SUMMARY PROCEEDINGS: Legal Issues and Liability for Construction Along the Ocean Shore

An Oregon State University Extension Service Seminar Conducted Tuesday, February 23, 1982 at the Oregon State University Marine Science Center, Newport, Oregon

OSU Sea Grant/Extension Marine Advisory Program
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Marine Science Center,

Newport, Oregon

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PREFACE

Oregon's ocean shore is world-renowned for its rugged beauty, its fortress-like headlands and sweeping beaches and sand dunes. Its allure has attracted millions, most to visit, but some to stay. They build their homes and resorts on the edges of the marine terrace or the high dune, so as to watch the endless waves, the storm-tossed sea or the setting sun.

But the shoreline is constantly changing and on the move. Erosion and accretion, usually imperceptible, is sometimes rapid and dramatic. Waves crash, beaches disappear, rain persists, and hills slide in a never-ending cycle. Sometimes, the structures we build along the ocean shore are damaged or destroyed in the process.

Who is responsible for the damage? Who must pay? Homeowner, realtor, developer, attorney, architect, planner, banker, local official, the government? This seminar, conducted at the Oregon State University Marine Science Center on February 23, 1982, addresses these questions and suggests ways that public and private parties involved can help protect themselves.

Special thanks are due to those who prepared the excellent draft manuscripts that make up this summary proceedings: Professor Richard Hildreth and law students Jerre Ziebelman and Glen Thompson, University of Oregon Law School. Thanks also to the attorneys and other speakers who generously shared their time and expertise with the 120 seminar attendees. Arly Helm typed the final manuscript and offered useful editorial suggestions.

LAWS REGULATING OCEAN SHORE DEVELOPMENT

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INTRODUCTION

Continuing severe weather conditions on the Oregon coast suggest the timeliness of a review of the laws regulating development along the ocean shore. In reviewing them, in addition to describing their major provisions, I will attempt to give my personal assessment of their effectiveness to date in minimizing losses of life and property caused by coastal natural hazards. The laws regulating coastal development can conveniently be addressed at three levels: federal, state, and local.

FEDERAL LAWS

Coastal Zone Management Act

The Federal Coastal Zone Management Act, under which the State of Oregon's Coastal Zone Management program has been funded and administered over the last several years, requires the Oregon Coastal Management Program to contain a planning process for shoreline erosion problems.[1] In addition, the 1980 amendments to the Federal Coastal Zone Management Act stated that state coastal programs should manage coastal development to minimize the loss of life and property caused by improper development in flood-prone, storm surge, geological hazard, and erosion-prone areas.[2] I will describe the response of the State of Oregon to these federal mandates in a moment. The important thing to note at this point is that the force of these federal mandates has been substantially reduced by the Reagan budget cuts, which have significantly reduced the federal funds flowing to coastal states in support of coastal planning and management.

Federal Flood Insurance

The other federal program with major relevance to coastal development in hazardous areas is the Federal Flood Insurance Program,[3] which has as one of its goals encouraging wise management of flood-prone land in order to minimize flood-related damage. Because the program also provides federally subsidized flood insurance, it has been criticized as promoting development in flood-prone areas, rather than discouraging it.

Efforts to improve the program are moving slowly. To remove the federal flood insurance subsidy of development on undeveloped barrier islands, Congress recently mandated that no new flood insurance be provided for new construction on coastal barriers after September 30, 1983.[4] The definition of "coastal barrier" contained in the law would seem in include sand spits on the Oregon coast, but to date the Secretary of the Interior has only proposed coastal barriers on the East and Gulf coasts for designation as undeveloped, and therefore ineligible for federal flood insurance after September 30, 1983.[5]

Two potentially significant changes in the federal flood insurance legislation remain largely unimplemented to date. They are provisions allowing the federal flood insurance administration to purchase severely flood-damaged buildings from an owner willing to sell, when it is covered by a valid federal flood insurance policy. Upon such a purchase, title to the property is transferred to the local government to be maintained as open space. Also, the concept of constructive total loss has been introduced to the program to allow a local government to prohibit the rebuilding of a flood-damaged structure in the designated coastal high hazard area. This enables the federal flood insurance administration to declare the property a constructive total loss for purposes of compensating the property owner, who then moves out of the coastal high hazard area.[6]

With decreased funding for the states under the Coastal Zone Management Act, and the emphasis on East and Gulf coast barrier islands in the flood insurance program, the impetus for improved planning and management of development in hazardous coastal areas on the West Coast will have to come from the state and local government levels and, perhaps even more significantly, from the private sector.

Corps of Engineers Jurisdiction

The only other federal regulatory program worth mentioning at this point is the Corps of Engineers' regulation of dredging and filling under the federal Rivers and Harbors Act, and the federal Clean Water Act.[7] The Corps programs are oriented toward protecting navigation and wetlands rather than managing development in coastal hazard areas, and generally are relevant only when shoreline protective devices are necessary to protect development. Furthermore, there are several proposals pending before Congress to reduce the Corps' jurisdiction, which, if enacted, would further reduce the federal role in managing shoreline development.

STATE LAWS

There are three state regulatory laws principally relevant to managing development in hazardous coastal areas. They are (1) the State Fill and Removal Law, (2) the State Ocean Shore Protection Law, and (3) the State Comprehensive Land Use Planning Law.

Fill and Removal Law

The first, the State Fill and Removal Law,[8] is similar to the Federal Corps of Engineers' program regulating dredging and filling, and is administered by the Division of State Lands. The law and implementing regulations contain specific standards and requirements for riprap and other bank and shore stabilization projects. Shoreline protective devices installed without the necessary permits may be ordered removed.[9] Under the Fill and Removal Law, the Division of State Lands' jurisdiction extends to the beds and banks of all waters of the state, including the Pacific Ocean. This overlaps the jurisdiction of the Parks and Recreation Division under the Ocean Shore Protection Statute discussed next, and therefore the two agencies coordinate their processing of shore protection permits.

Ocean Shore Protection Law

The Ocean Shore Protection Law[10] requires that a permit be obtained from the Parks and Recreation Division for all improvements constructed on the "ocean shore," which is defined as the zone extending landward from the extreme low tideline to the vegetation line. The vegetation line is the landward limit of public beach access rights under the famous Oregon Supreme Court decision in Thornton v. Hay,[11] and has been surveyed as the 16-foot contour line. The principal concern of the statute is preserving public access rights, although it does authorize emergency permits for shoreline protective devices where shoreline property is in imminent peril of being destroyed or damaged by action of the Pacific Ocean or any bay or river. The regulations suggest that shoreline protection projects should avoid causing erosion or safety problems for neighboring properties. The decision of the Oregon Supreme Court in State Highway Commission v. Fultz[12] indicates that the state has broad discretion to deny requests for permits for construction on the ocean shore which would have potentially severe erosion impacts on neighboring properties or be of questionable structural soundness.

The lack of a comprehensive set of standards governing construction in hazardous shoreline areas either under the Fill and Removal Law or the Shore Protection Law is to some extent corrected by the statewide land use planning goals relevant to shoreline development discussed next. Under the State Land Use Planning Law, in issuing permits under the Fill and Removal Law and the Ocean Shore and Protection Law, the Division of State Lands and the Parks and Recreation Division must act in accordance with these statewide land use planning goals.[13]

State Land Use Planning Law

The principal features of interest to us under the State Land Use Planning Law[14] are statewide planning goals 7, 17, and 18, the Natural Hazards, Shorelands, and Beaches and Dunes goals. Prior to acknowledgement of local comprehensive plans, the goals govern local land use actions directly. To be acknowledged, local comprehensive plans must comply with the goals. The state Land Conservation and Development Commission, LCDC, may impose enforcement orders and building permit moratoria on local governments who are slow in getting their plans into compliance with the goals.[15]

NATURAL HAZARDS GOAL

Goal 7, the Natural Hazards Goal, mandates that development subject to damage shall not be located in known areas of natural disasters and hazards without appropriate safeguards. The goal defines hazardous areas as areas that are subject to natural events that are known to result in death or endanger the works of man, such as: stream flooding, ocean flooding, erosion and deposition, landslides, earthquakes, and other hazards. The goal urges cities and counties not already eligible to qualify for inclusion in the federal flood insurance program previously discussed, and sets forth factors to be taken into account in locating development in hazardous areas. While not limited to the coastal areas of Oregon, the goal has obvious applications there.

SHORELANDS GOAL

Goal 17, the Shorelands Goal, also speaks about reducing the hazard to life and property. Local comprehensive plans must consider the geologic and hydrologic hazards associated with coastal shorelands. Specifically, the plans must identify floodways, adjacent areas of geologic instability, and areas of vegetation necessary to stabilize the shoreline. The goal's implementation requirements instruct local governments to regulate development in flood plain areas consistent with the hazards to life and property, and states that non-structural solutions to problems of erosion and flooding are preferred to structural solutions. Shoreline protective structures must be designed to minimize adverse impacts on water currents, erosion, and accretion patterns.[16] However, the strongest statements concerning development in hazardous coastal areas are contained in Goal 18, the Beaches and Dunes Goal.

BEACHES AND DUNES GOAL

The Beaches and Dunes Goal imposes the following key implementation requirements, among others:

(1) Local governments and state and federal agencies shall prohibit residential developments and commercial and industrial buildings on active foredunes, conditionally stable foredunes which are subject to ocean undercutting or wave overtopping. and interdune areas subject to ocean flooding.

(2) Foredunes may be breached only to replenish sand supply in interdune areas, or temporarily for emergencies.

(3) Permits for beach-front protective structures may be issued under the Ocean Shore Protection Law previously discussed only where the development existed on January 1, 1977.

