, but the CCB could only impose a civil fine for a violation of ORS Chapter 701 or a CCB rule. Since the CCB fined Contractor based on its Owner's prior criminal convictions, rather than an independent violation of ORS Chapter 701 or a CCB rule, the CCB erred in fining Contractor based solely on its

determination that Contractor was unfit for licensure.

*II. Contract Terms.*

REPAIR OBLIGATIONS: Commercial landlord that was contractually obligated to deliver "Landlord Improvements" to its tenant did not have a corresponding obligation to repair any defects in those improvements absent an express agreement to do so. *Cryo-Tech, Inc. v. JKC Bend, LLC, et al.*, 313 Or App 413, 428 (2021).

Tenant, the owner/operator of a fast food franchise, entered into a "build to suit" lease agreement with Landlord. Under the agreement, Landlord would purchase a piece of property, enter into a construction contract for the improvement of the property, finance the construction, then lease the improved property back to Tenant. Tenant's monthly rent obligations would be calculated based on Landlord's acquisition and construction costs for the property, with monthly rent being set at an amount that ensured an eight-percent return on Landlord's investment.


Ryan

Although Tenant was not a party to the construction contract between Landlord and its contractor, it selected the contractor, helped develop the construction plans, and assisted in the negotiation of the construction contract. When Tenant discovered latent defects in the property shortly after taking possession, the Landlord refused to remedy the defects, arguing that the lease made no warranties or imposed any repair obligations on Landlord for the improvements. The trial court found that Landlord was required to deliver to Tenant "Landlord Improvements" that were free of construction defects. Landlord appealed.

Citing to established common law, the Court of Appeals held that, absent a "special agreement," a commercial landlord has no duty to make repairs to leased premises. While the construction contract included warranties to the Landlord, Tenant was not a party to that contract. Landlord's repair obligations were therefore limited to those provided for in the lease agreement between Tenant and Landlord, if any.

Analyzing the lease language, the Court of Appeals acknowledged that the provisions concerning Landlord's repair obligations were susceptible to multiple interpretations and turned to the parties' original intent. The Court determined that, because the imposition of repair obligations on Landlord would increase Landlord's costs beyond those that went into calculating Tenant's rent, the imposition of those repair obligations would be inconsistent with the parties' intent. Thus, the Court concluded that the lease did not impose repair obligations on Landlord and reversed the trial court's ruling.

*III. Insurance.*

PROFESSIONAL LIABILITY: Exclusion for breach of contract claims in professional liability policy did not relieve insurer of its duty to defend its insured where the underlying claim against insured alleges that it breached an obligation independent of the terms of its contract. *Pinnacle Architecture, Inc. v. Hiscox, Inc.*, No. 3:20-cv-01922-HZ, 2021 WL 2418561, at *5 (D Or June 14, 2021).

Owner hired Architects to perform architecture services for a planned psychiatric hospital. After Architects' original plans failed to comply with state regulations for psychiatric hospitals, Owner and Architects executed a second contract for the redesign of the project. Architects' second set of plans was premised on its ability to obtain certain waivers from the Oregon Health Authority (OHA) that the OHA subsequently declined to issue. Owner then filed suit against Architects, alleging "incomplete, negligent, and defective design."

Architects notified their professional liability Insurer of the lawsuit, but Insurer responded that it had no duty to defend Architects because the claim was subject to an exclusion for breach of contract claims in Architects' professional liability policy. The Court was tasked with determining whether Insurer had a duty to defend Architects.

Relying on established Oregon law, the Court explained that an insurer's duty to defend is expansive and is triggered if any allegations in the complaint could be read as potentially affording coverage under the policy. Conversely, policy exclusions are to be construed narrowly, with any ambiguity being resolved in favor of the insured and against the insurer.

