BUSINESS BRIEFS

Legal Developments Affecting Business

Saalfeld Griggs PC

Second Quarter 2015

Subcontractor Obtains Award Against Surety Company

By Hunter Emerick

The Construction and Litigation Groups at Saalfeld Griggs PC recently obtained a favorable ruling from the Oregon Court of Appeals. The ruling imposed a judgment against a surety company for a substantial award in favor of our client. The judgment against the surety will allow collection of a judgment which, before the appeal, was entered only against a company that had no assets. Additionally, the Appellate Court allowed an award against the surety company reimbursing attorneys' fees expended by our client during the appeal.

Our client was a subcontractor on a public works project. The general contractor failed to pay the subcontractor in full for work performed pursuant to the contract, change order work, force account work, and extended use of rental equipment. The trial judge refused the subcontractor's claim for contract damages, but awarded a judgment against the general contractor for *quantum meruit* (implied contract) for the reasonable value of labor and materials provided by the subcontractor on the public works project. However, the trial court refused to require the surety company that issued a bond on the project to pay on the judgment.

The Court of Appeals reversed the trial court's decision, adding the surety company to the judgment in favor of the subcontractor. Apparently, the trial court decided that the surety company did not have to pay for the subcontractor's materials and labor unless the written agreement between the parties required payment. The Court of Appeals ruled that a claim under *quantum meruit* can require a surety issuing a bond on a public works project to pay for the reasonable value of labor and services provided by a subcontractor to the project. This is so, even if the subcontractor's contract claim was not sustained at trial.

The appellate court noted that a claim against a surety that issued a bond on a public works project requires that the general contractor is liable for labor or materials provided by its subcontractor on a public works project. Whether the contractor is liable to the subcontractor for breach of any express contract or for the reasonable value of labor or services, pursuant to an implied contract, is not relevant.

The subcontractor was entitled to its attorneys' fees incurred on appeal because claims under the Little Miller Act allow reimbursement of attorneys' fees to successful bond claimants. This decision is not yet final, as the surety company has not requested review by the Oregon Supreme Court. Our team, however, remains hopeful that either the Supreme Court will refuse to take the appeal or that it will affirm the Court of Appeals' decision requiring the surety company to pay on the bond it issued on the public works project.

In This Issue

Land Use Legislation Update
By Mark Shipman and Alan Sorem

Each year when the Oregon State Legislature meets, members of the legislative body propose a number of land use bills. This year is no exception. The following is a selective summary of land use bills currently pending before the Oregon State Legislature.

Urban Growth Boundary Bills
Last year, the headline act of the Oregon Legislature's land use bills was HB 4078, the land use "Grand Bargain," which designated urban reserves, rural reserves, and a new Metro urban growth boundary in Washington County. The legislature used Metro Council's Ordinance No. 11-4245 (designation of urban and rural reserves) and Ordinance No. 12-UGB-001823 (expansion of the urban grown boundary) as a starting point, then re-designated properties as urban, rural or undesignated and brought certain properties within the urban growth boundary ("UGB"). In 2015 many municipalities sought legislative fixes to their own UGB problems, including Woodburn in HB 2649, Langdon Farms in HB 3313, and Bend in SB 851. However, as of the date of this article, the majority of the bills are either dead by rule or not expected to progress further this session.

The only bill that may still have a chance of passing, as of the date of this article, is SB 716, which authorizes Clackamas, Multnomah and Washington Counties to each designate one large-lot industrial reserve of 150 to 500 acres. While SB 716 may be the Legislature's sole concession to the expediency, it appears the Legislature continues to hope that ORS Chapter 197A, which was adopted in 2013 and becomes effective on January 1, 2016, will address the need to update the state's urban growth boundary amendment process beyond Metro. The Department of Land Conservation and Development ("DLCD") is expected to issue proposed rules in the upcoming year. These rules are intended to provide new, simplified methods which growing cities can use to evaluate the capacity of their UGBs.