LOCAL GOAL IMPLEMENTATION

LCDC policy in the local comprehensive plan acknowledgement process is that no Goal exceptions which increase the hazard to life and property, contrary to the mandates of Goals 7, 17, and 18, will be allowed.[17] Coastal cities and counties are responding to the Goals' mandates and LCDC's stringent policy against exceptions with appropriate plan provisions and implementing ordinances regulating development in hazardous areas through a variety of techniques, such as hazard overlay zoning, beach and dunes overlay zoning, site-specific geologic report requirements, and density bonus awards to developers who avoid hazardous areas. Surprising to me is the lack of reliance on the traditional shoreline development control technique of set-backs. If new development is set back a sufficient distance from eroding bluff edges or unstable dune areas, then the installation of costly shoreline protective devices to save the development is avoided. Of course, determining what is a safe distance, even with the aid of a site-specific geologic report, can be a very difficult task.

At this point a reminder about a key feature of the State Land Use Planning Law is appropriate: the point is one we all know but may tend to

forget in focusing on the goals' requirements. The point is that once local comprehensive plans and implementing measures have been acknowledged by LCDC, local land use actions with respect to development in hazardous coastal areas are reviewable only against the plan and implementing ordinances--the goals drop out of the picture except, somewhat ironically, for state agency actions affecting land use, such as the issuance of fill and removal and shoreline protection permits, which must be consistent with both the acknowledged local plan and the goals. The 1981 legislature emphasized the minimal role of the goals after acknowledgement in several changes it made in the State Land Use Planning Law.[18]

LOTS OF RECORD

The 1981 legislature created some difficult legal questions in the application of the goals, local plans, and ordinances to undeveloped lots in unincorporated areas platted or transferred to the present owner during 1965 through 1974. Normally, hazard over-lay zoning may be applied to restrict or prevent development on previously platted lots.[19] However, now, for qualifying lots of record, if a single-family dwelling was a permitted use at the time of creation, a county may not deny the owner a permit for a single-family dwelling as a result of zoning, rezoning, adopting or amending a comprehensive plan, or changing the text of a zoning code.[20]

To qualify, the lot of record must be outside of areas "designated in a county comprehensive plan as being in a flood-plain or geological hazard area..." Unfortunately, the statute does not further define the terms "designate" or "geological hazard area." The issues this raises include whether new geological hazard area designations may be imposed to take lots of record outside the law's mandate that a building permit be issued, or whether hazard designations for purposes of the lots-of-record legislation are frozen as of the time of the lot's creation, the effective date of the lots-of-record legislation, or some other date. Also, does the term "designate" include identification of a hazardous area as part of the local comprehensive plan data inventory process, or is it limited to implementing measures such as permitted use designations based on identified hazards? Resolution of these and similar issues raised by the 1981 lots-of-record legislation certainly will complicate the already complex task of local governments in meeting the hazards management mandates of Goals 7, 17, and 18.

The lots-of-record legislation can be viewed as legislative expansion of the judicially recognized vested rights of property owners to continue development, despite changes in applicable land use laws where they have expended substantial sums on construction costs in reliance on validly issued permits.[21]

CONCLUSION

This completes my brief review of laws regulating ocean shoreline development. I have recently published an article on the subject in Volume 59 of the Oregon Law Review if you are interested in further details, especially with regard to experiences in states outside of Oregon. Stepping back from these laws for a moment, I would like to offer the following three perspectives:

(1) The laws just outlined are aimed principally at preventing or controlling future development in hazardous areas. They have very little to say about the problems of existing development threatened or damaged by hazards. Only the federal flood insurance program and Goal 18's prohibition of shoreline protective devices for post-1976 development significantly affect existing development.

(2) As Oregon local governments and state agencies proceed to implement the goals and statutes related to managing shoreline development, both by acting and failing to act they may be exposing themselves to the legal liabilities discussed by the public liability panel.

(3) In this area of declining budgets, federalism, and deregulation, exclusive reliance on regulation to solve problems of development in hazardous coastal areas would be very unwise. The private sector, from property owners, developers, brokers, consultants, and lenders, to title companies, should play a larger role in the process. Failure to exercise greater responsibility may lead to the private liabilities discussed by the private liability panel.

* * *

FOOTNOTES

1/ 16 U.S.C. § 1454 (b).

2/ 16 U.S.C. § 1452 (2) (B).

3/ 42 U.S.C. § 4001 (e).

4/ Omnibus Budget Reconciliation Act of 1981, P.L. 97-35, § 1321 (1981).

5/ 47 Fed. Reg. 2381-84 (Jan. 15, 1982).

6/ P.L. 90-488, § 1362.

7/ 33 U.S.C. § 401 et seq.; 33 U.S.C. § 1344.

8/ ORS 541.605 et seq.; OAR 141-85-100 et seq.

9/ State v. Davidson Industries, Inc., 291 Or. 839 (1981); Saxon v. Division of State Lands, 31 Or. App. 511 (1977).

10/ ORS 390.640 et seq.; OAR 736-20-005 et seq.

11/ 254 Or. 584, 462 P.2d 671 (1969).

12/ 291 Or. 289, 491 P.2d 1171 (1971). State v. Bauman, 7 Or. App. 489, 492 P.2d 284 (1971), held that the exclusive authority to enforce the ocean shore protection statute as then written was in the State Highway Commission and therefore the Attorney General could not bring suit to enforce the statute.

13/ ORS 197.180, 197.250, as amended by 1981 Oregon Laws, ch. 748, §§ 16, 29a (H.B. 2225); OAR 660-31-005 et seq.

14/ ORS 197.005 et seq., as amended by 1981 Oregon Laws, ch. 748 (H.B. 2225); OAR 660-01-000 et seq.

15/ ORS 197.320, as amended by 1981 Oregon Laws, ch. 748, § 32 (H.B. 2225). See Mayea v. Land Conservation and Development Commission, 54 Or. App. 510 (1981), rev. granted, 292 Or. 334 (1981), upholding an LCDC enforcement order against Curry County. Prior to plan acknowledgement, local governments may rely on their adopted but unacknowledged plans in enacting ordinances and making site-specific without making specific findings as to the ordinance's or site-specific decision's goal compliance, so long as the adopted but unacknowledged plan is found to be in goal compliance upon appeal to LUBA and LCDC. See Metropolitan Service Dist. v. Clackamas County, 2 or. LUBA 139 (1980); Friends of Benton County v. Benton County and Central Mountain Enterprises, LUBA No. 81-054, noted in Oregon Real Estate and Land Use Digest, Vol. 3, No. 6 (Dec. 1981) at p. 6.

16/ In Jakob v. Dune City, 51 Or. App. 505, 626 P.2d 376 (1981), LCDC was unable to decide whether a rezoning of land between Highway 101 and the Oregon Dunes Recreation Area from rural residential to tourist commercial complied with the Shorelands Goal.

17/ LCDC, Common Questions About the Exceptions Process Relating to the Preparation of Comprehensive Plans (Mar. 15, 1978); Manzanita Acknowledgement Order, Aug. 4, 1980; LCDC Staff Report on Lincoln County Acknowledgement (Aug. 6, 1981).

18/ 1981 Oregon Laws, ch. 748, §§ 3(4)(a), 3(6), 56 (H.B. 2225).

19/ Columbia Hills v. LCDC, 50 Or. App. 483, 490-91, 624 P.2d 157 (1981), rev. denied, 631 P.2d 340 (1981).

20/ ORS 215.990 et seq., as added by 1981 Or. Laws Ch. 884 §§ 9-12 (S.B. 419).

21/ See, e.g., Salishan Properties, Inc. v. Lincoln County, Lincoln County Cir. Court No. 38823, Feb. 28, 1978, allowing continued construction on lots in the Salishan Development despite serious erosion hazards based on the investment of undeveloped lot owners in the development's common facilities.

SUMMARY: PUBLIC LIABILITY PANEL

Prepared by Jerre Ziebelman,
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PANELISTS

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INTRODUCTION

Coastal hazard areas are threatened by many natural forces. Geologic hazards such as earthquakes, erosion, landslides, and land subsidence may threaten lives or cause property damage in these areas. Also, winter storms and hurricanes may cause injuries to people or their property. The likelihood of injuries arising in coastal hazard areas often depends on where development is allowed. Some of the coastal hazard areas are floodways, unstable hillsides, bluffs, and dunes.

Public liability is increasing because of governmental participation in planning and development. Public liability exists at federal, state, and local levels of government. Often, private property owners in ocean shore hazard areas want protective devices to reduce the likelihood of damage to their properties. Governmental liability to property owners may be incurred by a public body's approval or denial of protective devices and shoreline development. Public liability focuses on governmental responsibility to pay individuals compensation for loss of life or damage to private property. Government's role regulating human conduct sometimes makes public bodies liable for their actions or decisions not to act.

A variety of regulatory measures may be used in coastal hazard areas. Site-specific studies may be required before development is allowed in areas where potential hazards exist. Zoning ordinances may regulate construction in active dune areas. Before development permits are issued, on-site inspections may be required. Setback requirements may be established to forestall imminent danger in areas of development. Regulations and standards for designation of natural resource zones may be adopted; a similar framework may be used to preserve scenic areas along the ocean shore. Generally, these regulatory activities comply with consistency requirements between the three levels of government; the consistency requirements between the state and local government are especially strong in Oregon. These regulatory activities involve numerous public bodies that may become liable for injuries to individuals committed in a tortious manner.

Governmental bodies face the difficult task of balancing diverse and sometimes conflicting interests in coastal areas. Government must protect the private property rights of littoral landowners. Also, the public's health and safety when visiting or living in coastal areas must be protected. At the

same time, environmental concerns like preservation of coastal aesthetics and scenic areas must be addressed. Local government must reconcile both state and federal mandates and the concerns of local residents. All these actions must be taken without causing injuries to private property owners; otherwise, an individual may prove a claim exists against a governmental body.

This paper is based on a seminar at the Marine Science Center in Newport, on February 23, 1982, dealing with legal issues and potential liability resulting from construction along the ocean shore. The seminar was organized by James W. Good, Extension Coastal Resources Specialist at Oregon State University. This is a report on issues raised by the public liability panel at that seminar.