Turning to the exclusion for breach of contract claims in Architects' policy with Insurer, the Court emphasized that Oregon law recognizes a tort action between parties to a contract in instances where one party has breached an obligation that is independent of the terms of the contract. Because Architects owed Owner a professional duty of care that was independent of any contract between them, Owner's lawsuit against Architects supported a negligence claim in addition to a breach of contract claim.

Construing the exclusion of breach of contract narrowly, the Court concluded that Owner's allegations of negligence against Architects were not subject to the exclusion, and Insured therefore had a duty to defend Architects in the underlying suit.

*IV. Real Property.*

EASEMENTS: In a claim for an easement by prescription, the presumption of adverse use does not apply where the easement claimant and competing landowner are next-door neighbors, rather than strangers. *Hisey v. Patrick*, 309 Or App 625, 638-39, 484 P3d 377 (2021).

Plaintiff-Claimants and Defendant-Landowners were neighboring landowners whose residences were located atop a ridge overlooking the Umpqua River. The narrow nature of the ridgetop and steep drop-offs on each side made turning a vehicle around on the ridgetop infeasible, causing Plaintiff-Claimants to regularly drive over a portion of Defendant-Landowners' driveway.

After Plaintiff-Claimants' request for an easement was rejected by Defendant-Landowners, the Plaintiff-Claimants filed suit and asserted their right to a prescriptive easement and implied easement over the contested driveway area.

The trial court found that Plaintiff-Claimants established an easement by prescription by proving each of the required elements, namely their open and notorious use of the contested area in a manner that was adverse to the Defendant-Landowners' rights for a continuous and uninterrupted period of ten years. In reaching this conclusion, the trial court applied Oregon's common law presumption of adverse use applicable to cases where an easement claimant first proves open and notorious use for the requisite time period.

On appeal, Defendant-Landowners argued that the trial court improperly applied the rebuttable presumption of adverse use, citing Oregon Supreme Court precedent that the presumption "applies in ordinary cases, in which the person claiming the easement by prescription is a stranger to the landowner." To the contrary, Defendant-Landowners argued, the Supreme Court previously held that the presumption does not apply "when the nature of the land or the

relationship between the parties is such that the use of the owner's property is not likely to put the owner on notice of the adverse nature of the use."

The Court of Appeals agreed with Defendant-Landowners. Pointing to the nature of the contested property as a driveway between the homes of neighbors, rather than strangers, the Court concluded that the presumption of adversity did not apply, even where the neighbors experienced a contentious relationship. As Plaintiff-Claimants had not otherwise presented any evidence that their use of the driveway was adverse to Defendant-Landowners' rights, the Court held that Plaintiff-Claimants had not established an easement by prescription and reversed the trial court's ruling.

INVERSE CONDEMNATION: While access to a business' loading dock was made more inconvenient as a result of an adjacent construction project, the business could not establish a takings claim where it still maintained reasonable access to its property. *Kiasantana LLC v. Tri-County Metropolitan Transportation District of Oregon, et al.*, No. 3:20-cv-1419-SI, 2021 WL 2903228, at ** 5-6 (D Or July 9, 2021).

Camera Company leased commercial real property from Owner that featured a loading dock on the westernmost side of the property, which Camera Company regularly used in the operation of its business. After a Municipal Entity constructed a pedestrian and cyclist bridge adjacent to the property, the loading dock became virtually inaccessible to Camera Company's commercial trucks.

Owner and Camera Company filed suit against the Municipal Entity in federal court, asserting federal and state constitutional inverse condemnation claims.

As a threshold matter, the Court determined that Owner and Camera Company's claims primarily relied upon Oregon law, as the existence of a valid property interest is a prerequisite in all takings claims under either the Oregon Constitution of the U.S. Constitution.

Applying Oregon law, the Court dismissed Owner and Camera Company's argument that they maintained an existing property right to continued vehicular access of the entire street front along the property as it existed on the date that Owner acquired the property. Rather, the Court clarified that a property owner in Oregon has no reasonable expectation or valid property interest in an unchanging form of access to the property, so long as "reasonable access" to the property remains.