Planning Bills
Two additional bills, if passed, will result in additional administrative rules interpreting statewide planning goals. HB 2633 requires the Land Conservation and Development Commission ("LCDC") to adopt rules to implement statewide land use planning Goal 7 related to natural hazards within two years of enactment. DLCD, in coordination with the Office of Emergency Management and other federal agencies, is expected to establish a program, or modify an existing program, to provide guidance to local governments regarding adaptive planning to reduce risk to people and property due to development in hazard areas. SB 94 is a catch-all measure for a number of concepts related to disaster preparedness. The bill is an outgrowth of the Oregon Resilience Plan, which is designed to better prepare Oregon for tsunami and earthquake risks. The proposed bill also gives LCDC broad authorization to adopt rules.

Affordable Housing
HB 2564 has passed the House and is pending before the Senate. It repeals ORS 197.309, which prevents local governments from imposing conditions on approved permits that effectively establish sales price for residential development or limit purchase to a class or group of purchasers. However, amendments to HB 2564 limit such conditions of approval to not "require more than 30 percent of housing units within a residential development to be sold at below-market rates" and also offer developers one or more of the enumerated incentives including density adjustments, fee waivers or reductions, and expedited service for permits.

Procedural and Minor Substantive Rules
As in every session, there are a number of pending bills which are procedural in nature, or make relatively minor substantive law changes that might impact future land use applications.

- HB 2830 – Modifies time period for local government to take action on application for permit, limited land use decision, or zone change after remand based on final order of Land Use Board of Appeals.
- HB 2831 – Restricts property line adjustments in resource zones for Measure 49 properties to two acres for high-value farmland or forestland or lands within ground water restricted areas and to five acres for other resource land properties.
- HB 2938 – HB 2938 – Prohibits city from requiring consent to annexation of landowner's property in exchange for city providing county service as agent of county.
- HB 3212 – Makes law or rule for restricting previously allowed farming practice land use regulation for purposes of certain land use laws for Measure 49 claims.

While it is always difficult to determine what the legislature will ultimately do with the pending legislation, if you have a question or matter that you are considering, please contact one of our firm's real estate and land use attorneys for advice.

The Cadillac Plan Tax: *What Will You Pay?*
By Christine Moehl

The Affordable Care Act ("ACA") has been around since 2010 and nearly all of the major provisions of the law have been implemented in the intervening five years. However, there is one controversial element of the ACA which has not yet taken effect – the "Cadillac Plan Tax." This tax is scheduled to take effect on January 1, 2018. The tax drew its nickname from luxury Cadillacs because it is meant to apply to high-cost, "luxury" employer-sponsored health coverage. However, many ACA experts anticipate that the Cadillac Plan Tax will have a broader impact than was initially expected, and may affect many employers who offer middle-cost coverage to their employees. Therefore, as the effective date of the Cadillac Plan Tax draws near, it is imperative that all employers examine the cost of their health benefit programs to determine if the Cadillac Plan Tax applies.

The Details: The Cadillac Plan Tax is a 40% non-deductible excise tax on employer-sponsored health coverage that is in excess of statutory limits. The limits for 2018 are $10,200 for "self-only" coverage and $27,500 for "other-than-self-only" coverage (e.g., employee plus spouse coverage and employee plus family coverage). These limits will be adjusted in future years. The tax only applies to the cost of health coverage that exceeds the statutory limit. For example, if Greg is enrolled in self-only health insurance through his employer in 2018 and that coverage costs $12,000 in premiums per year, then the amount of Cadillac Plan Tax due would be $720 (($12,000-$10,200)*40% = $720). It does not matter whether Greg's employer pays 100% of the premium or if Greg pays some portion of the premium himself, the entire $12,000 is included in the calculation.