THE MANAGEMENT OF COASTAL HAZARDS: A GENERAL THEORETICAL FRAMEWORK

Presentation by Emil Berg, Portland attorney

Introduction

Several legal concepts are important to an understanding of some issues arising in coastal regions involving public liability. These legal concepts are: the property rights of littoral owners; the extent of state police power authority and the point at which regulatory activity becomes a compensable taking of property; federal navigation servitudes; state public trust interests; state navigation servitudes; and some issues relating to public access to beaches. Private property owners' rights in coastal areas described by these legal concepts indicate where public liability may arise.

These legal doctrines act as sources of constraints on the powers of a governing body. There are confusing jurisdictional limits imposed by rules based on these doctrines; conflicts and uncertainties exist in the coastal region. Management of ocean shore hazard areas should include careful consideration of the implications of these doctrines; the basis for liability may be denial of rights accorded by these legal doctrines.

Riparian or Littoral Rights

Often, rules based on littoral or riparian rights are used interchangeably with either type of property. Littoral lands are located on the shores of seas and large lakes; riparian lands are located on streams, rivers, or other watercourses. Both kinds of landowners may claim jsut compensation when any of their property rights are restricted or destroyed by governmental acts; however, littoral or riparian rights are subject to many qualifications and regulations that do not entail compensation.

It is important to understand the rights that belong to a littoral landowner. Some of these rights are described by the Alaska Supreme Court:

> "Generally speaking, a riparian proprietor has the right to (1) use the water for general purposes such as bathing and other domestic activities; (2) have access to navigable waters; (3) build wharfs and piers out to deep water if this can be done without interfering with navigation;

(4) take title to accretions and alluviums; and (5) make other beneficial use of the water even though the water level is lowered, so long as the use does not unreasonably interfere with similar rights of other riparians. These rights are valuable property, and ordinarily cannot be taken for public use by the federal or state governments without payment of just compensation to the landowner." Wernberg v. State, 516 P.2d 1191 (Alaska 1974)

Exercise of Police Power v. Compensable Taking

Government uses its authority through the state police power to regulate uses of property to protect the public health, safety, and other public interests. The state police power may be delegated to local authorities. Under the power of eminent domain private property may be condemned for a public use by a governmental body; however, the owner is entitled to just compensation for the property taken. If a governmental regulation affects some rights to the use of private property and the regulation is a valid exercise of the police power, then the owner is not entitled to just compensation. In some regulatory situations, a landowner may have a valid claim for compensation. But no clear legal boundary exists between a compensable taking and a legitimate exercise of police power regulation. Actually, diverse theories are used to resolve these disputes; the case law in this area is confusing.

Several factors may be useful in determining whether the diminution of the value of private property requires payment of compensation to the landowner, or is instead a legitimate exercise of police power regulation. These factors are:

(1) Where the value of private property is severely diminished as the result of a regulation, it is more likely the landowner will receive compensation. The landowner must establish the government's action constituted a taking of private property.

(2) If a physical invasion of private property by a governmental action can be shown, then the landowner can establish a taking exists.

(3) Private interests lost by landowners may be balanced against the public benefits gained by the same activity on a case-by-case basis, to determine whether it is a compensable taking.

Laws regulating land use in coastal hazard areas may create compensable taking situations. Some of the issues concerning regulation in coastal hazard areas are:

(1) Does imposition of more stringent regulations for coastal hazard areas create instances of compensable taking? If these are takings, then payment of just compensation to landowners is required.

(2) Setback requirements, denying a landowner use of part of his property, might be a specific instance of a compensable taking. Currently, the judicial response to this issue is not clear.

(3) Some areas have disclosure requirements. Sellers must provide buyers

> with information about possible erosion, landslides, subsidence, or other hazards that might occur to the coastal property for sale.

In geological hazard areas expensive scientific reports may be required; some landowners charge this regulation should be seen as a compensable taking. Presently, this theory is not gaining much acceptance in the courts.

See generally Hildreth, Coastal Natural Hazards Management, 59 Or. L. Rev. 201 (1980).

Federal Navigation Servitude

There is a basic federal interest in navigable waters. Federal activity in aid of navigation will not incur a taking of the property interests of a private landowner.

> "The navigation servitude is the paramount right of the federal government, under the commerce clause of the United States Constitution, to compel the removal of any obstruction to navigation, without the necessity of paying 'just compensation' ordinarily required by the Fifth Amendment of the Constitution. It has been held to apply to all waters up to the high-water mark which are 'navigable in fact,' whether tidal or non-tidal, and even to non-navigable tributaries of navigable waters." Morris, The Federal Navigation Servitude: Impediment to the Development of the Waterfront, 45 St. John's L. Rev. 189 (1970)

Because courts assume landowners have notice that their rights are limited by the federal navigation servitude, just compensation is not paid for federal acts to improve navigation.

Littoral landowners may not have recourse for erosion to their property caused by construction that aids navigation. Pitman v. United States, 457 F.2d 975 (Ct. Cl. 1972), held that erosion of a littoral landowner's beach does not result in a compensable taking, when public navigation improvements are erected or authorized by the Army Corps of Engineers under the Rivers and Harbors Act. The Corps adopted permit issuance procedures for public navigation improvements to implement this act. Specifically, the Rivers and Harbors Act prohibits any obstruction of navigable waters, unless the Corps approves it. 33 USCA § 403.

Public Trust Doctrine

State public trust interests in resources are gaining attention in courts and legislative bodies. Courts will look with skepticism upon the reallocation of public resources or the subjection of those resources to the interests of private parties. In fact, government actions contrary to public trust interests may be invalidated. Property subject to the public trust cannot be alienated to private owners unless trust purposes are promoted. Littoral landowners' property may be regulated to protect public trust interests; the regulation may not incur just compensation be paid to the landowner for a taking.

The California Supreme Court described the scope of the public trust doctrine as follows:

> "The State of California holds that all of its navigable waterways and the lands lying beneath them 'as trustee of a public trust for the benefit of the people.' Its power to control, regulate and utilize such waters within the terms of the trust is absolute except as limited by the paramount supervisory power of the federal government over navigable waters. The nature and extent of the trust under which the state holds its navigable waterways has never been defined with precision, but it has been stated generally that acts of the state with regard to its navigable waters are within trust purposes when they are done 'for purposes of commerce, navigation, and fisheries for the benefit of all the people of the state.'" Colberg, Inc. v. State, 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967)

Recently, the scope of public trust interests has been expanded to include recreation, preservation of scenery, and protection of the environment.

Oregon case law recognizes the public trust doctrine and gives it a broad scope. But not much case law in Oregon involves the public trust doctrine. Morse v. Oregon Division of State Lands, 285 Or. 197, 590 P.2d 709 (1979) recognized the state could issue a dredge and fill permit in the expansion of the North Bend airport on public trust land for a non-water-related purpose. Cox v. Davison Industries held that the public trust interest in state waters extends to the furthest reach of tidal influence; this includes land that is almost never covered by tidewater.

Many Oregon statutes contain provisions pertaining to public trust interests. Much of this regulatory framework involves navigable waters and adjacent lands. Some of these Oregon statutes that serve the public trust purpose are: removal and fill; water use; designation and use of scenic rivers; and access to beaches and public use of beaches. Some of these statutes may be important to issues involving public liability in coastal hazard areas.

State Navigation Servitude

States have a navigation servitude subordinate to the federal navigation servitude. States' navigation servitudes are related to their public trust interests in navigable waters and submerged lands. Like the federal government, states may avoid payment of just compensation to affected littoral landowners if improvements in navigation are involved. Wernberg v. State, 516 P.2d 1191 (Alaska, 1974).

A pattern emerges involving takings under the state servitude:

> "(1) A taking in the aid of navigation of riparian property, including a right of access below the high water mark, is a valid exercise of the servitude and no compensation is required; (2) that a taking, even though in the aid of navigation, which encroaches upon the fast lands is a taking of private property in the constitutional sense and compensation is required; (3) that a taking of a riparian landowner's property below the high water mark when not in the aid of navigation requires just compensation." Comment, The State Navigation Servitude, 4 Land & Water L. Rev. 521, 522-23 (1969).

There are three distinctively different types of state navigation servitudes. First, the general rule requires compensation to be paid to a littoral landowner unless the taking is in aid of navigation. Second, the public purpose rule does not require compensation if the project is for a public purpose, regardless of whether navigation is involved. Third, the Louisiana exception defines the scope of navigation in a manner allowing no compensation for projects in aid of navigation that may be miles from the boundaries of the watercourse. Oregon has not explicitly adopted any of the above rules.

Public Beach Use

Public rights to use the dry sand area of beaches have been upheld in various states recently under several different legal theories. Formerly, these dry sand areas were considered private property and were subject to control by littoral landowners without public rights of access.

In Oregon, the public's right to use the dry sand area of beaches is based on custom. There are a number of legal criteria that establish a custom exists; therefore, the right to use follows from the existence of the custom. State, ex rel. Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969). Further guarantees of these use rights are statutorily defined. ORS 390.605-390.725.

This public interest in beaches places limitations on landowner's uses and local authorities restrictions upon littoral property. If local government regulation impinged on public use of beaches, then state law might invalidate those regulations. Private construction activity like building fences or ocean shore protective devices might be prohibited if it interferes with the public's interest in the beach. State Hwy. Comm'n. v. Fultz, 261 Or. 289, 491 P.2d 1171 (1971), held that a road could not be built on the ocean beach because it interfered with the public use of the dry sand area. It is important to keep in mind these rights of the general public to Oregon's beaches.

Conclusion

Much of this general and theoretical introduction involves complex concepts with ambiguous legal ramifications. Often, these issues must be handled on a case-by-case basis. When making decisions regarding construction in coastal hazard areas, it is worthwhile to think about the following concepts: littoral rights; the exercise of the state police power and compensable taking; the navigation servitudes; the public trust doctrine; and the public use of beaches.

* * *

PUBLIC LIABILITY AND COASTAL HAZARD MANAGEMENT

Mary Diets did not attend the conference but submitted this paper, which was read by Corinne Sherton.

Issue: If shoreline protective devices such as seawalls, revetments, or groins are installed under permits issued by states or local authorities, who is liable for damage to adjacent properties? What about liability for

damage to private property caused by federal public works such as seawalls or jetties?