The fact that the Camera Company's access to the property and loading dock merely became more inconvenient was insufficient to prove that the pedestrian and cyclist bridge denied Camera Company of reasonable access to the property. As a result, the Court dismissed Owner and Camera Company's takings claims.

### *V. Land Use.*

JUST COMPENSATION: A municipal ordinance limiting the allowable square footage of residential construction did not restrict the residential use of the subject property so as to entitle the landowner to just compensation under Measure 49. *Moore v. City of Eugene*, 308 Or App 318, 335-36, 482 P3d 190 (2020).

Landowner brought a claim for just compensation under Measure 49, a statewide ballot measure that entitles a landowner whose desired use of their property is restricted by new land use regulations to either be compensated for the reduction in their property's fair market value or to obtain a waiver of the regulation.

In particular, Landowner sought to construct a 1,200 square foot residence on her property in Eugene, Oregon; however, the City's newly enacted ordinance limited the square footage of any residence to ten percent of the total lot area. Under this provision, Landowner could construct, at most, a 462 square foot residence on her

property. Landowner sought either just compensation for the reduction in her property's fair market value or a waiver of the ordinance.

The City denied Landowner's Measure 49 claim, finding that Landowner failed to satisfy the requirement that the new regulation restrict her desired use of the property. Landowner filed a writ of review with the trial court, which upheld the City's determination on the grounds that the regulation must actually prohibit Landowner's residential use of the property to give rise to a Measure 49 claim.

On appeal, the Court was asked to interpret the plain language of Measure 49, including its definition of a "land use regulation" to include a "provision of a city comprehensive plan, zoning ordinance or land division ordinance that restricts the residential use of private real property zoned for residential use." To the Court, the use of the term "restricts" referred to a regulation that limited the owner's preexisting legal right to use the property for a residential purpose, not a regulation that merely changed siting or development standards.

The Court concluded that the City ordinance establishing a dwelling size standard did not restrict the residential use of Landowner's property and, therefore, the trial court's determination should be upheld.

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**LIENING PUBLIC PROJECTS: YOU CAN'T – OR CAN YOU?**

*Alix Town*
*Oles Morrison Rinker & Baker, LLP*

Somewhat unusually as compared to other industries, construction contractors and owners have created systems whereby the contractors are guaranteed payment upon performance – either by the property owner or through a third-party bond. In private construction, contractors have lien rights to lien the real property and potentially force the sale of the property to recover their unpaid contract balances. However, in public construction, forcing the sale of public property to recover unpaid contract balances was deemed to be against public policy. So the system of bonding was created to allow contractors to still have a guaranteed payment avenue for their work. In 1894, the Federal Government instituted the Miller Act (then known as the Heard Act) that created a single performance and payment bond. In 1935, the Heard Act was updated to the Miller Act that construction practitioners recognize today. Similarly, state legislatures have enacted "Little Miller Acts" that provide the same protections to contractors. This system works well when the public owner is improving public land, but what happens with a private entity is improving public land? A gap appears.

There are many instances where a private entity may be improving public land such as a public-private partnership. In those instances, there may not be a payment guarantee. There may not be a payment bond but the lien rights are also questionable because the underlying property is public property, which cannot be foreclosed or liened. Many states do not have case law addressing how these situations are handled; however, Oregon does.