In order to determine the cost of its employer-provided health coverage for purposes of the Cadillac Plan Tax, and employer must aggregate the cost of all of its employer-provided health benefits, not just the cost of a major medical health insurance plan. To determine the aggregate cost of coverage, an employer must include the cost of any Flexible Spending Account (FSA), Health Reimbursement Account (HRA), executive physical program, or Health Savings Account (HSA) that its

employees are enrolled in. The cost of coverage for FSAs and HSAs include both employee contributions and employer contributions. In addition, if an employee has a supplemental health policy (such as hospitalization, cancer care, or executive care) and the cost of the policy is excluded from the employee's gross income, then the cost of the policy must be included in the aggregate cost of health coverage. In some cases, on-site medical care will also be included in the cost of coverage as well.

Employers are responsible for determining the amount of Cadillac Plan Tax that is due (if any) for each of their employees. Employers must then apportion the tax to the responsible "coverage providers" and tell the coverage providers to pay their share of the tax. The coverage provider for a fully-insured major medical plan is the insurance carrier. In the case of an HSA, the coverage provider is the employer. For other arrangements (e.g., FSAs and HRAs) the coverage provider is most likely the employer, although more guidance is expected on this issue. Please contact the Employee Benefits & Executive Compensation Department if you have any questions about how the Cadillac Plan Tax may apply to you or your business.

Tips for Including a Charity in Your Estate Plan
By Freeman Green

Thinking about including your favorite charity in your estate plan? Here are four simple, but important, items to consider.

Name and Taxpayer Identification Number
Start by obtaining your charity's legal name and unique nine digit taxpayer identification number (also known as an "Employer Identification Number" or "EIN"). Your charity can provide you with this information, or it can also be obtained online via websites such as www.guidestar.org and www.charitynavigator.org. Though simple, do not overlook this critical step! Many charities have similar names. Large national charities often have local chapters with their own distinct names and EINs. If you wish to benefit the local chapter, but name the national organization, your local chapter may never benefit.

For extra credit, double-check the charity's name, EIN, and charity status with the Internal Revenue Service by entering the EIN into the Service's web-site at http://www.irs.gov/Charities-&-Non-Profits/Exempt-Organizations-Select-Check. And don't forget to print a copy for your records.

How Should the Funds Be Used?
You can specify how a recipient charity can use (or not use) your bequest. Charitable gifts limited to a specific purpose are known as "restricted" gifts. Types of restrictions include:

- Geographical (Example: This bequest shall be used for the exclusive purpose of furthering XYZ Charity's general charitable purposes in Marion County and Polk County, Oregon.);
- Specific program or area of interest (Example: This bequest shall be used for the exclusive benefit of XYZ University's College of Forestry Management.);
- Scholarship creation (Example: This bequest shall be used for the exclusive purpose of creating a scholarship fund which shall be known as the "Jane Doe Scholarship Fund," to be administered under the following provisions…)
- Endowment (Example: This bequest shall be added to XYZ Foundation's Endowment Fund, to be administered under the terms of that Fund. NOTE: some charities have an endowment fund with a separate name and EIN.); and

- Prohibitions (Example: This bequest shall be used for the XYZ University's general charitable purposes, except that no part of this bequest shall be used to fund cage-fighting intramurals.)

Use caution and prudence when restricting bequests to a specific purpose! Restricted bequests can be problematic for charities if not carefully thought-out and drafted. Discuss your desires with the charity in advance to ensure that the intended purpose is clear to the charity and logistically workable.

Keep in mind that charities appreciate and need unrestricted bequests to handle day-to-day operations. Consider leaving at least a portion of the bequest as an unrestricted gift to help "keep the lights on" while your charity pursues your specific desires.

Choose the Best Vehicle for Delivering Your Gift
A charitable bequest can be included in your will or trust. You may name the charity as a beneficiary of a life insurance policy, annuity, or retirement account (IRA, 401k, 403(b), etc). Funding the bequest with a pretax annuity or retirement account has the added benefit of saving income tax that would otherwise be triggered if the account were distributed to an individual.