Primary responsibility for damages to adjacent properties attaches liability to the landowner who had shoreline protective devices built. Construction of a seawall, a revetment, or a groin may accelerate damage to adjacent properties; therefore, courts may find these works to be the proximate cause of injury to the rights of the adjacent landowners. Individual property owners do not have the right to project water onto adjoining lands, unless the water would naturally flow onto those lands or the landowner receives his neighbors' consent to project water onto their properties. Otherwise, the landowner may be liable for any injuries to adjoining lands.

Many of the rules applied in this discussion developed in case law concerning riparian rights. However, problems involving the determination of littoral rights usually are seen as analogous to problems involving riparian rights. But various distinctions in factual settings may cause problems applying riparian rules to liability questions for injury to littoral ownership rights.

If injury from construction could be foreseen or reasonable care was not taken, liability may attach to the owner of the seawall, revetment, or riprap. Negligence need not be proven. The burden of proof in these situations does not allow many good defenses against liability. One viable defense is that the injury was caused by an act of God; an act of God is an extraordinary or unprecedented event that is unforeseeable. Normal tidal movements, typical winter storms, predictable geological hazards, or foreseeable erosion are not acts of God constituting viable defenses against liability. But a once-in-a-generation winter storm, a hurricane, or an earthquake would probably be seen as acts of God. If an event causing injury to an adjacent property is shown to be an act of God, a landowner would not be liable for harm caused by his shoreline protective device.

Public liability may attach to a governmental agency that issues a permit to a private property owner for construction of a seawall, revetment, or riprap. Initially, analysis of governmental liability focuses on the duties a governmental body is delegated by statutes or assumes through promulgation of rules and ordinances. Another important consideration is whether the act was ministerial or discretionary. Discretionary acts require making deliberate decisions and the use of personal judgement, whereas ministerial acts do not leave the actor much choice in the performance of his duties. It is useful in determining the nature of an act to see what level of responsibility is delegated to the actor. The Oregon Tort Claims Act, ORS 30.260 to 30.300, exempts public bodies, their officers, their employees, and their agents from liability for claims based upon the performance of, or the failure to exercise or perform, a discretionary function or duty, even if the discretion is abused. ORS 30.265(3)(c). Recently, the Oregon Supreme Court narrowed the scope of what may be seen as a discretionary duty in Stevenson v. State of Oregon, 290 Or. 3, 619 P.2d 247 (1980). If a governmental body's duty is merely to issue or deny construction permits, there may not be a public liability for those acts because the duty may be a discretionary function. However, if the duty established for issuance of permits involves the design and construction of shoreline protective devices, defects resulting in injuries to adjoining property owners may attach liability to the governing body.

When a governmental body takes an active role by setting standards or commits a routine error in issuing a permit, the likelihood of public liability is greater. Also, a design change required by a public body that results in injury to an adjoining property may establish public liability. Governmental bodies must follow delegations of authority and adhere to their own rules and ordinances. If a public body does not follow its own rules and ordinances and an injury occurs, public liability may be incurred by the oversight. Brennen v. City of Eugene, 285 Or. 401, 591 P.2d 719 (1979). Statutes, rules, and ordinances establish certain requirements for issuance of construction permits, if those requirements are not met and a permit is issued anyway, the governmental body involved may be liable for a resulting injury.

Federal government liability depends on its role in the construction of federal public works and the function of the project. The federal government is not liable for projecting water onto adjacent private property if the project is an aid to navigation. Authorization of a public navigation improvement project by the Army Corps of Engineers, pursuant to the Rivers and Harbors Act, will not result in a federal liability. Pitman v. United States, 457 F.2d 975 (Ct. Cl. 1972). Excepting navigation projects, the federal government would be primarily liable for their projects both as proprietor and because of their role in designing, setting specifications, and inspecting the construction or doing the construction on federal public works like seawalls and jetties. In some circumstances, responsibility for injury to private littoral landowners caused by a federal project might be shifted to a private contractor, if the injury is primarily attributable to the contractor. The existence of federal liability for construction depends on the provisions of the Federal Tort Claims Act and other federal statutes and regulations related to the project.

Issue: Does local government have a duty to issue permits to littoral landowners for shoreline protective devices? What is the state's role in balancing competing interests to protect private investments, ensure public beach access, prevent erosion of adjoining properties, and preserve coastal aesthetics?

Examining permit processes involves determination of the authority and procedures of the permit issuing governmental body. Initially, the scope of authority and the extent of the duty under a charging statute, rules, ordinances, guidelines, standards, procedures, or practices should be examined. Also, determining what levels of government are involved in issuing a permit is important. Although the littoral landowner's property may be endangered, local government cannot issue a permit that violates their own rules and procedures. Until the landowner's application conforms to certain requirements, it is the duty of the local authorities involved to deny the permit. A landowner may successfully challenge denial of a permit application in the courts; a court order to issue a permit would discharge the governmental duty of either a state or local authority.

Governmental bodies face problems balancing conflicting interests in coastal hazard areas. Both government and private property owners are concerned about protecting the ocean shore and adjoining private property from injury. Usually, competing interests can be resolved and workable compromises achieved. States' and local governments' duties involve protecting private

investments, ensuring public beach access, preventing erosion, and preserving coastal aesthetics; governmental consistency requirements ensure some predictability in the planning process. Governmental errors in meeting standards and deviations from common practices may entail greater likelihood of public liability.

Brief Comments on Related Issues

Generally, public liability will not be incurred by information provided by a governmental agency used by a developer or builder. People using public information may be doing so at their own risk. Private parties may be required to obtain specific reports and information about hazards in designated areas before developing or selling their property in those areas.

Local government can and may ask property owners to waive their rights to future legal actions against public bodies before permits are issued in hazard areas. Covenants not to sue are a common legal device in written agreements; common law rights, statutory rights, and in some cases constitutional rights can be waived. Waivers or covenants not to sue can be incorporated into the permit process by provisions included in the controllling rules or ordinances. Public liability would still exist for injuries to adjoining property owners; however, voluntary waivers from neighbors might be made a part of the permit process.

Design of the permit process in a locality should reflect the likelihood of public liability. Government officials' knowledge of the requirements and standards of the permit process are crtiical to avoid being sued. Unfortunately, mistakes are made and duties violated; therefore, government officials should be aware of public liability and ways to disclaim liability.

* * *

PUBLIC LIABILITY OF LOCAL GOVERNMENTS AND THEIR OFFICIALS; GOVERNMENT TORTS IN PLANNING, ZONING, AND BUILDING PERMIT DESIGNATIONS

Presentation by Steven R. Schell, Portland attorney

Introduction and Historical Background

If a valuable new house on a coastal bluff slides into the ocean, who is the home buyer going to sue? Among those who might be liable are the builder, the developer, the building official who approved the building permit, the planning director, the county commissioners, the city, and the county. Initially, a lawyer tries to determine who is worth suing. Defendants without substantial property or liability insurance will not be able to pay for damages suffered by the attorney's client. Public officials should expect to be named in some lawsuits where a basis for public liability exists.

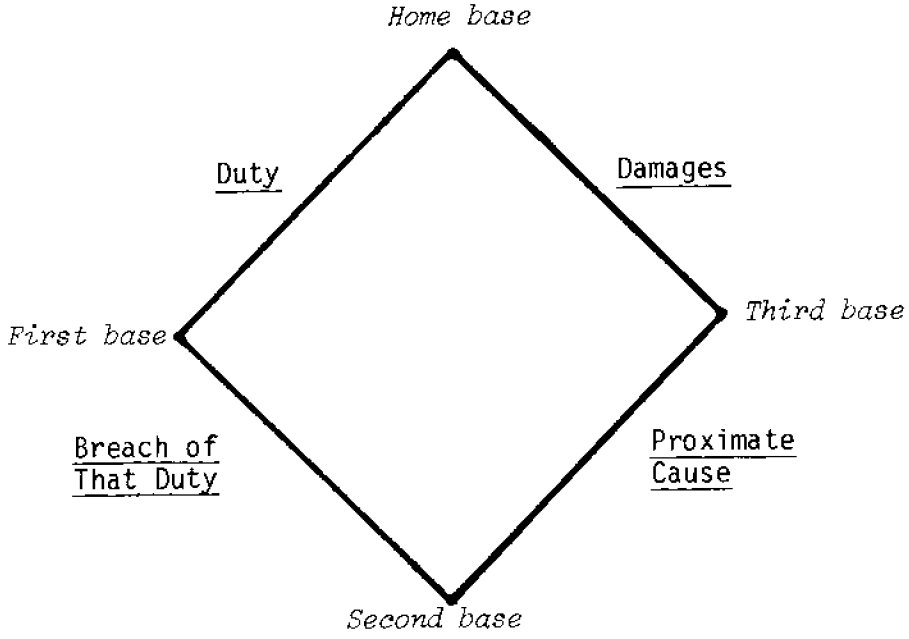
The historical trends in planning and zoning, and in sovereign immunity, are important to an understanding of public liability. The extent of public liability has increased significantly in recent times.

Zoning has gone through four basic phases in the United States. First, in the pre-zoning phase, government had some control over nuisances; at that time, public liability in the land use area related to abatement of nuisances. Second came the general acceptance of zoning phase: the burden was on local government to show zoning designations were consistent with police power functions. If the decision was consistent with public health, safety, and general welfare interests, then the zoning designation was valid. Third was the pre-Fazano phase, in which courts deferred to local authorities in most zoning decisions. Local officials were only constrained if it was shown the officials acted in an arbitrary or capricious manner. Fourth is the present phase following Fazano; currently, the review of zoning decisions can be characterized as more sophisticated than previously. Balancing public rights and private rights is a major concern in zoning designations. Zoning encompasses a broader range of issues now, including the exercise of exclusionary rights, the free exercise of religion, the free exercise of speech, and equal protection arguments. Zoning regulation may be the basis for a suit against local government.