In *Robertson, Hay & Wallace v. Kunkle*, a note holder moved to foreclose the leasehold for a lien for labor and materials used in construction on

land leased by the defendant from the Port of Portland. 69 Or. App. 99, 686 P.2d 399 (1984). First Interstate Bank, the mortgage holder, tried to invalidate the lien so that it could foreclose on the mortgage. The trial court ordered the sale of the defendant's interest in the lease and the improvements on the property of which the Plaintiff's lien would have highest priority. First Interstate Bank argued that the lien was invalid because it was placed on public property. In specific, First Interstate argued that "because allowing an encumbrance on the leasehold by operation of law violates a covenant in the lease, it could result in a default. If that occurred, the Port would have, and might exercise, the option to terminate the lease, in which case 'plaintiff's lien must attach to nothing or to public property." Id. at 404. The Court of Appeals declined to address the issue finding it to be hypothetical commenting in dicta that "if the Port were to terminate the lease First Interstate's mortgage would be in jeopardy." *Id.*


Alix

This case indicates that public property can be liened if the lien attaches to a property right that is outside of the public domain. If the property is leased, the lien holder can foreclose on the leasehold. However, at the sale of the leasehold interest, the purchaser takes both the benefits and the obligations of the leasehold, which makes it a risky item to foreclose on. If there is a private interest in a public easement, such as equipment installed in a commercial kitchen that is part of a public leasehold, the private property can be repossessed and foreclosed on. In a long term public-private ownership, such as a toll operation, it might be a better strategy to forgo the lien, obtain a judgment, and then garnish the income from the partnership.

Liens and bonds are important to securing a right to payment in construction. However, there are gaps in public-private procurement that neither requires a bond nor allows for an obvious lien to attach. In those instances, creative thinking is necessary in order to secure payment rights.

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## LAKE HILLS ROUND 2: THE SPEARIN DOCTRINE CLARIFIED – AGAIN

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In our December 2020 issue, Curtis Welch provided a detailed summary of a Washington Court of Appeals case that provided significant guidance on the application of the *Spearin* doctine as a defense to construction defect claims. *Lakehill Investments LLC v. Rushforth Construction Company, Inc.*, 472 P.3d 337 (Wash. Ct. App. 2020). That issue is available here: https://constructionlaw.osbar.org/files/2020-December.pdf

In September 2021, the Washington Supreme Court issued a decision reversing the Court of Appeals and rejecting the position that a general contractor must prove that the damages were caused "solely" by defective plans and specifications.

Most construction attorneys are generally familiar with basic concept behind the *Spearin* doctrine. Anyone litigating construction defect cases probably see it raised as an affirmative defense in almost every case. It is also almost universally recognized by state and federal courts, although

the doctrine does vary a little bit from state to state, as each state recognizes different exceptions or limitations.


Alex

The *Spearin* doctrine arises out of fundamental contract principles. In its most simplistic form, it refers the principle that an owner implicitly warrants the accuracy of any plans and specifications provided to the contractor. It can be used as both a shield and a sword, meaning any breach of the implied warranty could (i) entitle contractor to additional compensation; (ii) relieve the contractor for liability for the resulting damages; or (iii) both.

In concept, the application of the principle is simple. In practice, not so much. As a tool available to the contractor, the burden of proof obviously will lie with the contractor, whether or not the contractor is bringing a claim for compensation or asserting the doctrine as an affirmative defense to defects. But beyond that, it gets murkier. Whether it be delays, claims for additional compensation, or defects, few construction claims result from only one cause. So, the real question, as the Washington Supreme Court noted, is how the doctrine works when the plans and specifications *and* the contractor performs deficient work?

In *Lake Hills*, the project owner brought claims against the general contractor for construction defects in eight distinct areas of the project. The general contractor raised the *Spearin* doctrine as an affirmative defense. At trial, the court provided a special instruction to the jury on this affirmative defense: "[General contractor] has the burden to prove that [owner] provided the plans and specifications for an area of work at issue, that t[general contractor] followed those plans and specifications, and that the defects resulted from defects in the plans or specifications."

The Washington Court of Appeals determined that this instruction was erroneous because it understated the general contractor's burden of proof because it allowed the jury to find in favor of the general contractor if any part of the defect resulted from the plans and specifications. Rather, according to the Court of Appeals, "To be relieved of all liability for its breaches, [general contractor] had to prove [owner]'s defective designs 'solely' caused the [owner]'s damages."