Notify the Charity of Your Future Gift
Finally, consider informing your charity of the future bequest. I have heard a number of charities lament "We wish we could have told her 'thank you' while she was alive!"

Many charities have programs to recognize future donors and newsletters to keep those donors updated on the charity's developments and events. Your charity is excited about its mission and would love to share that excitement with you. Notifying the charity also allows the charity to receive feedback from you regarding the charity's mission and the programs you are particularly passionate about, which, in turn, can influence the direction and future policies of the charity.

Parting Thoughts
When including a charity in your estate plan, take time to think through these four items. Discuss them with your family, estate planning attorney, CPA, financial adviser, and charity. Doing so will ensure a final gift that efficiently meets your wishes and benefits the causes important to you.

Protecting Perfected Secured Interests:
JP Morgan's $1.5 Billion Warning
By Stephanie Schilling

For lenders who maintain perfected security interests in collateral, the Second Circuit's recent decision in *In Re Motors Liquidation Company, et al.* will go down in history as a middle-of-the-night, sweat-inducing source of anxiety. For business owners and others who rely on lenders to fund their ventures, the decision reveals the mechanics of a transaction. The characters and documents involved are common players in the financial industry: JP Morgan Chase Bank, N.A. was the lender; JP Morgan's law firm was Simpson Thacher & Bartlett, LLP; General Motors was the borrower; and GM's law firm was Mayer Brown.

There were two important documents at issue in the Court's decision. UCC-1 financing statements are public records perfecting a lender's secured interest in collateral other than real property. (Real property is perfected by recording in county land records.) UCC-3 termination statements release a lender's secured interest in the personal property, commonly after a loan is paid in full. In this recent case, there were three UCC-1 financing statements involved. Each UCC-1 financing statement was part of a complex loan structure involving the same parties, JP Morgan and GM. JP Morgan, GM, and their counsel commonly referred to the loans based

on the collateral used to secure the loans. One was identified as the "Synthetic Lease" and the other as the "GM Main Term Loan." Upon completion of the term of a Synthetic Lease held by JP Morgan, two of the three UCC-1 financing statements were to be terminated. However, the third UCC-1 financing statement perfected a security interest in the GM Main Term Loan for $1.5 Billion, or five times the amount of the Synthetic Lease. JP Morgan was the nominated lender for a syndicate of lenders for the GM Main Term Loan. A series of failures on the part of JP Morgan, GM, and their counsel resulted in the filing of UCC-3 termination statements and subsequent release of JP Morgan's security interest not only in the Synthetic Lease, but also a release of the lending syndicate's perfected security interest in the GM Main Term Loan. Filing the UCC-3 Termination Statement left the $1.5 Billion GM Main Term Loan unsecured.

The termination error and resulting unsecured status in GM's bankruptcy could have been caught a number of times along the way. First, the partner in the law firm who had assigned the task of drafting escrow instructions to the associate attorney could have discovered the error when reviewing the associate's escrow checklist. Second, the associate could have noticed that one of the UCC-1 financing statements that the paralegal identified did not relate to the $300 Million Synthetic Lease, but instead applied to the second $1.5 Billion GM Main Term Loan. Third, upon sending the escrow checklist and termination statements to all parties, any one of them could have discovered the error. Fourth, JP Morgan could have discovered the error when it received the escrow instructions. Finally, GM could have discovered the error before it filed the termination statements.

Because of this inattention to detail, the 2nd Circuit found: (1) that the objective intent of the filed termination statement controlled; and (2) that the authority of GM's counsel extended to filing the termination statement, albeit on the wrong loan. The court held that the security interest perfecting the GM Main Term Loan had been terminated. Had the court found otherwise, it would have rubber stamped actions showing that the parties simply failed to carefully review their documents prior to filing. In the opinion of the Court, this type of inattention affects the public record and all those who rely on it.