Sovereign immunity is the traditional concept that government is not liable to individuals for damages caused by governmental acts. In feudal society before the Magna Charta, the King's acts were immune from liability. Eventually, a distinction arose between government acting in a sovereign capacity or in a proprietary capacity. If government acts in a proprietary capacity such as operating a railroad or a fairground, public liability might exist. In 1968, with the passage of the Oregon Tort Claims Act, the legal effect of the doctrine of sovereign immunity ended in Oregon.

The Oregon Tort Claims Act

The Oregon Tort Claims Act (OTCA) made public bodies liable for their torts. There are four elements to a tort. All four of which must be proven to establish liability against a defendant. One can picture the relationships constituting a tort as a baseball diamond. The four elements of a tort are:



1. The defendant must have some kind of a duty towards the plaintiff.
2. The defendant must have breached his duty to the plaintiff in some manner.
3. The defendant's action or inaction must be the proximate cause or a contributing factor in the breach of the duty owed to the plaintiff; there must not be an intervening or supervening cause of the damages suffered by the plaintiff.
4. The plaintiff must have suffered some damages for the situation to be tortious.

Oregon follows the "open-end" approach to governmental liability in the OTCA; liability is the general rule and immunities to liability must be stated exceptions in legislation. Under Oregon law local governments and private individuals are liable for the same torts. In the OTCA, "public body" is defined to mean:

> "...the state and any department, agency, board or commission of the state, any city, county, school district or other political subdivision or municipal or public corporation and any instrumentality thereof." ORS 30.260(4).

The OTCA's "open-end" approach provides:

> "...every public body is liable for its torts and those of its officers, employes and agents acting within the scop of their employment or duties..." ORS 30.265(1).

Cities, counties, and their agents may be held responsible for their tortious actions; moreover, local government bodies are held responsible for the acts of their employees. But those acts must occur within the scope of the employees' jobs; otherwise, local government will not be held liable. Another important limitation in the OTCA is the amount that can be recovered from the public body being sued. Public liability is limited to:

> "(a) $50,000 to any claimant for any number of claims for damage to or destruction of property, including consequential damages, arising out of a single accident or occurrence.
> (b) $100,000 to any claimant for all other claims arising out of a single accident or occurrence.
> (c) $300,000 for any number of claims arising out of a single accident or occurrence." ORS 30.270(1).

Public bodies are required to defend and indemnify their officials against tort claims based on performance of those officials' duties or decisions not to act. ORS 20.285 Local government is not liable in three instances: where the actions were outside the scope of the official's duty; where the official committed "malfeasance in office"; or where the official was guilty of "willful and wanton neglect of duty."

The extent of governmental liability is limited by the scope of the duty owed those bringing a tort action. Recently, the Oregon Supreme Court examined public liability in Brennen v. City of Eugene, 285 Or. 401, 591 P.2d

719(1979). Brennen was a passenger in a taxicab involved in an accident; Brennen was injured and received a judgement for $41,719.62 against the taxicab company. But the taxicab company had no money and only $10,000 worth of liability insurance, despite a Eugene city ordinance requiring local taxicab companies to carry liability insurance for at least $100,000. Brennen sued the city, asserting that the city owed a duty to private individuals to ensure that taxicab operators had $100,000 per person insurance coverage. The city's licensing agent had not followed the ordinance in this case. The taxicab company Brennen had sued received a license after submitting a certificate of insurance showing on $10,000 coverage. The Oregon Supreme Court applied duty analysis and found the city liable. Because an official approved this license, the public body's duty to the plaintiff was violated; therefore, public liability attached to the official's action. The city's conduct was a cause-in-fact of plaintiff's injury, and the city was required to pay the difference between the $41,719.62 judgement and the taxicab company's $10,000 coverage.

Public Liability in the Coastal Zone

The requirement for a site-specific geologic report in a geologic hazard area is similar to the insurance coverage requirement in Eugene's city ordinance. Planning directors are charged to approve permits based on certain standards. One of those standards is a site-specific geologic report. What if a planning director issues a permit without a report being submitted? The planning director owes a duty to the developer, the builder, and the eventual homeowner to issue a permit that meets the established standards. If the house slides into the ocean, the homeowner may sue the planning director and the public body that employs the planning director. It is not unlikely the homeowner would be successful in this suit. Officials must be careful to go through all the steps to meet legal requirements for coastal development, or expose themselves to tort liability. If officials know their duties well, they may be better prepared to avoid breaching those duties.

Under the OTCA, public bodies have immunity from liability for their discretionary functions. Some of the considerations in determining whether an act is discretionary are: the presence of a policy decision; the delegation of responsibility to that level of administration to make a policy choice; the administration's need for freedom in exercising that function to avoid impairing efficiency; and finally, the suitability of non-tort remedies. A planning change or zoning change is a discretionary function; the county commissioners make policy decisions in authorizing these changes. The decision to issue a conditional use permit may be a discretionary function; nevertheless, where a permit is granted automatically when certain established standards are met the decision is probably not a discretionary function. Acts that are not discretionary under the OTCA are ministerial acts and may incur liability. Routine decisions employees must make in their jobs not involving policy judgements are ministerial. Initially, the level of administration at which a decision is made is significant in determining whether the act is discretionary or ministerial. Reviewing a building permit application to ensure it complies with the building code and relevant regulations may be a ministerial function. Dykeman v. State, 39 Or. App. 629, 593 P.2d 1183 (1979).

Information from experts or technical judgement may be involved in granting permits for coastal construction; an example is the requirement for a site-specific geologic report. Even where a decision involves input from planners, developers, engineers, architects, geologists, or other experts, it is not necessarily a discretionary function. Decisions involving complex, technical information may be ministerial. Stevenson v. State Dept. of Transportation, 290 Or. 3, 619 P.2d 247 (1980).

Officials following an ordinance that is later declared unconstitutional are not liable. There is specific immunity in the OTCA for this situation.

Floodways and the Taking Issue

Deciding acts are either a valid exercise of state police power or a taking or damaging of private property for public use cannot be reduced to a precise judicial formula. In Washington, a developer was denied a permit to construct housing in a floodway because he could not meet the standards in a Department of Ecology regulation. The developer challenged the decision. The Washington Supreme Court held that no taking occurred and the Department of Ecology did not exceed their rulemaking authority. Speaking for the Court, Justice Dolliver said:

> "It was not the State which placed...[Developer's] property in the path of floods. Nature has placed it where it is and if ...[Developer] had done nothing with respect to flood-plain zoning, the property would still be subject to physical realities." Maple Leaf Investors, Inc. v. Washington Dept. of Ecology, 88 Wash. 2d 726, 565 P.2d 1162 (1977).

In a similar situation the Oregon courts would probably reach the same result.

* * *

CIVIL RIGHTS LAW AND COASTAL DEVELOPMENT

Presentation by Corinne Sherton, Salem attorney

Causes of Action Under 42 USC §1983

There may be a cause of action against local government for deprivation of violation of constitutional and statutory rights, privileges, or immunities under 42 USC §1983. This presentation is somewhat theoretical because these suits against local government are a recent legal development, and there is not much case law for claims involving property. §1983 was originally part of the Civil Rights Act of 1871; it is a broad-ranging remedy for violations of civil rights. If some "person" has denied a plaintiff of a civil right secured by the Constitution or a federal statute and the action was taken "under color of state law," the plaintiff may sue in state or federal court under §1983.

42 USC §1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Generally, §1983 provides a remedy for violations of federal constitutional and statutory rights, not for violations of duties based on tort law, but the Oregon Tort Claims Act (OTCA) makes violations of §1983 actionable as torts. ORS 30.265(1). §1983 lawsuits cannot be brought against states because states traditionally have had sovereign immunity under the Eleventh Amendment. Recently, the scope of §1983 actions was expanded to include local governments, school boards, and municipal corporations.

In 1978, the United States Supreme Court held local government bodies were "persons" that could be liable under §1983. Monell v. City of New York, Dept. of Social Services, 436 US 658 (1978). Local government is not liable for actions of employees merely because of the relationship of employment; therefore, local government can assert a theory of respondeat superior as a viable defense to disclaim liability. Liability may attach to local government if an ordinance, regulation, decision, or policy statement can be shown to deprive individuals of civil rights secured under federal law. The plaintiff must prove the deprivation of rights arises from local law, governmental action, or custom. Governmental custom may be established without formal approval by local authorities; indications an offical policy exists may be enough.

Local governments are absolutely liable for all unconstitutional actions representing municipal policy or custom. In an action for violation of substantive and procedural due process rights by a former police chief alleging he was wrongfully discharged, the United States Supreme Court held municipalities may not assert their officers' good faith as a defense against liability in §1983 suits. Owen v. Independence, 445 US 622 (1980). However, individual officials can use good faith arguments as defenses in §1983 suits if they believe their actions were constitutional. Because local government has no "discretion" to violate federal laws, this is not a viable defense. Nevertheless, courts will not substitute their judgement in decisions involving competing policy considerations. But courts will ensure that local authorities' actions are consistent with the requirements of federal law.

Official policy, local law, or governmental custom must be causally linked to the injury to allege a cause of action under §1983. In federal court, an injured party may recover all actual damages they can establish; but in Oregon state courts the liability limits in the Oregon Tort Claims Act apply. It is unclear whether this distinction may be unconstitutional. Punitive damages are barred under the OTCA, whereas federal law allows claims for punitive damages. Also, the tort immunities in the OTCA are not exactly the same as the immunities under federal law.

In 1980, the Supreme Court ruled that the scope of §1983 causes of action includes claims based entirely on violations of numerous federal statutes. Construing the phrase "and laws" from §1983 applied to a large number of federal statutes, the opinion describes in an appendix three categories of federal statutes that may be the bases for §1983 actions. These three categories are: (a) statutes establishing regulatory programs in which states meet federal conditions or enter into cooperative agreements; (b) "resource management programs that may be administered by cooperative agreements between federal and state agencies"; and (c) federally subsidized grant programs or state and local welfare plans required to meet federal standards to receive matching funds. Local government actions should not be in violation of these types of federal statutes; otherwise, public liability may attach to those actions. Maine v. Thiboutot, 408 US 1 (1980).