The Washington Supreme Court reversed. The court agreed that in order to be a "complete" defense to any liability for defects, a contractor must prove that the damages from defects were solely due to the design. However, the court rejected the "all-or-nothing" approach adopted by the lower court. Rather, "if the defects were caused by a combination of deficient performance and deficient design, then it is not a complete defense." Therefore, the instructions must be "sufficient to allow the jury to apportion fault between [owner] and [general contractor]."

In summary, the recent *Lake Hills* decision suggests that the *Spearin* doctrine, as an affirmative defense, should be treated similar to the comparative fault doctrine or contributory negligence defense. Specifically, if a contractor fails to follow the design or otherwise performs deficient work, it can still avail itself of the protections of the *Spearin* doctrine if the defective design contributed to the resulting damages. It will be up to the jury to allocate fault between the construction defects and design errors.

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**DECLARATORY JUDGMENT ACTIONS: AN UNDERUTILIZED AND OFTEN MISUNDERSTOOD METHOD OF RESOLVING DISPUTES**

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If a contractor finds itself in a dispute over the meaning or implementation of a written contract, it should consider bringing a declaratory judgment action pursuant to ORS chapter 28, which is Oregon's adoption of the Uniform Declaratory Judgment Act. A declaratory judgment action can also be used to determine the construction or validity of a constitution, statute, municipal charter, or ordinance and to obtain a declaration of "rights, status or other legal relations thereunder." ORS 28.020. Declaratory judgment actions are used to "settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations," and the statutory chapter governing its implementation is to be "liberally construed and administered." ORS 28.120.

The scope and capacity of a declaratory judgment action are broad. They may be used to obtain either an affirmative or negative declaration, and they can be sought without seeking any other further relief beyond the declaration. ORS 28.010. With respect to a contract, a contractor may seek for it to be construed either before or after there has been a breach. ORS 28.030. In addition, a party may later seek supplemental relief based on a declaratory judgment. ORS 28.080.

A declaratory judgment action is also amorphous in structure; it may be either legal or equitable, depending on the nature of the relief sought. *Ken Leahy Construction, Inc. v. Cascade General, Inc.*, 329 Or 566, 571, 994 P2d 112 (1999). As a practical matter, the difference between a legal declaratory judgment action and an equitable one simply comes down to jury involvement and the standard of review on appeal. Either way, the court is tasked with making a declaration of the parties' rights. *Beldt v. Leise*, 185 Or App 572, 576, 60 P3d 1119 (2003).

In order to bring a declaratory judgment action, there must be both: (1) a judicial controversy and, (2) subject matter jurisdiction. *Brown v. Oregon State Bar*, 293 Or 446, 449-50, 648 P2d 1289 (1982). In order to constitute a judicial controversy, there must be an "actual and substantial controversy between parties having adverse legal interests," which involves "present facts as opposed to a dispute which is based on future events of a hypothetical issue." *Id.* at 449. In other words, the court needs to be able to issue "specific relief through a binding decree as opposed to an advisory opinion which is binding on no one." *Id.* With respect to subject matter jurisdiction, the requirement is simply that the action be brought in the proper court which would have jurisdiction over the subject matter of the dispute. *Id.*at 449-50.

Katie Jo

Perhaps the most misunderstood aspect of a declaratory judgment action is that, as long as it meets the requirements of a justiciable controversy and subject matter jurisdiction, the court must issue a declaration of the parties' rights, even if that declaration is not the one sought by a party. The Oregon Court of Appeals recently reiterated this requirement in the case of *Borough v.*

*Caldwell*, 314 Or App 48, 60-61 (August 18, 2021):