The result is a wake-up call for those working in the lending industry. Creditors are responsible for checking and double checking all of the documents that document, perfect, or release secured interests, whether or not those documents are part of the public record. The documents that become routine over time expose creditors to liability. Careful and clear drafting can avoid these issues by identifying the parties and specifically describing the collateral. Finally, parties should take the time to cross reference their drafting with loan documentation to ensure accuracy and ability to locate information in the future, such as when it is time to renew or terminate a security interest.

Creditors are one of the largest groups relying on the public record to identify the risk of making a loan, or to determine the equity of assets to be used as collateral. For this reason, creditors shouldn't underestimate the importance of documentation. Often all that is required is a fresh pair of eyes to provide the scrutiny required to prevent or correct inadvertent documentation errors. Our Creditor's Rights and Bankruptcy attorneys would welcome the opportunity to confirm the accuracy of UCC-1 financing statements, or lend a fresh perspective on a complex loan transaction that you fear has become routine and more prone to errors.

BUSINESS BRIEFS

FIRM ANNOUNCEMENTS & SEMINARS

Con-Tech, a charitable corporation that provides opportunities to local high school students to construct a residence, hosted its first annual Raise the Roof Auction in April. Mike Erdmann, CEO of the Home Builders Association of Marion & Polk Counties, served as the Master of Ceremonies, with Gordon King, president, and **Hunter Emerick**, secretary of Con-Tech, Inc., who also spoke. More than 250 supporters from the local building industry, title companies, real estate companies, and the Salem-Keizer School District attended and raised more than $30,000 to support the upcoming 2016 build project. The 2015 house build project is nearing completion and will soon be listed for sale.

Jeff Moore, a partner in our Estate Planning & Administration Group, participated in **"Career Connections,"** a lively and educational event to benefit our youth. It was an opportunity for more than 1,000 Salem-Keizer high school students to engage with future employers and improve their interviewing skills. For more information, visit: www.workandlearnnow.com.

Paul Sundermier, Of Counsel to the firm, will Co-Chair The Seminar Group's **8th Annual Eminent Domain Seminar** in Portland, on June 4-5. The firm will also co-sponsor a reception after Thursday's program. This seminar will include an overview and update of Oregon and federal eminent domain and land valuation litigation, with emphasis on special appraisal problems in eminent domain cases and recent court decisions impacting state and federal eminent domain.

Christine Moehl, a partner in our Employee Benefits & Executive Compensation Group, recently spoke to the Portland Chapter of the **Western Pension & Benefits Council** on Health Care Compliance and Preparing for the Cadillac Tax.

The **Oregon Bankers Association** published an article by **Randy Cook** titled "Using Nonqualified Deferred Compensation to Attract and Retain Key Employees." It discusses how an employer's retirement and executive compensation programs can be tailored to fit the specific needs of the employer's key employees.

Saalfeld Griggs is proud to support the many organizations in the mid-Willamette Valley and their activities that enhance local livability.

- The firm's **Health Law Industry Group** is pleased to sponsor of the monthly meeting of the Marion Polk Medical Society on May 28. The annual scholarships will be awarded to celebrate the next generation of medical professionals in our community.
- **Salem Chamber of Commerce** presents its **Vision Initiative** on June 9. Rick Davidson, CEO of Century 21 Real Estate LLC, will keynote this event, challenging attendees to ignite their passion and encourage the potential of their team. For more information, call 503.588.1466 or visit www.salemchamber.org.
- **SEDCOR** will host its annual golf tournament on June 19 at Illahe Hills Country Club. For information, please contact tlundy@sedcor.com or call 503.588.6225.
- Our **Agriculture Industry Group** will gather at the **80th Annual St. Paul Rodeo** on July 1. Come visit us in the entertainment tent, enjoy an evening of rodeo, and stay for the fireworks afterward. For more information, please visit www.stpaulrodeo.com.
- On July 22, join us at Salem's **River Rock** Wednesday Evening Concert Series. Our **Construction Industry Group** will gather with clients and friends of the firm who work in the construction industry. Check out the full summer line-up at: www.riverrocksalem.com.

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