Potential Liability for Cities and Counties in §1983 Actions

There are three basic areas in property law where cities and counties may be liable in §1983 lawsuits. First is where private property is subject to zoning designations or other restrictions on use. The plaintiff would allege a taking of some property rights without just compensation and could bring an action under §1983. A zoning designation protecting the public safety in a geologic hazard area would probably be a valid use of police power by local authorities. But some case law indicates when the property no longer has any "reasonable economic use" the regulatory activity constitutes a taking. Second, a property owner might challenge under §1983 an action to designate an area for a beach or park access.

Third, property owners and other citizens might argue their federally secured procedural and substantive due process rights were violated. Allegations might be raised that local authorities violated individuals' due process rights in decisions involving a land-use planning implementation system. Also, a property owner, developer, or builder might bring a suit because denial of his permit application was not consistent with the controlling ordinances, land designations, or general zoning plan. Public interest groups might argue issuing permits for development in geologic hazard areas deprives the group of some of their rights and violates the protection accorded by §1983. These various activities may be bases for §1983 suits.

Oregon's Land Conservation and Development Commission (LCDC) land use goals and guidelines have established a comprehensive statewide system. Cities and counties are directed to develop comprehensive plans, zoning designations, and sub-division ordinances that are consistent with LCDC's goals. The three most significant goals for management of coastal hazard areas are: Goal 7, Areas Subject to Natural Disasters and Hazards; Goal 17, Coastal Shorelands; and Goal 18, Beaches and Dunes. After LCDC acknowledges the local comprehensive plans, the goals are no longer the applicable standards for local land use decisions; but the goals are still important for fill and removal and shoreline protection permits. LCDC can also: issue enforcement orders; declare a construction moratorium if local government is not complying with the goals; and make recommendations regarding legislative designations of areas of critical state concern.

LCDC's role in Oregon's statewide land use planning system may be crucial to the viability of §1983 actions. If local authorities are seen as implementing a statewide system in a particular land use decision, local government may be immune from liability as an arm of the state. Recall that states are immune from liability under the Eleventh Amendment. Determination of the limits on §1983 causes of action involving local land use decisions awaits further developments in the case law.

Another possible §1983 action against local government might arise under the Coastal Zone Management Act (CZMA). While the appendix to Thiboutot did not mention the CZMA, it did mention other comprehensive regulatory programs like the Marine Mammal Protection Act, the Fish and Wildlife Coordination Act, the Outer Continental Shelf Land Act Amendment of 1978, and the Anadromous Fish Conservation Act. Arguably, local government would be liable for the deprivation of any rights, privileges, or immunities secured by the CZMA.

* * *

LIMITING PUBLIC LIABILITY

Presentation by Paula Bechtold, Coos Bay attorney

Public bodies can safeguard themselves against lawsuits; there are a number of methods to limit public liability. Most municipal corporations have liability insurance, but this costs the taxpayers money. More successful claims make premiums costlier and the expense to the taxpayers increases. Public bodies should keep themselves advised about their potential liability; if they anticipate where lawsuits might arise, they may devise ways to avoid being sued. There are four basic methods to limit public liability; all four are applicable to ocean shore development.

Cities and counties can make valid arguments to disclaim liability or be indemnified if they are sued. This method of protecting local government from lawsuits protects the public body but does not serve the public, whereas the other three methods of limiting public liability also serve the public. Permit applicants in hazard areas may be required to sign waiver agreements, indemnification agreements, or hold-harmless clauses. These should be comprehensive agreements foreclosing the developer, builder, homeowner, homeowner's assigns and heirs, and other conceivable parties from suing. Before a building permit is granted, a public body should require it be indemnified against claims by adjoining property owners or others who might suffer injuries from the applicant's development.

Requirements for these agreements should be written into the controlling ordinances for issuing permits. When drafting these ordinances, public bodies should balance the public interest in development against the governmental interest in avoiding lawsuits. It is likely these provisions would be upheld if challenged because legislative acts are considered to be presumptively reasonable.

If the developer or builder has no assets and liability may attach to the public body, waiver and indemnification agreements might not bar recovery

by the injured party. This situation might be similar to Brennen, in which the city was found liable and had to pay the difference between the amount of the judgement and what the taxicab's insurance paid.

Because of these situations of insolvency, bond requirements are a common practice among public bodies. This method of avoiding public liability protects local government against the financial uncertainties businesses may experience. Generally, the bonds posted by applicants must be equal to public bodies' tort liability limits under the OTCA. To ensure compliance it is important to write these bond requirements into the applicable ordinances. Where a developer stops a project because erosion or other problems arise, the public body could use the bond money to restore the area or rectify the problem. Unfortunately, it is often a long and difficult process to collect on a bond. Another problem is that bond requirements push the costs of development higher.

The third method of limiting public liability is to establish standards for construction, excavation, clearing, and design to minimize hazards. Some of the potential hazards to identify are landslides, weak foundation soils, flooding, seismic activity, and erosion. Planners and geologists should help local government designate hazard overlay zones and list the specific hazards in those areas. Two recent cases indicate cities and counties have a duty to establish standards that safeguard the public.

Generally, issuance of building permits is considered a ministerial function. A public body must use reasonable care in processing an application for a permit to avoid creating a foreseeable risk of injury; if the building official breaches his duty, he may be held liable for negligently issuing a building permit. Dykeman v. State, 39 Or. App 629, 593 P.2d 1183 (1979). Cities and counties may be liable for issuing permits in hazard overlay zones unless appropriate precautions are taken; there is foreseeable risk of harm in a hazard overlay zone.

A city may be liable if it fails to perform its statutory duty under state law in approving development and issuing building permits. A developer established a cause of action against an Oregon city where the city improperly granted approval of a subdivision and issued building permits without establishing standards and procedures in compliance with state law. The developer suffered financial losses when the subdivision approval was vacated and the building permits were withdrawn. Public liability may attach to local government for failure to enact appropriate development ordinances and standards. Gregcin, Inc. v. City of Dayton, 39 Or App 743, 593 P.2d 1231 (1979). Public bodies may limit their liability by establishing comprehensive standards to minimize hazards and a strong permit application process to reduce risk; however, once standards are in the ordinances they must not be overlooked.

The last method discussed to limit public liability is reliance on expert opinions. Before a site plan is approved or a building permit issued in a hazard overlay zone, a study by a soils engineer or engineering geologist should be conducted in the proposed development area at the applicant's expense. This study could be required by the local development ordinances. When a public body receives an expert's "stamp of approval" on a design plan, that should immunize the public body from liability. Alternatively, a public body might seek indemnification from the expert because it relied on

his report in making a decision. Sometimes, both local government and the applicant may hire experts with conflicting opinions. When local authorities make a reasonable choice as to which expert to rely on in making a decision, liability will not attach to their action. While using expert opinions in the development of hazard overlay zones reduces risk, it also pushes development and construction costs higher.

* * *

QUESTION AND ANSWER PERIOD

Comments by Steven Schell: (1) As Professor Hildreth suggested, the LCDC goals drop out of the picture after local comprehensive plans are acknowledged; but (1981 Oregon Laws, Ch. 748) H.B. 2225 provides for periodic review of local comprehensive plans. This review may be crucial to re-evaluate things in the land use process. It enables realtors and interested citizens to participate and give some input if the process is starting to go astray. (2) You can't get shoreline protective structures for "development" unless that "development" existed on January 1, 1977. But what does "development" mean in this law? If subdividing before that date is equal to development, then, even if there is no physical development on the land, you could still get a permit for a shoreline protective structure at a later date.

Comment by Corinne Sherton: Because we have an ambulatory shoreline in Oregon that often changes, there are areas that are physically beach that are not protected by law because they were not beach when the 16' contour line was surveyed. The issue becomes: what is a beach?

Question 1: Who is liable when a technical report was not adquately examined by a public body?

Berg: Mere examination of a report is not a discretionary function; errors in evaluating the report might be exempted from liability. If there was no attempt or a negligent failure to study the report, the public body might be liable under the OTCA.

Schell: It would be important to see how the expert "buried" his qualifiers in the report.

Question 2: What is the distinction between professional judgement and discretion?

Schell: Here we are looking at the exemption for discretionary functions discussed in Stevenson. If enforcement actions are being weighed in monetary terms, that is a policy decision; it's not an area in which courts want to interfere. If a planning director, in making a decision, needs an expert opinion to meet fairly specific standards, failure to meet those standards would probably result in liability. On the other hand, where the planning director is required to weigh things under standards, to make trade-off/ evaluative judgements, immunity might exist under the OTCA.

Question 3: What about situations where there are conflicting experts?

Bechtold: There isn't necessarily a requirement that the city or county have an expert; but local government may be shielded from liability by having information from an expert on the record. This would be especially true where no opposing information was presented.

Question 4: What if the city or county certifies an expert?

Bechtold: Certification of experts by local government would not be a good practice because it increases the likelihood of public liability.

Schell: When someone chooses to affirmatively act, they may have a higher duty. In the case of a public body, the affirmative action might increase exposure to liability.

Question 5: What is the statute of limitations in a lawsuit involving a house that slides into the ocean?

Schell: (1) The basic rule is two years from the date of the injury. Notice to the government of a claim must be presented within a 180-day period from the occurrence of the tort. A property owner's notice to the county that their negligent maintenance of roadside ditches and culverts was resulting in frequent overflows of water onto his land was proper, although notice was not filed within a 180-day period of the property owner's first observation of the tort. If a continuing tort like these frequent floodings of private property is involved, notice of a claim filed within 180 days of the last occurrence of the tort is timely. Holdner v. Columbia County, 51 Or App 605, 627 P.2d 4 (1981).

(2) The tort does not occur until the injury actually happens; so the two years would start to run on the day the house slides down the hill.

(3) The rule of ultimate repose would not allow the suit to be brought more that 10 years after the property was sold.

Question 6: What is the definition of a "reasonable economic use?"

Schell: "Reasonable economic uses" deal with people's legitimate business expectations, in general. The United States Supreme Court seems to be looking for an appropriate case to determine what a legitimate expectation of future use means in a "down-zoning." At present, the legal definition of "reasonable economic use" is not clear.