> "Perhaps because that approach is somewhat counterintuitive, trial courts sometimes *dismiss* declaratory judgment claims upon determining that the requested declaration would be improper—essentially treating them as they would a contract claim or other kind of failed claim—rather than making declarations different from the ones requested by the plaintiff. In such situations, we routinely vacate the existing judgment and remand for entry of a new judgment that contains a declaration of rights." [emphasis in original]

Along those lines, claims for declaratory judgment are not generally susceptible to motions to dismiss for failure to state a claim. *See, e.g., Erwin v. Oregon State Bar*, 149 Or App 99, 106, 941 P2d 1094 (1997) ("as a rule, an action for declaratory judgment may not be dismissed for failure to state a claim. If the complaint presents a justiciable controversy, a motion to dismiss brought under ORCP 21A(8) should be denied"); *Doe v. Medford School Dist. 549C*, 232 Or App 38, 46, 221 P3d 787 (2009) ("The proper procedure is for the defendant to answer and for the parties then to submit the matter to the court for a declaration as to the merits of the claim."); *Advance Resorts of America, Inc. v. City of Wheeler*, 141 Or App 166, 180, 917 P2d 61, *rev den*, 324 Or 322 (1996) ("A claim for declaratory relief may be dismissed only if there is no justiciable controversy").

Because a claim for declaratory judgment is both adaptable and resistant to dismissal, it is a helpful tool to utilize when a contractor needs to resolve a dispute over a written contract, or other writing, such as a statute or ordinance.

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## MAKING (SOME) SENSE OUT OF EVOLVING VACCINE MANDATES

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For even the most seasoned of construction attorneys (not to mention the unaided construction contractor), navigating changing vaccine mandates can be daunting; it is no wonder there continues to be confusion about these mandates' effects. At first, members of the construction industry and construction law bar discussed these new rules in terms of how they applied to contractors working on federal or state projects. Then the federal government expanded the mandates to include *all* employers who employ at least 100 employees, regardless of whether they work on federal or state projects. While there has been a lot of reporting out on these new issues, the purpose of this article is to clarify the current state of vaccine mandates and offer some general guidance in terms of how our clients can prepare and best position themselves in the coming months.

### *I. Emergency Temporary Standards: Applies to All Employers, Not Just Contractors.*

On November 4, the federal government – through the Occupational Health and Safety Administration ("OSHA") – issued a new mandate as an Emergency Temporary Standard ("ETS") that now applies to all employers with over 100 employees. Several states immediately filed legal actions against the ETS in federal courts, and on November 6, the Court of Appeals for the Fifth Circuit issued an immediate stay of the ETS pending arguments over whether OSHA had authority to issue the mandate. While the ETS is currently on hold, employers should prepare to comply.


Stephanie

Under the ETS, all employers are required to ensure their employees are vaccinated or undergo weekly COVID-19 testing and test negative in order to work. The ETS requires employers to pay for up to four hours of paid time at the regular rate of pay for purposes of receiving the primary vaccination dose. Employers may require employees to use accrued but unused sick leave or PTO to recover from the side effects of a vaccine dose, but may not require an employee to use vacation time if that is in a separate bank of leave. Employers also may not require employees to go negative for paid leave. The ETS does not require employers to pay for the costs associated with testing, but provides that other laws or collective bargaining agreements may apply. Oregon and Washington both have state OSHA plans and have 30 days in which to adopt the federal standard, or to create their own more restrictive standard.

### *II. Prior Federal Mandate: Federal Contractors –NEW FEDERAL INJUNCTION.*

Previously, the federal government ordered a more onerous requirement for contractors working on federal projects: mandate vaccination for employees who do not have a religious or medical exemption from vaccination – full stop. Basically, there is no testing option for contractors working on federal public works projects. So, non-contractor employers affected by the new ETS might fare better because they would be able to hire employees who agree to comply with the weekly testing requirements versus vaccination.

For all federal contractors, employees must either provide proof of vaccination, have a medical or religious exemption, or begin the disciplinary process to remove employees who refuse vaccination.