Suggested Reading

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SUMMARY: PRIVATE LIABILITY PANEL

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INTRODUCTION

There are many parties who may be involved in lawsuits concerning liability for coastal geologic hazards. To help identify who the parties are and how their involvement may affect their exposure to liability, the following hypothetical fact situation was given. It does not represent the only possible situation, nor should it be considered the "typical" situation.

The Situation

A parcel of undeveloped land exists west of Highway 101 on the Oregon coastline. It is situated on the marine terrace at the ocean's edge.

The developer, noticing the property is for sale, envisions a subdivision with a number of individual building lots and further envisions that he will be the catalyst in construction of the individual homes, marketing them separately upon completion to individual buyers. He contacts a local broker who assures him that the property is suitable for the purpose intended. The local broker is the listing local broker, and he accepts earnest money from the developer which results in a sale to the developer.

The developer is aware that he will need to gain local governmental approval for the subdivision. He hires an independent engineer, geologist, architect, planner and attorney to assist in obtaining approval for a planned unit development on the property he has purchased. He intends to use each of these different professionals to gain his approvals and then complete his dream.

The geologist is hired to determine suitability of the property for development; he is to give his assessment of the geology of the site.

The engineer is to design the improvements, including access roads and services.

The architect is called upon to design the residences.

The planner is retained to assist in gaining approval from the local authority, and also to assist in the layout of the development.

The attorney is retained to provide legal advice to the developer in conjunction with gaining the local jurisdiction's approval and also in providing any contracts requested with the other professions.

The local planning authority grants a planned unit development approval for single-family residence lots, each lot being suitable for a single-family residence.

No appeals are taken from the decision and it stands.

The developer is provided by the architect with plans for the residences and in fact contacts contractor, giving the contractor the plans to build a residence on one of the choicest oceanfront lots.

The contractor builds the residence, pursuant to the plan.

The developer was so satisfied with the listing broker that he returns to the local listing broker and lists the lot and the residence for sale.

To the point in time, the developer has used interim financing from the interim lender.

The home buyer makes an offer on the subject lot and house, and after consultation with the buyer's attorney, completes the purchase.

The interim lender releases the lot from the loan at closing, and the home buyer obtains a long-term loan from the local long-term lender to enable finance of the purchase. In determining whether or not the local long-term lender should make the loan, the lender retains an independent broker to appraise the potential security. The broker/appraiser reports that in his opinion there is no reason why the security is not sufficient for the loan.

In closing, the home buyer buys title insurance from the local branch office of a statewide title company, just as did the developer when he closed the primary transaction.

The homeowner insures his home with a standard homeowner policy through a local insurance agent.

The transaction closed in May. The following December, during the rainy and stormy season on the coast, and after a particularly heavy rain in conjunction with a high tide and extreme on-shore winds, the lot gives way, The homeowner's residence is deposited on the beach, where it is destroyed by the surf.

Developer's Liability

As a general rule, the developer will have the ultimate liability to the purchaser, if anyone does. As the individual who owned the property, hired the experts to develop the property, hired the contractor, and sold

the property, he is in a vulnerable position. The three principal common law bases for finding the developer-seller liable are (1) the contractual theory of implied warranty of fitness; (2) fraud or misrepresentation; and (3) the tort theory of negligent development.

The traditional rule concerning real estate transactions has been caveat emptor. Implied warranty of fitness as a cause of action was initially limited to the sale of goods and was based on the disparate positions of the buyer and seller. The theory is that the seller has superior knowledge concerning the fitness of the goods and should be held to have warranted the condition of the goods. Since the warranty is implied and not dependent on any express representation of the seller, it is, in essence, a form of strict liability. Courts have increasingly held that, by analogy, certain real estate transactions are so similar to "sales of goods" that the implied warranties will apply.

The Oregon Supreme Court has held that the sale of a new home is accompanied by a warranty of fitness for a particular purpose. Yepsen v. Burgess, 269 Or. 634, 525 P.2d 1019 (1974). However, the Supreme Court in Cook v. Salishan Properties, 279 Or. 333, 569 P.2d 1033 (1977), held that the warranty does not extend to the sale or lease of developed but unimproved land which contains latent natural defects. The court has also held there was no implied warranty of the condition of the land upon which a developer-seller had built and sold condominiums when the defect concerned the inherent nature of the land and was not caused by the developer-seller's work on the land. Beri, Inc. v. Salishan Properties, Inc., 282 Or. 569, 580 P.2d 173 (1978). In Beri, the defect was the land's susceptibility to erosion. Two justices expressed in a concurring opinion, a suggestion that the implied warranty might attach when the building itself was made unfit by virtue of a defect in the land. The court appeared to follow this reasoning in Forbes v. Mercado, 283 Or. 291, 583 P.2d 552 (1978), where it found that an implied warranty of fitness applied to the sale of a new house that, due to the high iron content of its well water, was found uninhabitable.

The second basis of liability of the developer-seller is the tort theory of fraud or misrepresentation. The standards of proof for fraud or misrepresentation are fairly high. The following elements must be proven to establish an action for fraud: (1) a material representation concerning the land, building, or product, etc.; (2) that the respresentation is false; (3) the speaker's knowledge of the falsity of the representation or ignorance of its truth; (4) the intent that the representation should be acted upon by the person; (5) the hearer's ignorance of its falsity; (6) his reliance on its truth; (7) his right to rely on it; and (8) resulting damage.

Although the intent to defraud must ordinarily be proven, innocent misrepresentations may cause one to be liable if they were made recklessly without the knowledge of whether they were true or not and with the intent that they would be acted on. Under the theory of fraud or misrepresentation, the developer-seller may also be liable for what he does not say. If the developer-seller is aware of a factor which materially affects the suitability of the property for the purposes for which he is selling it, he may be liable for the omission of this fact. In general, any words or acts which create a false impression covering up the truth, or which remove an opportunity which

might otherwise have led to the discovery of a material fact can be classed as a misrepresentation.

The third base for liability of the developer-seller is the recent theory of negligent development. In Beri, Inc. v. Salishan Properties, Inc., supra, the Oregon Supreme Court held that a developer-seller holds himself out as having the skill and knowledge normally possessed by members of that profession; and has a duty to exercise reasonable care in the development of the project he has undertaken. The standard of reasonable care was not explicitly defined by the court, but compliance with all land use statutes and regulations may be sufficient to meet the standard.

The developer-seller often finds himself in a delicate position since he is stuck between the ultimate consumer, whom the law wants to protect, and governmental bodies and lending institutions which are in a superior bargaining position. There are, however, several steps that a developer-seller could take to decrease his exposure to liability.

The first is to use expert consultants in the development of the project. This will not only lead to a better development project, but the reliance on expert consultants may cause the liability to be shifted to them.

The second step would be fore the developer-seller to provide a written disclosure to the buyer of known risks and hazards.

Since warranty liability is not subject to the defense of reasonableness, the most important step would be for the developer-seller to structure his transactions so as to avoid warranty liability. All documents should contain warranty disclaimers. To be effective, the warranty disclaimer must be considered part of the bargain. Therefore it must be signed by the purchaser and agreed to before the transaction is closed. Since the warranty disclaimer is contractual in nature, it is limited to the parties to the contract and cannot be extended to third parties.

The developer-seller should also try to avoid warranty liability by structuring the transaction so as not to appear to sell a complete product. As the Oregon cases have shown, a developer-seller is in a better position if he sells only a bare lot without a house on it than if he sells a house and lot.

Contractor's Liability

The contractor may be liable for the negligent failure to use reasonable care. Another source of contractor liability is the breach of the construction contract which can carry some implied warranties, such as the warranty of workmanlike performance.

If the contractor buys bare land, builds on it and sells it to the ultimate consumer, he has assumed the role of the developer and is subject to the same liabilities, including the implied warranty of fitness.

If the contractor was hired solely to build the house or other structure for the developer, his liability for damage due to erosion and natural defects in the land is limited because the damage is not associated with the

contractor's work or performance on the land. However, if the contractor notices natural defects in the land while he is working on it, he may be found liable if he fails to warn others about the defects.

Liability of the Expert Consultants: Architect, Engineer, Geologist, Appraiser-Broker

If the developer-seller is sued, he will most likely join the architect, engineer and geologist as third-party defendants, on the theory that he satisfied his duty by hiring the best consultants he could find.

Architect's Liability

The architect is required by an administrative rule of the Board of Architect Examiners (OAR 806-10-050(3)) to provide supervision on all work requiring the architect's stamp and signature. The supervision includes interpretation of construction according to the accepted practice of architecture. If the architect is, for any reason, prevented from providing this supervision, the rule provides that he must advise in writing all involved permit issuing agencies of this fact. In this supervisory role, the architect, as "captain of the ship," might be vicariously liable for the acts of those under his supervision and control.

The Oregon Supreme Court, in Johnson v. Salem Title Company, 246 Or. 409, 425 P.2d 519 (1967), held that the architect, in his supervisory position, cannot escape liability for a defectively designed structure by showing that an engineer employed by the architect actually did the negligent work. In Johnson v. Salem, the court also held that the architect could not escape liability by showing that the design was approved by the city building inspector.

The Board of Architect Examiner's administrative rule requiring the architect's supervision contains an important exception, however, for single-family residences, and this will greatly limit the exposure of the architect to liability as a supervisor of construction. Even in those cases where the architect is held to be a supervisor, it must be shown that proper supervision would have prevented the problem from occurring.

As with the contractor, the architect also may be found liable for failing to warn others of a defect he has discovered on the property.

Geologist and Engineer

The geologist in the given set of facts was hired to determine the suitability of the site for development. In doing so, he has significantly exposed himself to liability if his assessment of the site is proven to be in error. In the given case, the geologist may be liable not only to his direct client, the developer, but also to the ultimate consumer.

The geologist will be liable if it is found that a reasonably competent professional geologist exercising reasonable care would have discovered the geological condition that caused the problem. This will almost always

require another geologist to testify as an expert witness for the plaintiff that the geologist's performance fell below that expected of the profession.

The more difficult case to prove against the geologist is where a defect or hazard was not obvious, but the competent geologist would have been suspicious of the possibility of a defect. In this situation, it must be proven that the observations of the property, while not disclosing the defect, would be sufficiently troublesome to cause a competent geologist to further investigate the possibility of a defect through consultations with other geologists, trade manuals, and other specialists.

If the engineer feels uncomfortable with the geologist's report, he too might be held liable for the failure to investigate further. Both the geologist and the engineer might decide not to investigate further because it would incur extra unanticipated costs which were not covered in their contracts. However, they should both be aware that a decision to make their assessments without further investigations could possibly subject them to liability.

Appraiser-broker

In the given set of facts, the appraiser-broker was requested to give his opinion in two situations. The broker-appraiser was first contacted by the developer to assure him that the site was suitable for the construction of individual homes. The appraiser-broker would be ill-advised to make such a broad statement without the benefit of further investigation by other expert consultants. However, it may be very difficult to prove that a sophisticated developer would rely solely on the appraiser-broker's opinion.

The appraiser-broker is later retained by the local long-term lender to appraise the value of the finished product as potential security for the loan. The lender may choose to sue the appraiser-broker in a situation where the security for the mortgage loan (the house) was destroyed and the lender could not obtain a deficiency judgement after foreclosure against the defaulting homeowner. The lender, left with an unsecured note, may try to recover against the appraiser-broker for his failure to properly assess the risk that the property may be destroyed by erosion or other natural hazard.

The liability of the appraiser-broker will depend on the following factors: (1) Was there sufficient factual investigation done by the appraiser-broker? (2) Was there a proper analysis of the factual investigation? (3) Was the appraiser-broker's report written properly so that nothing was omitted? Again, these factors will be judged according to the performance expected of a reasonably competent professional appraiser-broker exercising reasonable care. In the given fact situation, it might be found that it was unreasonable for a competent appraiser-broker to rely on the fact that county approval was given for the property.

How Consultants Can Protect Themselves

The consultants can narrow their exposure to liability by taking several precautionary steps. The first is to ensure that each has a clear understanding with the client as to what is expected. If the duties and responsibilities of

the consultant are explicitly laid out and written into the signed contract, the consultant's duty will be limited to the agreed terms. This will avoid the situation where the client assumed a certain aspect was taken care of, while each consultant assumed it was another consultant's responsibility.

The consultant should also keep complete and accurate records of all work done, persons contacted, sources of information utilized, etc. This will be helpful in verifying the amount and extent of the work done on a particular job.

The third step is very basic and necessary. The consultant should talk to the insurance agent to make sure that the insurance covers the liability that the consultant may be exposed to.

Real Estate Broker's Liability

The buyers, seeking to recover for the loss of their home, may choose to sue the real estate broker, who is the person with whom they had the closest personal contact in connection with the purchase of their home. The real estate broker could also be subject to being sued by the seller on a claim that the broker's representations were unauthorized.

There are three principal bases for finding the real estate broker liable. The first is under the theory of fraud and misrepresentation. The elements required to be proved to establish fraud or misrepresentation are the same as those stated for the developer, supra. As with the developer, misrepresentation by the real estate broker can be shown by conduct, omissions of material facts, and suppression of material facts.

The real estate broker may also be found liable under a negligence theory. Due to his employment relationship, the real estate broker's duty to the seller is of a higher standard than just reasonable care. The fiduciary duty of the broker to the seller requires the broker to disclose to the seller all the information he knows concerning the property and all information affecting the interests of the seller which could be discovered with the exercise of reasonable diligence.

The duties of the real estate broker are also proscribed through the existence of disciplinary standards found in Oregon statutes. For example, ORS 696.301 (28) provides that a real estate broker is subject to discipline if he "[k]nowingly authorized, directed or aided in the publication, advertisement, distribution or circulation of any material false statement or misrepresentation concerning...any land or subdivision offered for sale." Unless he has obtained written permission from all the parties whom he represents in a transaction, the real estate broker is required by Oregon law to act for only one party. Although this usually means that the broker is the seller's representative, Oregon court decisions have recognized that the buyer may often think that the broker is an intermediary acting on behalf of both parties. Therefore, Oregon case law has imposed liability on real estate brokers with respect to assurances and representations made to purchasers.

The third source for liability of the real estate broker is found under the Unlawful Trade Practices Act, ORS 646.605 to 646.652. The Unlawful Trade

Practices Act covers real estate transactions for personal, family or household purposes which are not covered by the Oregon Landlord-Tenant Act (ORS 91.700 - 91.895). In the given fact situation, the original sale to the developer would not be covered by the Unlawful Trade Practices Act while the sale by the developer to the homeowner would be covered. The Act is basically a consumer protection act. The types of violations covered by the Act include the use of deceptive representations, the representation that the goods or real estate possess characteristics, approvals, or qualities that they do not have, and the failure to disclose known material defects or nonconformities upon tender or delivery. The act provides a private remedy to any person who suffers any ascertainable loss as a result of the willful use of unlawful trade practice.

There are several relatively easy steps which a real estate broker should take to avoid or limit his liability. The first is for the broker to resist answering questions about the property when he does not know the answers. He should resist the temptation to provide all the answers and state that he doesn't know.

The broker should also always disclose the source of any information he gives to his clients or prospective purchaser. By always identifying the source of the information (i.e. "the geologist says there are no problems") the broker can avoid taking on the liability of the geologist.

If the broker should later become aware of any problems, he should disclose the information to the seller and also possibly to the buyer.

The broker could also include in the provisional listing agreement language which would help allocate responsibility between the seller and the broker. The typical language would include a warranty by the seller that all information given to the broker is truthful, and a promise by the seller to defend and indemnify the broker against any claim connected with the breach of the seller's warranties or with the seller's failure to disclose material facts, alleged defects or other conditions of which the broker had no knowledge. This language gives the broker the opportunity to sue on the contract for indemnity from the seller. While in certain circumstances a court may not find the language in the agreement to be binding, the language will always help to better establish the relationship between the broker and seller.

Lender's Liability

Except for the risk concerning the adequacy of the security, the lender is in a fairly safe position. The lender should be aware, however, of a case in California which extended common law negligence liability for geologic hazards to a construction lender. In Connor v. Great Western Savings & Loan Association, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968), Great Western had financed the development by an inexperienced developer of a large tract of homes, which suffered serious damage when the foundations, which were inadequate for the soil conditions, failed. Noting that Great Western received substantial fees for making the construction loan and was actively involved with setting the selling price and promoting the sales of the homes, the Court concluded that the lender's involvement in the development process resulted in a duty to exercise reasonable care to protect the buyer from damages caused by major structural defects.

Partly in response to Connor v. Great Western Savings & Loan Association, the California legislature passed a law limiting the liability of a construction lender. Under Section 3434 of the California Civil Code, a lender is liable for defects in the property only if there are misrepresentations or the lender's acts go beyond lending.

While the California approach has not been adopted in Oregon, Oregon lenders should avoid getting in a position where a home buyer could effectively urge Oregon courts to adopt such an approach against them.

Several other novel approaches have been tried in unsuccessful attempts to find the lender liable. These include use of the Federal Land Sales Disclosure Act and federal securities laws. The Federal Land Disclosure Act specifically exempts the lender from direct liability, yet aggrieved purchasers have tried, unsuccessfully, to develop theories of indirect liability with the lender seen as an aider or abettor. The liability of the lender under these theories will depend on the degree of the lender's control and participation in the construction. In most situations, the lender will not be found liable.

Developer's Attorney

As a general rule, the attorney is responsible to his or her immediate client. The standard of care applicable to an attorney is generally the same as to other professionals, i.e. an attorney is required to use that degree of care, skill and diligence which would ordinarily be exercised by lawyers in the community under similar circumstances. The attorney may be held to a higher standard of care if he professes to be a specialist in a particular field.

The developer's attorney could possibly be found liable to the developer if his malpractice was found to be responsible for one or more of the following: damage to the developer's reputation; devaluation of the lots still held by the developer; loss of a bond or revocation of a permit of the developer; and litigation costs incurred by the developer in defending lawsuits brought against him. The attorney can be liable for malpractice if the developer can prove that if it had not been for the attorney's negligence, the developer would have prevailed in the underlying legal action.

Only in limited situations will a court find an attorney liable for malpractice to someone other than his or her immediate client. In Metzker v. Slocam, 272 Or. 313, 537 P.2d 74 (1975), the Oregon Supreme Court recognized that other jurisdictions have disregarded the privity requirement and have found, as a matter of policy, an attorney to be liable to third parties when the balancing of various factors indicates it is appropriate to do so. Such factors include the extent to which the transaction was expected to affect the plaintiff, the foreseeability of the harm, the degree of certainty that the plaintiff in fact suffered the injury, the closeness of the connection between the attorney's misconduct and the injury suffered and the prevention of future harm. Courts have usually found this liability to exist only in narrowly defined cases concerning beneficiaries under wills, negligent title inspection by a seller's attorney, and actions by creditors against the attorney of a collection agency for mishandling a claim. In a given set of facts, it may be very difficult for a third party to prove that his injury was closely connected to the attorney's misconduct, since there are so many intermediary parties involved.

Private Planner

Unlike the attorney, architect and real estate broker, the planner is not a member of a heavily regulated and state licensed profession. Perhaps the greatest risk of the planner is that he might be accused of giving advice which could be construed as giving legal advice, such as interpreting statutes and regulations, or as practicing architecture, such as presuming to know what is safe architecturally. He may then be found to have violated statutes and regulations designed to protect the general public, which prohibit non-lawyers and non-architects from practicing in those fields. Under the doctrine of negligence per se, the court will find that the planner's violation of such statutes or regulations will result in liability if the following conditions are met: (1) the violation of the statute or regulation was the cause of the plaintiff's injury; (2) the plaintiff was within the class of persons intended to be protected by the statute or regulation; and (3) the injury was within the area of risk intended to be avoided by the statute or regulation.