On November 10, the Safer Federal Workforce Task Force issued a new "COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors." This new Guidance updated the deadline by which employees of covered contractors need to be fully vaccinated to **January 18, 2022**. The Guidance also notes that Federal agencies can provide limited exceptions to this deadline if the agency has an urgent, mission-critical need for a covered contractor to have covered contractor employees begin work on a covered contract or at a covered workplace before becoming fully vaccinated. The extension of time for employees to become fully vaccinated is then limited to 60 days.

In addition to updating the deadline for employees to be vaccinated, the Safer Federal Workforce Task Force has also provided examples of signs that contractors can use to comply with the Guidance's requirement that contractors post signage at entrances to covered contractor workplaces providing information on safety protocols for fully vaccinated and not fully vaccinated individuals. The Guidance also provides updated FAQs explaining that the requirements applicable to covered contractor workplaces apply to irrespective of whether the work is performed at a covered contractor workplace or at a federal workplace.

With all of that said, right before this article went to print, on December 7, a federal district court judge in the United States District Court for the Southern District of Georgia issued a preliminary injunction enjoining enforcement of the vaccine mandate for federal contractors in all covered contracts in any

state or territory of the United States. In other words, **this is a nationwide injunction and applies to all federal contractors.** While there had been other lawsuits filed by different states against this federal vaccine mandate, there had not been a full-scale injunction halting the government's enforcement of this rule until now.

This means there is a significant possibility that the January 18, 2022 deadline for compliance will be delayed as a result of this injunction. There also now appears to be a material possibility that the federal contractor vaccine mandate will ultimately be affirmed as outside the scope of the President's authority. But, diligent contractors will continue preparing for the mandate in any event, pending final resolution of this issue.

*III. Existing Oregon and Local Mandates: state Contractors.*

As we all know, Oregon previously issued similar vaccine mandates that affect large and small contractors who work for state agencies, school districts, or medical providers. Metro and several Oregon municipalities have also started to mandate vaccinations for contractors who perform work on their projects.

Jean

For those contractors who work for the State of Oregon, school districts, or health care providers, the deadline for vaccination was October 18, 2021. Employees were to provide proof of vaccination or a valid exemption request by that date, or suffer termination of employment.

While various parties have filed numerous lawsuits challenging Oregon's vaccine mandates, those litigants have had little success. So far, at least two lawsuits filed by health care workers and police officers, respectively, have failed to successfully persuade a court to grant an injunction against enforcement of the mandates. While another handful of lawsuits are still pending, we believe the real battle lines might end up being over what constitutes a sincerely held religious belief under Title VII for applicability of the religious exemption versus the vaccine mandates themselves.

*IV. Planning Ahead and Absorbing Impacts.*

As it stands now, contractors in Oregon must begin to comply with the vaccine mandates. A best practice for contractors moving forward will be to establish a company-wide vaccination policy, which will vary depending on whether a contractor contracts with the federal, state, or local government. For contractors with federal or state contracts, the policy should mandate vaccination and provide information on medical and religious exemptions. For contractors who are subject to the ETS, one requirement of the standard is for employers to create a vaccine policy that either requires mandatory vaccination, or that allows testing as an option.

COVID-19 has been challenging for employers, and this recent spate of vaccine mandates is not going to make it any easier for contractors to complete projects on time or within budget. And, of course, these evolving mandates will likely constrict an already-tight labor market. Contractors who are affected by these government mandates should be sure to build in to their estimates costs associated with mandate compliance, if they can. Those with existing contracts should consider requesting formal contract modifications to address mandate impacts relating to both cost and time. Alternatively, they should carefully review their applicable contracts to evaluate whether they can credibly submit a change

order request to alleviate potential effects. A force majeure clause might also be instructive depending on its exact language.

This article summarizes aspects of the law and does not constitute legal advice. How these mandates apply, if at all, to your organization or clients is a more nuanced question.

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